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Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty Comment.

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CHANGING THE NATURE OF CORPORATE REPRESENTATION: ATTORNEY LIABILITY FOR AIDING AND ABETTING THE BREACH OF FIDUCIARY DUTY

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I. Introduction 214
II. History of the ABA Ethical Codes and the Attorney-Client Relationship 219
III. What is Breach of Fiduciary Duty, Anyway? 229
A. Aiding-and-Abetting Liability: The Traditional Contours 229
B. Elements of Aiding-and-Abetting Liability 232
1. When Does Aiding-and-Abetting Liability Attach? The Question of What Constitutes "Substantial Assistance" 233
2. The Problematic Issues of "Knowledge" and "Nonfeasance" 235
C. Expansion of the Traditional Doctrine: Aiding and Abetting a Breach of Fiduciary Duty 239
IV. Aiding and Abetting a Breach of Fiduciary Duty: Elements and Precedent 241
A. The Elements and the Trend of Cases 241
B. The S&L Mess: The Basis of New Theories of Aiding-and-Abetting Liability, or Pushing the Envelope of the Traditional Contours 245
C. How the RTC's Novel Theory in *RTC v. Bonner* Weakens Rule 1.13: An Attorney May Be Liable for Assisting in a Bad Policy Decision 250
D. Analysis of the RTC's Allegations and the Attorney's Participation in the Sale of University Savings Association 252
V. The Case for Extending Aiding-and-Abetting Liability to Include Participation in a Bad Policy Decision: Strategic Considerations and Public Policy Concerns 254
VI. The Case for Limiting Aiding-and-Abetting Liability: The Impact on the Nature of Corporate Representation 259
VII. Conclusion 266

I. INTRODUCTION

In 1983, the American Bar Association (ABA) defined, for the first time comprehensively,[1] corporate counsel's ethical duties in situations where a corporate officer engages in conduct that could substantially harm the organization.[2] In such cases, the nature of the corporate attorney's duties depends on whether the officer's conduct is illegal, as in the case of securities fraud, or whether the officer has made a policy decision that falls short of illegality.[3] Rule 1.13 of the Model Rules of Professional

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1. *See infra* notes 30–32 and accompanying text.

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1995). Rule 1.13 reads:
(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to an appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.
(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
(e) A lawyer representing an organization may also represent any of its directors, officers, employers, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.
Id.

3. *See id.* at Rule 1.2(d) (forbidding lawyer to assist in client's criminal or fraudulent activity); *id.* at Rule 1.16(a) (imposing mandatory duty upon lawyer to withdraw if continued representation will cause lawyer to commit illegal act or to contravene Rules of Profes-

Conduct imposes a mandatory duty on corporate counsel to take steps to stop a corporate director or officer from engaging in illegal conduct that is "likely to result in substantial injury to the organization."[4] In contrast, counsel is obliged to defer to the corporation's representatives in policy matters falling short of illegality, such as investment decisions.[5] In other

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sional Conduct); *id.* at Rule 1.16(b) (providing lawyer option of voluntary withdrawal if lawyer reasonably believes that client's conduct is criminal or fraudulent); *id.* at Rule 1.6 (prohibiting lawyers from revealing confidential information except under two narrow circumstances, one of which involves revelations necessary to prevent client from committing acts that lawyer reasonably believes would result in "imminent death or serious bodily harm"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C) (1983) (allowing lawyer to withdraw from representation if lawyer's client pursues illegal plan of action or demands that lawyer undertake course of action that is plainly illegal or that is forbidden under Disciplinary Rules); *id.* at DR 7-102(A)(7), (8) (imposing mandatory duty upon lawyer not to "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent" or to "[k]nowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule"); *id.* at DR 4-101(C)(3) (permitting lawyer to breach normally sacrosanct duty of confidentiality to client in order to reveal "[t]he intention of his client to commit a crime and information necessary to prevent the crime").

4. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1995); *see* 1 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.13:301, at 409–10 (2d ed. Supp. 1993) (stating that Rule 1.13(b) directs lawyer to take reasonable measures within corporation to remedy problems stemming from lawyer's knowledge of illegal conduct that may substantially harm entity); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.7.5, at 742 (1986) (emphasizing that Rule 1.13 creates unequivocal duty for corporate counsel to take action within hierarchy of corporation to block decisions that could potentially violate legal obligations); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1995) (describing chain-of-command process to be pursued when lawyer is aware that representative of organization is pursuing course of action that is probably going to harm organization); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 91:2401 (1991) (describing steps lawyer must take under Rule 1.13 when mandatory duty to act becomes apparent); GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING 776–78 (2d ed. 1994) (considering options available to attorney when dealing with corporate wrongdoing under Rule 1.13).

5. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1995) (requiring lawyer to abide by client's directives regarding goals of representation and consult with client regarding means by which goals are attained); *id.* at Rule 1.13 cmt. 3 (warning that when constituents make decisions for organization, lawyers must accept such decisions, regardless of whether they are prudent or useful). Additionally, Comment 3 states that decisions "concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province." *Id.* at Rule 1.13 cmt. 3. These statements imply that even if a lawyer has serious doubts about the client's course of action, the lawyer should refrain from second-guessing policy decisions. The "chain of command option" is clearly reserved for illegal conduct that the lawyer believes could seriously harm the organization; such a directive minimizes the disruption that would ensue from a lawyer expanding the scope of the lawyer's duties to include evaluation of policy judgments. The comment appears to be designed to shield lawyers from being held liable for the seriously flawed policy decisions of their clients. *See id.* at Rule 1.13 cmt. 3 (stating that lawyer representing organization

words, the lawyer must take steps to prevent illegal acts, but is required to follow orders rather than second-guess management regarding routine policy decisions on matters not involving illegality.

The rise of malpractice litigation in the late 1980s spawned a series of cases that read the terms of Rule 1.13 broadly by holding that attorneys may be liable for not taking remedial action to prevent their clients' representatives from engaging in illegal acts.[6] This ominous new form of attorney liability has been misleadingly called liability for "aiding and abetting a breach of fiduciary duty,"[7] which implies that an attorney may

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must usually accept constituents' decisions since lawyer is not obliged to evaluate or otherwise act on business and policy decisions of decisionmakers); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT § 91:2408 (1991) (asserting that Rule 1.13 recognizes that lawyers are not hired to second-guess corporate directors' business judgments); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.7.5, at 743 (1986) (advising attorney to defer to client on non-legal considerations).

6. *See* Charleson v. Hardesty, 839 P.2d 1303, 1304–05 (Nev. 1992) (holding attorney liable for failing to obtain accounting from trustee who had made unsecured loans against trust funds); McGarry v. Eastern Airlines, Inc., No. 86-2497-CIV-Ryskamp, 1987 WL 13900, at *8 (S.D. Fla. July 6, 1987) (denying attorney's motion to dismiss claim of aiding and abetting breach of fiduciary duty for knowingly participating in fiduciary's refusal to fund pension plan). *But see* Koutsoubos v. Casanave, 816 F. Supp. 472, 475 (N.D. Ill. 1993) (refusing to recognize tort of aiding and abetting breach of fiduciary duty under Illinois law in suit regarding fraudulent loan transaction); Weingarten v. Warren, 753 F. Supp. 491, 496–97 (S.D.N.Y. 1990) (dismissing aiding-and-abetting claim against lawyer who was not in privity with beneficiary in suit for diversion of trust assets); Wiebolt Stores, Inc. v. Schottenstein, No. 87-C-8111, 1989 WL 99545, at *2 (N.D. Ill. Aug. 23, 1989) (refusing to grant aiding-and-abetting claim under Illinois law because attorney who assisted alleged illegal leveraged buy-out did not have special relationship with injured party).

7. *See* John K. Villa, *Emerging Theories of Liability for Lending Counsel* (asserting that government regulatory agencies are now using new theories of liability, such as aiding and abetting breaches of fiduciary duty, to hold lawyers accountable for huge losses stemming from collapse of savings and loan industry), *in* THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER, at 93, 96, 97, 100 (1992) (PLI Corp. Law & Practice Handbook Series No. 779). While the trend of using novel theories of attorney liability has resulted in the FDIC and the Resolution Trust Corporation (RTC) bringing actions against attorneys on several new theories, the emerging claim of civil aiding and abetting breach of fiduciary duty has not been recognized in some states and is available in limited contexts in other jurisdictions. *Id.*; *see also* David F. Heroy & Lee C. Carter, *Alternative Liability Theories for Fraudulent Conveyances: Breach of Fiduciary Duty, Conspiracy, Aiding and Abetting, Negligence and Contribution Rights* (citing recent cases in which plaintiffs have successfully pleaded aiding-and-abetting torts, such as breach of fiduciary duty), *in* FRAUDULENT CONVEYANCES, PREFERENCES AND VALUATION, at 275, 305 (1994) (PLI Corp. Law & Practice Handbook Series No. A-684); J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. REV. 803, 815–17 (1994) (exploring implications of two aiding-and-abetting theories—client violation of Racketeer Influenced and Corrupt Organizations Act and client violation of Securities and Exchange Act of 1934 § 10(b)); Bettina M. Lawton & Thomas W. MacIsaac, *Attorney and Accountant Liability to Financial Institutions* C620

be 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. Essentially, an attorney could breach his or her obligation not only through illegal conduct, but also by simply giving bad advice.[8]

Taken to its logical conclusion, this new theory of liability for aiding and abetting a breach of fiduciary duty threatens to undermine Rule 1.13 and radically change the nature of corporate representation. Under this theory, a lawyer would be liable for conduct that constitutes indirect assistance of a policy decision that at worst, was unwise.[9] While existing case law deals with lawyers *directly* assisting clients in violating established law (typically crimes involving fraud),[10] this radical expansion of

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ALI-ABA 531, 537–41 (1991) (considering strategic implications of employing aiding and abetting as theory of liability used by federal regulators in suits filed by FDIC and RTC); Christopher G. Sablich, Note, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 CHI.-KENT L. REV. 517, 539–40 (1992) (analyzing impact of federal pension laws under ERISA as weapon to find attorneys liable for aiding and abetting client's breach of fiduciary duties).

8. *See* RONALD E. MALLEN & JEFFREY M. SMITH, 1 LEGAL MALPRACTICE § 2.30, at 183 (3d ed. 1989) (stating that attorneys have frequently been targets of client complaints for failing to caution clients with regard to imprudent and disadvantageous—but not illegal—financial projects).

9. *See* Plaintiff's Original Petition for Money Damages at 104–05, RTC v. Bonner (No. H-92-3479) (S.D. Tex. Nov. 10, 1992) (on file with the *St. Mary's Law Journal*) (outlining theory under which liability could be imposed on attorney for participating in bad policy decision).

10. *See* Thornton v. Evans, 692 F.2d 1064, 1082 (7th Cir. 1982) (holding that attorney aided breach of fiduciary duty by drawing up documents that furthered deceptive transfer of funds to defraud union); United States v. Sarantos, 455 F.2d 877, 879–80 (2d Cir. 1972) (finding attorney liable for aiding and abetting sham marriage scheme by making false statements while "closing his eyes" to truth of illegal transaction); Thompson v. Glenmede Trust Co., No. 92-5233, 1994 WL 675186, at *5 (E.D. Pa. Nov. 23, 1994) (allowing amended complaint for aiding and abetting attorney's breach of fiduciary duty by intentionally excluding plaintiffs from buy-back transaction); FDIC v. Nathan, 804 F. Supp. 888, 896–97 (S.D. Tex. 1992) (holding attorneys liable for aiding and abetting breach of fiduciary duties to Continental Savings Association by structuring, documenting, and closing loans attorneys knew to be illegal); SEC v. National Student Mktg. Corp., 402 F. Supp. 641, 642, 650–51 (D.D.C. 1975) (finding that attorney aided and abetted breach of securities law by preparing opinions concerning propriety of back-dating sales agreements of organization's subsidiary); Dow v. Hyatt Legal Servs., 132 B.R. 853, 856, 860–61 (Bankr. S.D. Ohio 1991) (alleging that lawyers committed actionable malpractice by counseling and helping debtor in fraudulent conveyances when attorneys knew that debtor entered into transactions with intent to stall creditors); Environmental Research & Dev., Inc. v. Resource Dynamics, Inc., 46 B.R. 774, 779–80 (Bankr. S.D.N.Y. 1985) (denying attorney's motion to dismiss malpractice claim brought by trustee concerning attorney's participation in alleged fraudulent transfer with debtor); Florida Bar v. Rood, 622 So. 2d 974, 977 (Fla. 1973) (suspending attorney for one year for helping son fraudulently convey property to hide property from son's creditors); Pierce v. Lyman, 3 Cal. Rptr. 2d 236, 238–39, 243 (Cal. Ct. App. 1991) (finding attorney who deliberately drafted and filed yearly accountings with probate court

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. Further, this remarkable extension of liability would disrupt the daily operations of corporate entities. The corporate lawyer would now be obliged to second-guess every policy that may pose a potential breach of fiduciary duty and proceed up the chain of command in accordance with Rule 1.13.[11] Given the substantial liability that is often imposed in malpractice cases[12] and the large numbers of practicing corporate attorneys,[13] the imposition of liability on an attorney participating in bad policy decisions would dramatically change the rules applicable to the attorney-corporate client relationship.

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with intent to conceal trustee's imprudent investment schemes liable for breach of fiduciary duty). *But see* Doctors' Co. v. Superior Court, 775 P.2d 508, 513 (Cal. 1989) (circumscribing right to sue attorneys by finding attorneys and insurance adjusters not liable for conspiracy to breach insurance statute on grounds that they had no statutory duty to effectuate good-faith settlement).

11. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 3 (1995) (authorizing lawyer to take steps to have matters that may seriously harm organization considered by higher authorities in organization if lawyer believes it is reasonably necessary to do so). However, Rule 1.13(b) warns that "[a]ny measures taken shall be designed to minimize disruption of the organization" and recommends a series of steps that gives the lawyer guidance when resolving a problem with the constituent decision-maker, who is acting against the best interests of the organization, before going up the chain of command. *Id.* at Rule 1.13(b). There is a strong public policy argument to be made that, because of the lawyer's role in effectively assisting corporations to attain their profit-maximizing goals, going up through the chain of command on every decision the lawyer thinks could become a potential liability would seriously conflict with the mandate for efficiency. *See id.* at cmt. 3 (noting that clear justification ought to exist before climbing ladder of command).

12. *See* Charles Bosworth, Jr., *Law Firm Must Pay $3 Million . . . Former Client Said Lawsuit Was Bungled*, ST. LOUIS POST-DISPATCH, June 4, 1992, at 9A (describing circumstances of medical-malpractice suit gone awry); Marcia Coyle et al., *$12 Million Lie*, NAT'L L.J., Jan. 23, 1989, at 6 (reporting jury award of $12 million in damages for legal malpractice because attorneys mishandled medical malpractice case); Wayne E. Green & Paul M. Barrett, *Houston Firm Faces Malpractice Award*, WALL ST. J., Jan. 10, 1990, at B3 (describing $17.5-million legal malpractice award as one of largest amounts ever awarded); *Malpractice Costs*, NAT'L L.J., Feb. 17, 1992, at 6 (socking solo practitioner with $1.75 million in damages for legal malpractice committed in two cases for same client); Ellen J. Pollock & Christi Harlan, *Law Firm Insurance Premiums May Rise*, WALL ST. J., Apr. 1, 1992, at B6 (analyzing impact of $41-million settlement in suit brought by Office of Thrift Supervision against New York law firm that presided over collapse of Lincoln Savings & Loan).

13. *See* RICHARD L. ABEL, AMERICAN LAWYERS 305 (1989) (stating that 14.2% of specialized firms had primary specialty in corporate law); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.7.1, at 731 (1986) (stating that about half of work of all urban lawyers concerns corporate clients, even though precise number of corporate lawyers is not known).

Part II of this Comment discusses the rationale behind the ABA's model ethical codes and the role of Rule 1.13 in clarifying a lawyer's duties when representing a corporate client. Part III examines the traditional contours of aiding-and-abetting liability. Part IV presents the elements of aiding and abetting a breach of fiduciary duty as a cause of action. Part V analyzes the implications of this proposed extension of liability in malpractice litigation in the context of the savings and loan (S&L) crisis. Finally, Part VI explores the limits that should be placed on this theory of liability in the future.

II. HISTORY OF THE ABA ETHICAL CODES AND THE ATTORNEY-CLIENT RELATIONSHIP

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?[14]

Aiding and abetting a breach of fiduciary duty has emerged as a viable cause of action against a background of widespread public hostility toward lawyers and the legal profession.[15] While the public's long-standing

14. Carl Sandburg, *The Lawyers Know Too Much* (1920), *reprinted in* THE COMPLETE POEMS OF CARL SANDBURG 189 (1970).

15. *See* Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 87–88 (1994) (noting how several leading public opinion polls reflected serious decline of public confidence in legal profession). Causes of popular discontent include: (1) "abuses of the adversary system"; for example, the assumption that the party who retained the most zealous and conniving "hired gun" will generally win; (2) "Rambo tactics" employed by lawyers against each other and against witnesses on the stand; (3) an emphasis on materialistic concerns, that chips away at the traditional confidence clients reposed in their attorneys and essentially shifts the lawyer's accountability from the client to the law firm's imperious billing committee and its demands for more billable hours; (4) advertising and contingent fees, which have the effect of diminishing the profession in the public's eyes by providing the lawyer with a powerful financial stake in an accident or catastrophe; and (5) the public holding lawyers responsible for the "litigation explosion" and its poisonous effects on society. *Id.* at 91–98, 102–04, 107–10; *see also* Gary A. Hengstler, *The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 61–62 (1993) (finding that only two professions—stockbrokers and politicians—ranked lower than legal profession in terms of overall favorability); Andrea Sachs, *First, Kiss All the Lawyers*, TIME, Aug. 16, 1993, at 39 (citing several reasons for hostility, including traditional power and prosperity of lawyer class and peculiar uneasiness which clients experience in both needing and resenting lawyers); Randall Samborn, *Anti-Lawyer Attitude Up, But NLJ/WEST Poll Also Shows More People Are Using Attorneys*, NAT'L L.J., Aug. 9, 1993, at 1 (reporting that 73% of 813 United States citizens polled asserted that there were too many lawyers). *See also* Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 56 (citing poll in which 69% of Americans think that lawyers are "only sometimes honest or not usually honest," 27% assert that lawyers

distrust of lawyers has been amply documented,[16] the fallout from the twin cultural shocks of Watergate and the S&L crisis has made courts more willing to hold lawyers accountable for a wide range of activities in which the lawyer's participation is increasingly less direct.[17]

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are "very honest or mostly honest," and 56% believe that lawyers manipulate legal system to "protect the powerful and enrich themselves"), *available in* 1995 WL 3113259. In particular, the pressure to rack up billable hours essentially pits the lawyer against the client, and is a prime area for significant abuse. *Id.* In one case, an auditor revealed that a lawyer billed "62 hours in a single day," and another attorney billed an asbestos client "as many as 3,000 separate times for the same 12 minutes of his time." *Id. Cf.* Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 768 (1994) (citing mixed results of 1993 ABA poll as bolstering claim that public's disapproval of legal profession possibly mirrors its unhappiness with real-world facets of profession, instead of aspects that lawyers could fix). A fundamental "schizophrenia" in the ABA poll implies that people laud and condemn the legal profession for almost identical reasons: the public approves of the lawyer putting the client first, but despises the lawyer for cynically manipulating the legal system with no thought to morality. *Id.* at 767; *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 1.1, at 1–3 (1986) (asserting that lawyers have been portrayed simultaneously as both self-sacrificing heroes and henchman of low-life criminals, and that neither image correctly reflects social reality).

16. *See* DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 10–15 (1973) (cataloguing complaints against lawyers' veracity and character from 14th century); Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 767 (1994) (stating that throughout recorded time, "everyone from the King of France to Frasier Crane . . . seems to have had something negative to say about lawyers"); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395, 395 (1906) (stating that dissatisfaction with justice system and legal professionals is as ancient as law itself); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 589 (1985) (citing Plato's criticism of attorney's "small and unrighteous soul" as rippling across thousands of years in various cultures); Gary A. Hengstler, *The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 65 (asserting that those viewing history of legal profession over centuries would find that "[p]ublic skepticism—if not cynicism—has always draped the profession like an unwanted cape").

17. *See* Mendicino v. Magagna, 572 P.2d 21, 23–24 (Wyo. 1977) (suspending lawyer for long-standing pattern of outrageous delays in closing estates, and stating that "[l]awyers and judges everywhere are, themselves, on public trial in this day and age. The entire judicial branch of the Government is suspect . . . our integrity is at issue—the very system of attorney-client relationship, which has its genesis in trust, is now fraught with public misgiving."); 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 2.1, at 35–36 (3d ed. 1989) (asserting that Watergate led to sharp decrease in general public esteem because of participation of public service lawyers and that judges and scholars zeroed in on ethical problems found in law firms in wake of scandal); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 1.1, at 4 (1986) (warning that criminal involvement of lawyers in Watergate signals weaknesses in self-regulatory structure which will have far-ranging repercussions); Robert F. Drinan, *Moral Architects or Selfish Schemers?*, 79 GEO. L.J. 389, 396 (1990) (noting that Watergate scandal sparked American Law Institute drafting of all-inclusive treatise which defined ethical norms for lawyers); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 106 (1994) (opining that Watergate and S&L scandals help perpetuate negative perceptions of law-

The legal profession has not been blind to its own shortcomings and poor reputation. In fact, the ABA promulgates its ethical codes in large part to maintain public confidence in the profession.[18] The overarching purpose of these codes is to establish a mechanism of self-regulation. The codes enable the Bar to discipline its members, thereby protecting the public from incompetent practitioners[19] and arguably preventing policing by the federal government.[20]

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yers, such as their fundamental dishonesty); Kirsten L. Thompson, *Liability of Professionals, Officers, and Directors: Annual Survey*, 28 TORT & INS. L.J. 376, 376 (1992–93) (stating that professionals can no longer predict to whom courts will hold them liable, either for their own actions or actions of third parties).

18. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1983) (exhorting lawyer to adhere to highest standard of ethical conduct in order to maintain confidence and respect of public); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 3.1, at 79 (1986) (hypothesizing that strong motivation for system of disciplining lawyers is "to reassure a doubtful public that notorious instances of lawyer depredation are being handled appropriately" and to protect public image of profession); Ann Peters, *The Model Rules as a Guide for Legal Malpractice*, 6 GEO. J. LEGAL ETHICS 609, 621 (1993) (arguing that by not using Model Rules better in malpractice suits, codes might be seen as symbolic gestures of legal profession instead of significant aids in cementing public confidence in standards that attorneys strive to meet); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 131 (1994) (positing that public dissatisfaction with lawyers is function of their failure to embrace standards of professional responsibility and of lawyers elevating personal financial gain over ideals of personal honesty and dedicated service to clients). *But see* Gary A. Hengstler, *The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 64 (asserting that more stringent ethical standards geared to significant volume of complaints not addressed by ethics codes is public's top priority).

19. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1995) (stating that profession is obliged to promulgate regulations in light of public interest); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 3.1, at 79 (1986) (noting that purpose of disciplining legal profession is to shield public and others against those attorneys who have refused to abide by minimal normative professional expectations); John S. Dzienkowski, *The Regulation of the Legal Profession and Its Reform*, 68 TEX. L. REV. 451, 483 (1989) (book review) (claiming that ABA has never really identified rationale for self-regulation in terms of reform and transformation of profession, but that one general purpose advanced by Bar is protection of public). *But see* Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 274–75 (1985) (chiding Preamble of Model Rules as false promise to protect public interest, when in reality lawyers have used self-regulation to look out for themselves).

20. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1995) (stating in paragraph 9 that government regulation is unnecessary as long as profession meets obligations of self-regulation and that self-regulation is crucial to continue profession's independence from government control); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 802 n.10 (1992) (stating that legislators, among others, have been convinced by Bar's self-regulatory efforts to defer majority of enforcement questions to professional disciplinary organizations). *But see* Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 273–74 (1985) (punching holes in logic that self-regulation reduces potential for government regu-

However, ABA ethical guidelines have traditionally failed to keep pace with the rapidly changing profession. The ABA Canons of 1908, for example, addressed only the ethical considerations confronted by the general-practice attorney and a flesh-and-blood client seeking advice on a well-defined legal problem.[21] However, this model of the typical attorney-client relationship quickly became outdated as more and more attorneys went to work representing corporate clients.[22] Gone, for many lawyers, was the flesh-and-blood client. In that client's place was a complicated and confusing corporate structure.[23] The Canons of 1908 were silent regarding this and other problems of client identity in a corporate environment. In response to pressures to revamp the profession's ethical standards and bring them more in line with contemporary legal work environments, the ABA promulgated the Model Code of Professional Responsibility (Code) in 1969.[24] The Code itself, however, was immediately subject to serious scrutiny and criticized for using anachronistic assumptions about the demands of the lawyer's professional life.[25] Essentially, the Code was based on the assumptions of traditional attorney-client relations prevalent in 1908.[26]

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lation by claiming that even with self-policing, government and courts are not foreclosed from legislating another level of control).

21. *See* 1 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.13:102, at 387 (2d ed. Supp. 1993) (commenting that lawyering is basically uncomplicated when dealing with single person who wants specific service performed and no other constituents are involved); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 147-48 (1986) (calling traditional image of client as individual coming to lawyer for specific legal assistance on well-defined legal issue "antique").

22. *See* Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics*, 76 MICH. L. REV. 425, 425 (1978) (noting that modern lawyer would be unrecognizable by mid-1800s counterpart because of immense changes in both lawyers' function and workplace).

23. GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING 14-15 (2d ed. 1994).

24. *See* MURRAY L. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION 76–77 (1979) (articulating four reasons why Bar Association chose to replace Canons) (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preface (1970)). First, the Canons either completely left out or partially addressed significant areas of lawyer conduct. *Id.* Second, some Canons, while substantively valid, were in great need of revision. *Id.* at 77. Third, most of the Canons did not provide for any practical sanctions in the event of a violation. *Id.* Fourth, the changes of both the legal profession and an increasingly urbanized society necessitate new statements of professional norms. *Id.*

25. *See* GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING 14–15 (2d ed. 1994) (complaining that Model Code reflects outdated assumptions about lawyers' work and daily pressures).

26. *See* Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 704 (1977) (criticizing Code for inverting priorities and putting law-

The Code's Ethical Consideration (EC) 5–18, the ABA's first attempt to grapple with the problem of client identity in a corporate setting, illustrates the Code's shortcomings.[27] EC 5–18 informed lawyers employed by an organization that they owed "allegiance" to the entity and not to any individual constituents, such as stockholders or employees.[28] However, while the Code identified the "client" as the entity, it failed to adequately define the corporate entity. The Code ignored the reality that the entity must act through its agents, each of whom has different, and possibly conflicting, interests.[29]

Just as the 1969 Model Code was developed to remedy the perceived failure of the Canons, the Model Rules were developed in 1983 to correct this and other weaknesses of the Code.[30] Model Rule 1.13, as adopted by the 1983 ABA Rules Committee, survived heated debate and provided a long overdue framework for defining who makes the decisions on behalf of a corporate entity and under what circumstances a lawyer must obey orders from an organization's constituents.[31] This framework establishes a clear dichotomy between ill-advised policy decisions and illegal conduct, and formulates a process that a lawyer must follow to protect the lawyer's primary client, the organization.[32] A majority of jurisdictions

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yer's interests ahead of interests of client and far ahead of public's interests); Charles W. Wolfram, *The Code of Professional Responsibility As a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 281 (1979) (quoting letter received by Grievance Committee of District of Columbia from Professor Anthony G. Amsterdam, in which Amsterdam says that Code provides lawyer as much precise guidance in negotiating professional responsibility problems as valentine would provide heart surgeon).

27. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5–18 (1983) (asserting that corporate attorney owes allegiance to corporation rather than stockholders, directors, officers, or employees of corporation).

28. *Id.*

29. *See* VERN COUNTRYMAN ET AL., THE LAWYER IN MODERN SOCIETY 132–35 (1976) (citing inadequacy of EC 5–18 in neglecting to define "client" in situations that involve actual or potential conflicts between constituents of corporations).

30. *See* ROBERT H. ARONSON ET AL., PROBLEMS, CASES AND MATERIALS IN PROFESSIONAL RESPONSIBILITY 31 (1985) (asserting that partially because of Watergate, ABA appointed Kutak Commission to draft Model Rules of Professional Conduct). The Code was seen as a transitional document between the moralistic Canons and the more detailed Model Rules. *Id.*

31. *See* ABA/BNA MANUAL OF PROFESSIONAL CONDUCT § 91:2403 (1991) (delineating "client-identity paradox" addressed by Rule 1.13(a), which directs corporate lawyer to consider corporation itself as client, but to deal with constituents, who are *not* clients, in order to represent their corporate client); *id.* § 91:2002 (stating that lawyer who represents organization must determine identity of client and that Rule 1.13 assigns entity as client).

32. *Id.* § 91:2401 (describing process by which lawyer evaluates proper response to perceived threat to organization).

have accepted Rule 1.13 as a necessary clarification of the lawyer's duties with respect to organizations.[33]

The core principle of Rule 1.13 is that "[a] lawyer representing an entity client does not thereby (and without more) become the lawyer for any of the entity's members, agents, officers, or other constituents as they are referred to in the rule; the lawyer instead represents the entity itself."[34] According to this "entity theory," constituents of the corporation

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33. *See id.* §§ 01:3–4 (listing jurisdictions that have adopted Model Rules). The following 37 jurisdictions have adopted the Model Rules, with significant regional differences: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* Various states have significantly amended Rule 1.13. For example, Minnesota has changed Rule 1.13(b) to permit counsel to act without determining whether the constituent's course of action is probably going to result in significant injury to the organization. *Id.* §§ 01:15–16. Additionally, Minnesota's Rule 1.13(c) deletes the provision that limits the lawyer's ability to withdraw. *Id.* § 01:16. In effect, Minnesota has bolstered Rule 1.13 by loosening the chain of command requirements, thereby making it easier to defend the corporation. *See id.* (explaining that corporate counsel will not need to first determine that superior's actions will "likely result in substantial injury" before acting). Colorado's amendment strengthens the central command of Rule 1.13 by stressing that the lawyer's duty is to the entity, and not to the organization's representatives. *Id.* § 01:42. Alaska also bolsters the duty to the organization provisions of Rule 1.13 and amends Rule 1.13(c) to read "and shall act in accordance with Rule 1.6," which deals with the lawyer's duty of confidentiality to the client. *Id.* § 01:44. Michigan has expanded Rule 1.13 to permit a lawyer to reveal confidential matters involving significant injury to the entity instead of resigning, as the Rules would mandate. *Id.* § 01:29. Furthermore, Michigan insists that the attorney must carefully explain exactly who the client is to the organization's representatives whenever necessary to avoid confusion. *Id.* The Rules charge the lawyer with that duty only when it is clear that the entity's interests are contrary to those of the organization's representatives. *Id.* § 01:29. New York has changed Rule 1.13(d) slightly. *Id.* § 01:39. Unlike the Code, which cautions the lawyer to explain the identity of the client to the organization's constituents when the respective interests are "adverse," New York amends the language to read when their interests appear to "differ." *Id.* Hawaii adds a provision that would allow government lawyers to "proceed as is reasonably necessary in the best interest of the Government or the public" if the lawyers become aware that a government employee (or someone associated with the government) intends or is actually breaking the law. *Id.* § 01:45. Washington has deleted Rule 1.13. *Id.* § 01:16. Finally, Utah has not adopted Rule 1.13. *Id.* § 01:26.

34. 1 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.13:112, at 387 (2d ed. Supp. 1996); *see also In re* Professional Serv. Indus. v. Kimbrell, 758 F. Supp. 676, 684 (D. Kan. 1991) (rejecting motion to disqualify attorney by interpreting Rule 1.13(d) to mean that attorneys must have actual knowledge of conflict between employee and entity); *In re* Consumers Power Co. Derivative Action Litigation, 132 F.R.D. 455, 475–76 (E.D. Mich. 1990) (relying on Rule 1.13 to clarify to whom attorney owes allegiance in dismissing complex derivative action claim); *In re* Conticommodity Serv., No. 644, 1988 WL 96179, at

become in effect "co-agents" with the lawyer, all obliged to serve the corporation instead of one another.[35] Furthermore, Rule 1.13 clarifies who speaks on behalf of the client. Generally, the lawyer can follow directives from the lawyer's co-agents, because "[i]n matters of policy and business judgment, the lawyer validly assumes that her client has 'directed' her to defer to the decisions of managerial level co-agents."[36] Indeed, Comment 4 to Rule 1.13 states that "decisions concerning policy and operations, including ones entailing serious risk are not as such in the lawyer's province."[37] This "hands-off" approach to a client's policy choices applies even though the decisions are imprudent.[38] This deference to the constituent representatives of the client is in accord with several key provisions of the Model Rules, which vest the broad policy objectives of representation in the client's hands and charge the lawyer with tactical and technical responsibilities.[39]

But if Rule 1.13 places upon lawyers the duty to take orders with regard to most policy decisions, it places quite a different duty on lawyers where co-workers undermine the entity through illegal acts or acts that could cause the entity substantial injury. Subsection (b) of Rule 1.13 requires lawyers faced with a constituent engaging in conduct that could substantially harm the organization to protect the best interest of the entity,[40] because the lawyer's fellow workers are never considered clients.[41]

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*1 (N.D. Ill. Sept. 9, 1988) (rejecting employee's interpretation of Rule 1.13 that attorney represents employees in addition to corporation unless lawyer clearly explains otherwise).

35. *See generally* ABA/BNA MANUAL OF PROFESSIONAL CONDUCT § 91:2001 (1995) (describing roots of entity theory as grounded in corporate law and agency law); ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 87, 89–91 (1987) (citing entity theory in explaining that purpose of Rule 1.13 is to clarify who speaks for organization).

36. 1 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.13:112, at 395 (2d ed. Supp. 1996).

37. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 3 (1995).

38. *Id.* Additionally, EC 5–18 states that: "In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal diaries of any person or organization." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5–18 (1995).

39. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1995) (mandating that client has final say regarding goals of representation and that lawyer must consult with client regarding means by which goals are attained); *id.* at Rule 1.4 (requiring lawyer to explain matters to client as thoroughly as possible in order for client to make informed decisions with respect to representation).

40. *See id.* at Rule 1.13(b) (asserting that "if a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action . . . which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization").

The rule lays out a procedure that takes effect only when the organization is facing "substantial injury," or when there is a violation of law that "reasonably might be imputed to the organization."[42] Generally speaking, this process is "pro-client," because Rule 1.13(b) allows the lawyer to report such conduct only to appropriate authorities within the entity. Rule 1.13 further obliges the lawyer to minimize disruption of the usual work within the organization and to minimize the risk of "revealing confidential information to outsiders."[43] After unsuccessfully asking the constituent to reconsider and unsucessfully bringing the matter to the attention of the employee's superior, the lawyer is required to go to the highest authority within the entity if the lawyer believes the potential harm warrants such action.[44] Should the highest authority refuse to take steps to correct for the misconduct, Rule 1.13(c) authorizes the lawyer to withdraw from the representation, but it authorizes no further action.[45]

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41. *Id.*

42. *Id.*

43. 1 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.8, at 410 (2d ed. Supp. 1996); *see also* James P. Hemmer, *Resignation of Corporate Counsel: Fulfillment or Abdication of Duty?*, 39 HASTINGS L.J. 641, 658 (1988) (submitting that for all practical purposes, Rule 1.13 admonition that lawyer's actions should minimize disruption will rarely justify withdrawal).

44. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b)(3) (1995) (offering lawyer option of referring matter to "highest authority that can act in behalf of the organization as determined by applicable law").

45. *See id.* at Rule 1.13(c) (allowing lawyer to resign if client's acts are clear violations of law and would likely cause substantial harm to entity). This provision of Rule 1.13 sparked the most controversy during the 1983 ABA House of Delegates' discussions on adopting the Model Rules. *See* ABA/BNA MANUAL OF PROFESSIONAL CONDUCT § 91:2401, at 54–55 (1995) (describing debates and process of deliberation of delegates). The original provision would have allowed the lawyer to "take further remedial action" if the highest authority refused to take steps to correct the problem. *Id.*; *see also* ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 90–91 (1987) (detailing precise phraseology of original amendment). Opponents of the draft provision heatedly insisted that the rules would transform lawyers from "trusted counselors" to "whistle blowers." *See* ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT at 89–90 (1987) (describing those opposed to draft provision as perceiving "watchman" role imposed on lawyer as chilling candid communications between lawyer and board of directors). The critics further asserted that the draft provision impermissibly shifted the balance of power from the directors to the lawyer. *See* Marvin G. Pickholz, *The Proposed Model Rules of Professional Conduct—and Other Assaults upon the Attorney-Client Relationship: Does "Serving the Public Interest" Disserve the Public Interest?*, 36 BUS. LAW. 1841, 1851–53 (1981) (complaining that Rule 1.13(c) would completely realign traditional lawyer-client relationship by forcing lawyer to become more like auditor than advocate). This would put the business manager in the untenable position of deciding before consulting lawyer if what he tells him would necessitate lawyer to become "town blabbermouth." *Id.*; *see* F. Michael Higgenbotham, *See No Evil, Speak No Evil—*

Numerous other Model Rules must be considered in situations where a corporate attorney confronts the actual or potentially harmful actions of a constituent.[46] The net effect of these Rules is to make it impossible for

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Developing a Policy for Disclosure by Counsel to Public Corporations, 7 J. CORP. L. 285, 301–09 (1982) (insisting that drawback to proposed Rule 1.13(c) is serious harm from vesting too much power in corporate counsel in determining disclosure process, with possible consequence of undermining corporate structure itself). Rule 1.13(c) as adopted, however, restricts the lawyer's options when confronted with a recalcitrant board of directors. The lawyer must take the matter to the highest constituent on the chain of command and withdraw if the constituent does not act to halt the illegal action. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(c) (1995) (allowing lawyer to withdraw as long as other provisions in Model Rules are satisfied). Critics of the adopted provision have leveled a blistering criticism against the final version, asserting that Rule 1.13(c) assumes that the highest authority is the final judge of what is in the best interests of the corporation. *See* James R. McCall, *The Corporation as Client: Problems, Perspectives, and Partial Solutions*, 39 HASTINGS L.J. 623, 637–39 (1988) (declaring Rule 1.13 ineffective in situation where board itself refuses to protect corporation's interests). Instead, Rule 1.13(a) clearly posits that *both* the lawyer and the highest authority share that responsibility. Subsection (c) subverts the purpose of the Rule—the lawyer must be able to part ways with the highest authority when the action (or inaction) *of those officers or directors themselves* pose a threat to the interests of the organization. *See* Martin Riger, *The Model Rules and Corporate Practice—New Ethics for a Competitive Era*, 17 CONN. L. REV. 729, 741–42 (1985) (remarking sarcastically that now that ABA has blessed preservation of confidences at cost of protecting entity, corporate lawyers will be able to retain clients by avoiding difficult matters involving substantial harm); *see also* Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289, 299–300 (1987) (rejecting silent assumption of Rule 1.13 that if internal corrective measures fail to deter rogue constituent from unlawful acts, it is always better to allow client to "suffer in silence" than to let lawyer sound alarm to outsiders). Rule 1.13(c) essentially commands the lawyer to go all the way up the chain of command, but the lawyer must then defer to those at the top, even though they may contribute to the harm by refusing to act. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1995) (refusing to give lawyer option of outside disclosure to stop internal illegal activity).

46. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1995) (ruling out helping client in criminal or fraudulent course of action); *id.* at Rule 1.8 (setting out comprehensive prohibitions regarding conflict of interests between lawyer and client); *id.* at Rule 1.16 (elucidating specific conditions under which lawyer may or must withdraw from representation); *id.* at Rule 3.3 (commanding lawyer to disclose client fraud upon tribunal); *id.* at Rule 4.4 (reminding lawyer that while primary duty remains with client, third parties' rights must not be ignored); *id.* at Rule 1.6 (controlling lawyer's options in determining what confidential information lawyer is able to disclose to prevent or minimize fraud). Rule 1.6 is the primary rule protecting confidentiality, as it prohibits disclosure of *any* information relating to the representation of the client, with several extremely narrow exceptions: (1) client consent; (2) to prevent the client from doing something that the lawyer in good faith believes will likely cause "imminent death or substantial bodily harm"; or (3) to help the lawyer prove his defense in the event of a controversy with the client. *Id.* at Rule 1.6(b)(1)–(2). States are divided over when a lawyer may breach the iron-clad duty to keep client confidences imposed by Rule 1.6. *See* ABA/BNA MANUAL OF PROFESSIONAL CONDUCT § 91:2401, at 52 (1995) (listing permutations in states' ap-

the lawyer to disclose information outside the corporation, or to "blow the whistle" as a last resort, whether the actions are illegal or substantially harmful. Further, the Rules require the attorney to defer to the corporate client where policy matters are concerned.

Rule 1.13, then, provides clear and principled guidelines for self-regulation of the legal profession. These guidelines attempt to guarantee ethical behavior on the part of the attorney while protecting the attorney-client relationship. However, angry public reaction to the S&L crisis of the 1980s, and attorneys' involvement in that crisis, has tested the effectiveness of this self-regulation to maintain public confidence.[47] The S&L crisis has come to symbolize the greed and excesses of legal practitioners. Perhaps in response to this general sense that self-regulation had failed, government prosecutors articulated a cause of action that held corporate attorneys liable for their clients' bad policy decisons by expanding the traditional contours of aiding-and-abetting liability.[48]

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proaches to problem of when disclosure to third parties is permissible). At one end of the disclosure spectrum, in the states of Delaware, Missouri and Montana, the lawyer is allowed, but not required, to reveal information in order to stop a client from criminal acts that would likely lead to serious injury or death. *Id.* at 7. Arizona, Connecticut, Florida, Illinois, Nevada, North Dakota, Texas and Wisconsin, however, *require* disclosure to prevent the threatened injury. *Id.* There is a substantial body of case law documenting instances where corporations are charged with violations of toxic environmental laws, as well as with crimes in a variety of products liability/worker safety contexts. *Id.* at 8. However, for the purposes of the focus of this Comment, the crucial question regarding disclosure of confidential corporate information is whether a lawyer can reveal confidential matters "to prevent a crime or fraud that is likely to result in substantial injury to another's property or financial interests." *Id.* In jurisdictions that authorize permissive disclosure, such as Connecticut, Maryland, New Hampshire, New Mexico, North Dakota, Pennsylvania, Texas, and Utah, the impact of aiding-and-abetting actions that involve the interests of a third party is considerable. Generally speaking, "injury to a third party's property or financial interests is precisely what is at issue in many if not most cases of corporate misconduct." *Id.*

47. *See* Steve France, Commentary, *Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability*, 7 GEO. J. LEGAL ETHICS 725, 726 (1994) (comparing Model Rules to Maginot Line of World War II because of whopping $400 million paid in malpractice sanctions sustained by 22 of largest 200 law firms over S&L mess).

48. *See id.* (stating that "liability to persons outside the profession [has] displaced the old system of regulating professional conduct through ethical sanctions administered by the Bar itself").

III. What is Breach of Fiduciary Duty, Anyway?

A. *Aiding-and-Abetting Liability: The Traditional Contours*

The principle of vicarious liability for concerted action was developed early at common law.[49] This principle holds that "[w]here two or more persons act in concert, it is well settled in both criminal and civil law that each will be liable for the entire result."[50] The elements of the early concerted action cases included a common goal or purpose and "mutual aid" in carrying out violations of criminal law, such as trespass or battery.[51]

The concept of vicarious liability for concerted action has evolved from these limited applications to embrace a variety of liability theories, in-

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49. *See* Clark v. Newsam, 154 Eng. Rep. 55, 59 (Ex. 1847) (stating rule that "when two persons have so conducted themselves as to be liable to be jointly sued, each is responsible for the injury sustained by their common act"); Sir Charles Stanley's Case, 84 Eng. Rep. 1094, 1094 (K.B. 1675) (holding Sir Stanley jointly liable with servants for killing servant who accompanied bailiff in attempt to arrest Sir Stanley for murder); Matthews v. Coal, 79 Eng. Rep. 329, 329 (Ex. Ch. 1616) (holding defendants jointly liable for fine of 40 pounds for concerted action in trespass and battery of plaintiff's wife); *see also* Vincent R. Johnson & Alan Gunn, Studies in American Tort Law 391–92 (1994) (discussing applicability of doctrine of joint-and-several liability where tortfeasors have acted in concert); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 46, at 322–23 (5th ed. 1984) (citing classic example of concerted action liability as event in which one party hit plaintiff and another held him down while third party stole his silver buttons; each party is held liable for entire concerted harm inflicted).

50. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 52, at 346 (5th ed. 1984); *see also* Bunker Hill & Sullivan Mining Co. v. Polak, 7 F.2d 583, 584–86 (9th Cir. 1925) (holding defendants engaged in joint mining operations jointly and severally liable for flooding plaintiff's land with poisonous mineral matter); Garrett v. Garrett, 46 S.E.2d 302, 302–03 (N.C. 1948) (affirming general rule of concerted action in case of wife forcibly dragged out of her house and into street by defendant, where she was beaten by both defendant and her husband); Bobich v. Dackow, 18 S.W.2d 280, 281 (Ky. Ct. App. 1929) (citing general rule in holding defendants jointly and severally liable because one defendant hit woman over head while second defendant pushed victim out of house); Wrabek v. Suchomel, 177 N.W. 764, 766 (Minn. 1929) (holding barroom brawl participants jointly and severally liable for assaulting farmer and forcing him to kiss American flag in retaliation for farmer supporting opposition gubernatorial candidate); Houston v. De Horrodora, 136 S.E. 6, 9 (N.C. 1926) (holding rural police officers jointly and severally liable for wrongful arrest and assault of milk salesman suspected of transporting intoxicating liquor during high speed chase).

51. *See* Sir John Heydon's Case, 77 Eng. Rep. 1150 (K.B. 1613) (finding three men jointly liable for trespass as well as inflicting "cruel and barbarous wound" on knight); Austen v. Willward, 78 Eng. Rep. 1086 (K.B. 1601) (apportioning damages in trespass not permissible when all parties are found equally guilty); *see also* Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1450 (1994) (stating that aiding and abetting is "an ancient criminal law doctrine"); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 46, at 322–23 (5th ed. 1984) (stating that general rule of concerted action has roots in early days of common law when action of trespass was considered criminal action, *e.g.*, trespass of battery).

cluding aiding and abetting,[52] conspiracy,[53] and respondeat superior,[54]

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52. *See* 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, 320–21 (1988) (noting that long-established civil common law theory of joint tortfeasor liability encompasses aiding and abetting and conspiracy and that both have been adopted by Restatement (Second) of Torts).

53. *See* Pinkerton v. United States, 328 U.S. 640, 647 (1946) (citing principle that each conspirator is liable for criminal actions of partners in conspiracy); United States v. Alvarez, 755 F.2d 830, 849 (11th Cir. 1985) (affirming *Pinkerton* doctrine that a "co-conspirator is vicariously liable for the acts of another co-conspirator, even though he may not have directly participated in those acts" in finding participants in drug conspiracy guilty of murder of undercover agent); United States v. Gagnon, 721 F.2d 672, 676 (9th Cir. 1983) (expressing *Pinkerton* theory in cocaine conspiracy case); Halberstam v. Welch, 705 F.2d 472, 477 (D.C. Cir. 1983) (stating that principle of "vicarious liability for concerted action" has been used by courts in conspiracy situations). The *Halberstam* court distinguished aiding and abetting from conspiracy by noting that the primary emphasis in aiding and abetting is the issue of whether the defendant knowingly supplied "substantial assistance" to the tortfeasor. *Halberstam*, 705 F.2d at 477. In contrast, the gravamen of conspiracy is the agreement to take part in illegal activity. *Id. See generally* WAYNE R. LAFAVE, MODERN CRIMINAL LAW 596–704 (2d ed. 1988) (defining common law conspiracy as "a combination between two or more persons formed for the purpose of doing either an unlawful act or a lawful act by unlawful means"). Conspiracy requires both a mental state, or intention to realize the common goal, along with an act, *i.e.*, an agreement between the planners. *Id.*

54. While respondeat superior is a form of vicarious liability, it can be distinguished from aiding and abetting and conspiracy in several respects. First, aiding and abetting and conspiracy require some sort of culpability, but respondeat superior cases typically hold the employer liable for the wrongful actions of the employee, even though the employer was completely without fault. *See* 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 10.1, at 14–16 (2d ed. 1986) (stating that joint tort is not really correct description of master-servant liability because of principal's lack of participation and asserting that respondeat superior actually has roots in law of agency). Second, respondeat superior situations generally do not involve any kind of concerted action; rather, they involve situations where an employer typically does not know of his agent's harmful activity, much less assists, agrees, or substantially aids the wrongdoing. The employer is held liable by virtue of his position as master or one who controls the agent. *See* Smith v. Lannert, 429 S.W.2d 8, 14–15 (Mo. Ct. App. 1968) (holding company vicariously liable for employee spanking check-out girl because his action was arguably within scope of employment, even though employee acted contrary to employer's instructions). Third, the critical question in respondeat superior actions is not whether there was an agreement between the parties or whether the employer substantially assisted his agent in the wrongdoing; instead, the key issues are: (1) whether the tortfeasor was an employee (as opposed to an independent contractor) and, (2) if so, whether the agent was acting within the scope of his duties. *See, e.g.*, John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 952–55 (Cal. 1989) (discussing public policy justifications of respondeat superior doctrine in context of high school teacher accused of sexually assaulting student in teacher's apartment); Haehl v. Wabash R.R., 24 S.W. 737, 740 (Mo. 1893) (citing basic principles of respondeat superior in case of railroad watchman killing pedestrian to keep company bridge clear of pedestrians); Tockstein v. P.J. Hamill Transfer Co., 291 S.W.2d 624, 625–26 (Mo. Ct. App. 1956) (discussing scope of employment issues in case involving truck driver who punched customer in nose following delivery dispute). *See*

which are grouped under the rubric of "secondary liability."[55] In addition to the common law traditions of criminal law[56] and tort, secondary liability theories are also grounded in the common law of agency[57] and trusts.[58] Secondary liability is triggered when a party directly or indirectly assists a primary tortfeasor in unlawful conduct, rendering the party jointly and severally liable for any subsequent injury.[59] Such assist-

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generally VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 22, 23, 582–97 (1994) (discussing respondeat superior doctrine as form of strict liability).

55. *See* Ginger E. Margolin, Case Note, 26 ST. MARY'S L.J. 601, 611 (1995) (asserting that these three theories of secondary liability are generally used most often).

56. *See Central Bank*, 114 S. Ct. at 1450 (explaining that in 1909, Congress enacted general aiding-and-abetting statute, "decree[ing] that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime"); Standefer v. United States, 447 U.S. 10, 20 (1980) (concluding that history of 18 U.S.C. § 2 authorizes conviction of aider and abettor subsequent to conviction of principal because all participants who violate federal criminal law are considered "principals"); United States v. Parekh, 926 F.2d 402, 405–06 (5th Cir. 1991) (setting out elements for aiding and abetting criminal action under 18 U.S.C. § 2); State v. Newberg, 278 P. 568, 570–71 (Or. 1929) (holding hunters liable for killing man on horseback). In *Newberg*, one hunter held the spotlight while the other hunter shot, mistaking the deceased man's horse for a deer. *Newberg*, 278 P. at 570. The first hunter complained, "Hell, you never hit him; give me that gun," then fired one final bullet. *Id.*; *cf.* WAYNE R. LAFAVE, MODERN CRIMINAL LAW 705 (2d ed. 1988) (stating modern view that "a person is legally accountable for the conduct of another when he is an accomplice of the other person in the commission of the crime").

57. *See* Johns Hopkins Univ. v. Hutton, 422 F.2d 1124, 1130 (4th Cir. 1970) (holding broker liable under agency principles contained in Restatement (Second) of Agency §§ 257–58 for misrepresentations of agents), *cert. denied*, 420 U.S. 908 (1975); RESTATEMENT (SECOND) OF AGENCY § 344 (1957) (stating criteria for holding agent liable for another's conduct); *id.* § 257 (holding principal liable for harm caused to third party as result of reliance upon tortious representation of agent under certain conditions); David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy*, In Pari Delicto, *Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 603 (1972) (stating that common law principles of agency provide underpinnings of secondary liability theories used in securities law); Ginger E. Margolin, Case Note, 26 ST. MARY'S L.J. 601, 609–10 (1995) (stating that secondary liability is rooted in criminal law, torts, and agency).

58. *See* RESTATEMENT (SECOND) OF TRUSTS § 326 (1957) (stating general rule that third person who has notice and participates in trustee's breach is liable to beneficiary for any loss or harm that resulted from breach); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 901 (asserting that third-party liability attaches only when one who assists in breach does so knowingly); Marcia L. Walter, Note, *Aiding and Abetting the Breach of Fiduciary Duty: Will the Greenmailer Be Held Liable?*, 39 CASE W. RES. L. REV. 1271, 1274 (1989) (asserting that courts may refer to trust law when acknowledging aiding-and-abetting claims).

59. *See* 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, 320 (1988) (describing relationship between primary and secondary violators); David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy*, In Pari Delicto, *Indemnification, and*

ance can take the form of active participation, furthering the common plan or scheme by cooperation or request, agreeing to participate, adopting the primary wrongdoer's act for one's benefit, or knowingly aiding or encouraging the primary tortfeasors.[60]

B. *Elements of Aiding-and-Abetting Liability*

In 1939, the Restatement of Torts first adopted the tort of aiding and abetting,[61] which had been reported as early as the mid-19th century.[62] Under the heading "Persons Acting in Concert," Section 876 of the Re-

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Contribution, 120 U. PA. L. REV. 597, 600 (1972) (defining secondary liability in terms of primary and secondary wrongdoers); Ginger E. Margolin, Case Note, 26 ST. MARY'S L.J. 601, 609–11 (1995) (discussing definition of secondary liability in context of security fraud aider and abettor liability). Those whose liabilities attach because of their relationship to another who has violated the law are considered secondary wrongdoers. *See* Ginger E. Margolin, Case Note, 26 ST. MARY'S L.J. 601, 609 (1995) (explaining that secondary liability attaches "pursuant to another's wrongdoing"); Elizabeth Sager, Comment, *The Recognition of Aiding and Abetting in the Federal Securities Law*, 23 HOUS. L. REV. 821, 821 n.3 (1986) (stating that secondary liability is imposed on defendants not because they have violated law, but because of their relationship to primary tortfeasor).

60. *See* Agovino v. Kunze, 5 Cal. Rptr. 534, 537–38 (Cal. Ct. App. 1960) (holding that tacit agreement could be inferred by two boys drag racing down local street where one racer hit plaintiff crossing intersection, knocking plaintiff unconscious); Thomas v. Doorley, 346 P.2d 491, 494 (Cal. Ct. App. 1959) (affirming liability of defendant in assisting principal tortfeasor in driving car to remote spot where plaintiff was beaten for not repaying $1,000 debt); Jaffray v. Hill, 191 N.E.2d 399, 401–02 (Ill. App. Ct. 1963) (insisting that common plan or agreement could be inferred when teenager collected beer money for friends, bought beer, and drove companions to side street, where cohorts robbed doctor); Herman v. Wesgate, 464 N.Y.S.2d 315, 316 (N.Y. App. Div. 1983) (holding that all defendants who participated in stag party that resulted in plaintiff-guest being thrown from barge were responsible for plaintiff's injuries, even though some did not actually propel plaintiff into water); Price v. Halstead, 355 S.E.2d 380, 389 (W.Va. 1987) (holding passengers liable for plaintiff's injuries in car wreck as result of their encouraging driver to continue to smoke marijuana as well as consume alcohol, knowing driver was already drunk); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 323 (5th ed. 1984) (stating that parties who perform various forms of assistance, even with no express understanding among themselves, are equally liable).

61. *See* Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting By Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 15 (1993) (stating that authors of Restatement first acknowledged tort of aiding and abetting in 1939, and again in 1977).

62. *See* Hicks v. United States, 150 U.S. 442, 446 (1893) (remanding charge of aiding and abetting against individual who told victim, "[P]ull off your hat and die like a man" before shooting fatal bullet); State *ex rel.* Martin v. Tally, 15 So. 722, 741 (1894) (finding judge guilty of aiding and abetting relatives in killing man who seduced judge's sister-in-law); Clark v. Bales, 15 Ark. 452, 458 (1855) (holding defendant liable for aiding and abetting trespass where plaintiff's home was invaded and his hogs driven off, butchered, and stolen); Prince v. Flynn, 12 Ky. (2 Litt.) 240, 242–43 (1822) (finding defendants liable for aiding theft of plaintiff's ferry boat).

statement sets out the elements of aiding and abetting liability: a person can be liable for the harm done to a third person from the wrongful acts of another, if he or she: (1) commits a tortious act in concert with the primary tortfeasor; (2) *knows* that the other's conduct is wrongful; and (3) gives *substantial assistance* to or encourages the other's conduct.[63] Therefore, the aider and abettor is held liable because of his or her acts in relation to the primary tortfeasor, who directly commits a violation of law.[64]

There are two primary public policy reasons for imposing liability under these circumstances. First, the guiding principle of tort law mandates that those injured should be compensated.[65] Second, giving advice or encouragement to a tortfeasor engaged in conduct that the aider knows to be tortious is the equivalent of moral support. This type of support renders the aider legally blameworthy, as if the aider had physically assisted the primary wrongdoer.[66]

1. When Does Aiding-and-Abetting Liability Attach?: The Question of What Constitutes "Substantial Assistance"

These policy justifications for aiding-and-abetting liability guide courts in determining when such liability attaches. In *Halberstam v. Welch*,[67] for example, the United States Court of Appeals for the District of Columbia Circuit observed that whether liability for aiding and abetting attaches generally depends on "how much encouragement or assistance is substantial enough."[68] In addition, the court noted that there are two key issues for evaluating the secondary actor's conduct: (1) determining what constitutes "knowing and substantial assistance or encouragement;" and (2) the degree to which the aider and abettor is liable for harm caused by the primary actor.[69] In evaluating whether the encouragement or assistance was substantial, courts have generally applied the five factors set out in the Restatement of Torts: the "nature of the act encouraged; the amount

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

64. *See* Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 86 n.40 (1993) (stating that essence of aiding-and-abetting liability is to "reach those who only assist, rather than commit, a primary violation").

65. *See* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 7 (1994) (stating that full compensation of accident victims is one of several basic public policies that has influenced development of tort law).

66. *See* RESTATEMENT (SECOND) OF TORTS § 874 cmt. d (1979) (explaining why liability is created when advice or encouragement to act equates to moral support of wrongdoer).

67. 705 F.2d 472 (D.C. Cir. 1983).

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

69. *Id.* at 481.

[and kind] of assistance given by the defendant; his [or her] presence or absence at the time of the tort; his [or her] relation to the [tortious actor]; and [the defendant's] state of mind."[70] To these five criteria, the *Halberstam* court added a sixth, the "duration of the assistance provided."[71]

The second issue enunciated in *Halberstam*, the extent to which the secondary actor is liable for injuries caused by the principle wrongdoer is, in effect, an inquiry into proximate cause. Case law implies that one who assists a wrongful act might be held liable for other related acts that are reasonably foreseeable.[72] Courts that have found insufficient evidence to

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70. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979); *see also Halberstam*, 705 F.2d at 483–84 (concluding survey of aiding-and-abetting cases with assertion that courts generally applied Restatement factors in determining question of substantial assistance). The *Halberstam* court examined several cases to illustrate the contours of substantial assistance. *See, e.g.*, Cobb v. Indian Springs, Inc., 522 S.W.2d 383, 387–88 (Ark. 1975) (using Restatement of Torts § 876 to find security guard's suggestive comments sufficient to be considered substantial assistance in causing injury to pedestrian after guard prodded teenager to drive new car at fastest possible speed to "see what it will do"); American Family Mut. Ins. Co. v. Grim, 440 P.2d 621, 625–26 (Kan. 1968) (finding 13-year-old boy liable for aiding and abetting raid on church refrigerator, causing fire damage to church, even though he did not participate in acts that started fire); Russell v. Marboro, 183 N.Y.S.2d 8, 32 (N.Y. Sup. Ct. 1959) (finding book company's sale of model's pictures to company with knowledge that photos would be used to defame model substantially assisted defamation); Keel v. Hainline, 331 P.2d 397, 400 (Okla. 1958) (finding schoolboy who merely retrieved erasers thrown by schoolmates in classroom free-for-all liable for loss of eyesight sustained by little girl hit by eraser).

71. *Halberstam*, 705 F.2d at 484. The court explained that it decided to expand the Restatement factors because of the impact duration would have on the kind of relationship involved between the aider-abettor and primary tortfeasor, and the aider's state of mind. *Id.*

72. *See id.* at 484–85 (commenting on foreseeability as "elusive" concept in stating test that one who assists or encourages wrongful act may be accountable for other "reasonably foreseeable acts" executed in relation with that act); *Cobb*, 522 S.W.2d at 388 (noting that guard who encouraged teen to test drive car at highest possible speed could foresee substantial risk of harm to others); *American Family Mut. Ins. Co.*, 440 P.2d at 626 (commenting that one who encourages another to commit breach of law may well be responsible for "other foreseeable acts done by such other person in connection with the intended act"). The Texas Supreme Court has defined proximate cause as including both foreseeability and cause in fact. Missouri Pac. R.R. Co. v. American Statesman, 552 S.W.2d 99, 103 (Tex. 1977); *see also* Farley v. M M Cattle Co., 529 S.W.2d 751, 755 (Tex. 1975) (declaring that proximate cause can be established by circumstantial evidence); Clark v. Waggoner, 452 S.W.2d 437, 440 (Tex. 1970) (stating that test for proximate causation is whether tortfeasor reasonably could have foreseen whether consequence or event would occur); Texas & Pac. Ry. v. McCleery, 418 S.W.2d 494, 497 (Tex. 1967) (defining proximate cause as whether defendant's act or omission was substantial factor bringing about injury in sense that "but for" his conduct, harm would not have occurred). *See generally* VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 377, 377–429 (1994) (noting that notion of limiting defendant's liability to foreseeable consequences of negligent actions advances important tort principle of assessing liability in proportion to fault); Patrick J. McNulty &

support aiding-and-abetting liability have generally staked their holdings on their interpretation of the limits of "substantial assistance."[73]

2. The Problematic Issues of "Knowledge" and "Nonfeasance"

In addition to the difficulty of assessing whether a secondary party's actions constitute substantial assistance, two other issues arise when analyzing the contours of aiding-and-abetting liability: first, determining what constitutes "knowledge," or culpable state of mind, and second, the notion of aiding through nonaction, or nonfeasance.[74] Section 876 of the Restatement of Torts does not define "knowledge," presumably because in most physical torts it is less difficult to ascertain.[75] However, with in-

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Daniel J. Hanson, *Liability for Aiding and Abetting by Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 18 (1993) (stating that substantial assistance element in Restatement test is really proximate cause concept).

73. *See* Duke v. Feldman, 226 A.2d 345, 347–48 (Md. Ct. App. 1967) (refusing to find wife liable for aiding and abetting husband's beating of real estate broker). Even though the wife knew her husband had threatened the man before, and she was observed driving her husband away from the scene with the victim in hot pursuit, the court found insufficient evidence to support a finding that she provided substantial assistance on her husband's attack of the agent. *Id.* at 347–48. *See also* Kilgus v. Kilgus, 495 So. 2d 1230, 1231 (Fla. Dist. Ct. App. 1986) (finding no hint of substantial assistance in father's suggestion to son that he douse cook-out fire with lighter fluid). The resulting fire ignited the can of fluid. *Id.* at 1230. The son dropped the can and splashed some fluid on his wife, who was seriously burned. *Id.*; Olson v. Ische, 343 N.W.2d 284, 289 (Minn. 1984) (finding passenger not liable for aiding and abetting drunk driver because passenger did not actively encourage driver to operate vehicle).

74. *See* Camp v. Dema, 948 F.2d 455, 459 (8th Cir. 1991) (asserting that knowledge element is critical in aiding-and-abetting cases to prevent unlimited extension of liability); Woodward v. Metro Bank of Dallas, 522 F.2d 84, 96–97 (5th Cir. 1975) (stating that issue of whether silence or inaction can meet aiding-and-abetting requirement of substantial assistance is "most problematic"); 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, 322 (1988) (stating that knowledge is one of several problematic elements of aiding-and-abetting test).

75. *See, e.g.*, Mock v. Polley, 66 N.E.2d 78, 81 (Ind. App. 1946) (finding employer liable for aiding and abetting vicious assault on employee after employer ordered foreman to throw employee out of office because employer's command proved knowledge of consequences); Garratt v. Dailey, 279 P.2d 1091, 1094 (Wash. 1955) (finding that five-year-old knew with "substantial certainty" that elderly, arthritic aunt would fall once he pulled chair from under her as she was about to sit down); *see also* RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1979) (linking amount of knowledge with degree of culpability); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 35 (1994) (asserting that knowledge is variety of intent, and is present if defendant is certain "for all practical purposes" that his act will trigger tortious consequences); 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, 322 (1988) (asserting that because most tort law evolved in regards to physical torts, knowledge is generally not difficult to ascertain).

tangible torts, such as an attorney assisting in a transaction later deemed to be fraudulent, the issue of what the attorney knew or should have known about the potential illegality of the transaction is considerably more difficult to determine.[76]

The elusive nature of knowledge in legal contexts further confuses the issue. For example, in the great majority of aiding-and-abetting situations, actual knowledge is nonexistent, or nearly impossible to prove.[77] A critical question, then, is whether a party can be liable when the complainant "can show only that the aider and abettor was negligent or reckless in some form in failing to know of the violation."[78] An equally

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76. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.3.3, at 695 (1986) (noting problem of determining lawyer's factual knowledge, *i.e.*, "when does a lawyer possess facts from which knowledge of the illegal nature of the client's enterprise must be drawn?"); *see also* Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978) (concluding that recklessness, or knowing indifference, would satisfy scienter requirement in securities fraud case); 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, 322 (1988) (declaring that general tortfeasor liability is not all that relevant in situations where advice of professional to hire consultant results in fraud perpetrated on plaintiff); John K. Villa, *Liabilities of Bank and Thrift Counsel* (arguing that constructive knowledge—that lawyer "should have known"—is not enough to support liability for aiding and abetting and suggesting that actual, subjective knowledge must be present), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 548 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666).

77. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.3.3, at 696 (1986) (commenting that knowledge is "dynamic concept" and noting situation where lawyer begins representing client on knowledge of facts which indicate enterprise is lawful only to find later that client is engaged in illegal activity, changing lawyer's duties relative to representation); 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, 324 (1988) (asserting that knowledge is difficult to prove because of difficulty in ascertaining degrees of direct and indirect forms); *see also* FDIC v. First Interstate Bank, 885 F.2d 423, 431 (8th Cir. 1989) (stating bank's overall awareness and general role in misappropriation scheme could be proven from circumstantial evidence); Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting By Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J., 14, 14 (1993) (stating that awareness or knowledge of tortious act is generally proven by inferences drawn from indirect or circumstantial evidence because direct knowledge is very difficult to demonstrate); *cf.* Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 78 (1993) (noting attorney's commitment of extreme loyalty to client may lead some lawyers to rationalize probable harm of client acts). The situation is further complicated to the extent that the lawyer discovers that she has assisted her client's fraudulent acts only after complicity has been established. *Id.*

78. 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, 324 (1988); *see also Camp*, 948 F.2d at 459–60

difficult question for the courts is how strictly should the standard for requisite knowledge on the part of the secondary party to the tortious act be construed.[79]

The second critical issue raised in aiding-and-abetting situations is distinguishing between assistance in the form of affirmative acts (misfeasance) and assistance in terms of mere inaction (nonfeasance).[80] Numerous cases support the notion that one may be held liable for inaction, or failing to prevent another's illegal conduct.[81] In cases involving

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(holding that knowledge of violation is necessary to prevent courts from casting "too wide a net" and dragging in those who merely participated in routine business transactions that aided incidentally in violation of securities laws); David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy*, In Pari Delicto, *Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 632–33 (1972) (noting that in most securities law conspiracy cases, aider and abettor would be doing nothing more than engaging in ordinary business activities). Additionally, substituting a "should-have-known" standard in place of knowing assistance in the wrongful conduct of the primary tortfeasor would be tantamount to creating a duty to investigate customary business activities of clients. *Id.* at 632–33. Ruder argues that such a duty almost certainly would be overly burdensome, if not impossible, to follow. *Id.*

79. *See* Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1455 (1994) (Stevens, J., dissenting) (holding that private plaintiffs may no longer bring aiding-and-abetting actions under § 10(b) of Securities and Exchange Act of 1934). The problem of determining the proper standard of knowledge adjudicated in securities-fraud cases is representative of the problem as a whole. Courts have formulated the knowledge element in a variety of ways. *See, e.g.*, Harmsen v. Smith, 693 F.2d 932, 943 (9th Cir. 1982) (requiring *actual* knowledge by aider and abettor of tortious quality of act and of aider's role in furthering act); International Inv. Trust v. Cornfeld, 619 F.2d 909, 922 (2d Cir. 1980) (asserting that prerequisite to aiding-and-abetting liability is "knowledge" of violation, and suggesting that knowledge element needs to be considered relative to amount of assistance by aider and abettor); SEC v. Coffey, 493 F.2d 1304, 1316 (6th Cir. 1974) (requiring that aider and abettor have "general awareness" that aider's role in overall actions was wrong, as well as knowing assistance in violation); Landy v. FDIC, 486 F.2d 139, 162–63 (3d Cir. 1973) (setting out requirement that aider and abettor know of existence of wrongful act, but holding that knowing assistance in tortious conduct is not necessary).

80. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373–74 (5th ed. 1984) (explaining difference between concepts of misfeasance and nonfeasance at common law). Misfeasance is taking affirmative action that harms others, and nonfeasance is failing to prevent harm from occurring from passive inaction. *Id.*

81. *See* Metge v. Baehler, 762 F.2d 621, 624 (8th Cir. 1985) (noting that defendant company's involvement in securities case amounted to inaction and that where showing of substantial assistance is slight, standard of knowledge required is heightened considerably); Edwards & Hanly v. Wells Fargo Sec. Clearance Corp., 602 F.2d 478, 484–85 (2d Cir. 1979) (analyzing role of unfaithful employee under theory that he was liable as aider and abettor for silence in face of broker's fraudulent activities); Kerbs v. Fall River Indus., Inc., 502 F.2d 731, 740 (10th Cir. 1974) (stating that party who assists in fraudulent acts may be liable, though assistance was comprised of mere silence or inaction); Brennan v. Midwestern United Life Ins. Co., 417 F.2d 147, 154 (7th Cir. 1969) (noting that defendant's silence in fraudulent acts of securities company along with other affirmative actions comprised

monetary loss, the issue is not whether the party directly assisted the primary tortfeasor by direct advice or support, but whether the actor was obligated to "disclose or stop another's wrongdoing discovered in the performance of normal and customary business activities."[82] Because the scope of this liability could be potentially unlimited, courts have struggled to determine when a person may be liable for nonfeasance.[83] Traditionally, the common law had refused to hold an individual liable for mere inaction.[84] Even today, the general rule in modern tort law is that one is

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aiding-and-abetting claim under § 10(b) and § 10b-5 of Securities Exchange Act of 1934); Green v. Jonhop, Inc., 358 F. Supp. 413, 419 (D. Or. 1973) (holding defendants liable for acquiescence in misleading financial prediction by remaining silent in face of inaccuracy).

82. Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting By Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 14 (1993); *see also Camp*, 948 F.2d at 459 (asserting that assistance of routine business transactions does not constitute "knowing substantial assistance" unless there is showing of conscious intent to violate law); Schatz v. Rosenburg, 943 F.2d 485, 496 (4th Cir. 1991) (linking knowledge requirement to whether aider and abettor owed duty to plaintiff and stating that without such obligation, defendant must have definite, deliberate, and specific intent to assist in tortious act); Roberts v. Peat, Marwick, Mitchell & Co., 857 F.2d 646, 652–53 (9th Cir. 1988) (asserting that aiding-and-abetting liability may attach based on defendants' silence if they owe duty to disclose information material to third-party investors); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 496–97 (7th Cir. 1986) (declaring that mere inference that aider and abettor must have had knowledge of material facts was insufficient to state cause of action and that in absence of knowing intent to violate law, court should determine if defendant enjoyed pecuniary gain by wrongful act).

83. *See* First Interstate Bank v. Pring, 969 F.2d 891, 898–900 (10th Cir. 1992) (emphasizing benefit obtained by aider and abettor), *rev'd*, Central Bank v. First Interstate Bank, 114 S. Ct. 1439 (1994); DiLeo v. Ernst & Young, 901 F.2d 624, 628–29 (7th Cir. 1990) (refusing to recognize silence as grounds for aiding-and-abetting claim absent duty to disclose and stating that aiding-and-abetting liability would otherwise become "liability without fault"); Woodward v. Metro Bank, 522 F.2d 84, 94–97 (5th Cir. 1975) (blending results from various courts to create test that accounts for aider's intent and benefit aider received, while balancing elements of knowledge and substantial assistance). The court required that the aider and abettor be generally aware of the illegal activity, and that he or she knowingly give substantial assistance, or else "the securities laws would become an amorphous snare for guilty and innocent alike." *Woodward*, 522 F.2d at 97; *see also* Martin v. Pepsi-Cola Bottling Co., 639 F. Supp. 931, 934–35 (D. Md. 1986) (adopting Second Circuit "sliding scale" approach, which requires higher level of scienter when element of duty to disclose is slight, and vice-versa); Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting By Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J., 14, 15–16 (1993) (declaring that results and approaches of courts in this arena have been confusing and contradictory).

84. *See* RESTATEMENT (SECOND) OF TORTS § 314 cmt. c (1965) (explaining common-law roots of rule). The comment illustrates the moral dilemma inherent in the rule with an example of a defendant sitting on a dock smoking a cigar while observing another drown; the defendant is under no duty to aid the hapless victim. *Id.* The traditional rule states that there is no liability for nonfeasance absent special considerations, such as the quality of the relationship between the parties. RESTATEMENT (SECOND) OF TORTS § 314 cmt. c

under no duty to prevent injury to another person, even if one knows the other is in danger of being injured.[85]

C. *Expansion of the Traditional Doctrine: Aiding and Abetting a Breach of Fiduciary Duty*

In identifying and expanding the tort of aiding and abetting a breach of fiduciary duty, courts have apparently ignored this general rule. Until recently, precedent in the aiding-and-abetting arena, with the exception of securities law, was "largely confined to isolated acts of adolescents."[86] In the last two decades, however, there has been an exponential growth of aiding-and-abetting litigation in a variety of contexts. This burgeoning litigation has involved actions against bankers and brokers, and the attor-

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(1965). Courts have found a duty of affirmative action in a relatively limited number of situations. Examples include those instances involving custodial relations, (*e.g.*, parent-child), obligations stemming from one's ownership of land or business, (*e.g.*, landlord-tenant, innkeeper-guest, and employer-employee) and persons who are responsible for individuals inclined to exhibit dangerous behavior. *See* Union Pac. Ry. v. Cappier, 72 P. 281, 283 (Kan. 1903) (stating that law of land does not impose obligation to rescue drowning person, even if there is no personal risk, as long as one is not responsible for victim's predicament); Cramer v. Mengerhausen, 550 P.2d 740, 743 (Or. 1976) (stating that customer had no duty to warn mechanic underneath pickup truck that truck was about to fall off improperly placed jack because there is "no duty to aid one in peril in the absence of some special relation between the parties which affords a justification for the creation of a duty"); *see also* 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 18.6, at 718–719 (2d ed. 1986) (speculating that "rugged, perhaps heartless, individualism" at common law may be one reason for no-duty rule); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373–74, 383–85 (5th ed. 1984) (explaining origins of rule and circumstances in which liability for nonfeasance attaches); *see generally* Vincent R. Johnson, *Rescuers and the Duty to Act*, *in* PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES, passim (1988).

85. *See* Galanti v. United States, 709 F.2d 706, 708–09 (11th Cir. 1983) (finding that FBI agent had no duty to warn bystander, who was murdered along with key government witness, of foreseeable risk of harm even though agent knew that convicted felon would try to kill witness); Williams v. State, 664 P.2d 137, 138–39 (Cal. 1983) (stating general rule of no duty to act in case where highway patrolmen failed to investigate cause of injury to motorist hit in face with heated brake drum from passing truck); Bishop v. City of Chicago, 257 N.E.2d 152, 153–54 (Ill. App. Ct. 1970) (stating that municipality that operated airport had no duty to rescue pilot who crashed and drowned in lake on approach to airport); Hurley v. Eddingfield, 59 N.E. 1058, 1058 (Ind. 1901) (stating that physician, who refused "without any reason whatever" to treat dangerously ill patient, had no duty to render aid, despite subsequent death of victim); Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting By Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 21 (1993) (asserting that general rule still prevails in modern law, despite erosion of rule as courts have carved out exceptions).

86. Halberstam v. Welch, 705 F.2d 472, 489 (D.C. Cir. 1983).

neys who assist them, in securities law violations;[87] actions against attorneys for aiding and abetting ERISA (Employment Retirement Income Security Act) violations;[88] and actions against attorneys and other professionals for aiding and abetting a breach of fiduciary duty in the wake of the S&L banking crisis.[89] In particular, the novel theories that government regulatory agencies advanced in order to hold lawyers accountable for their role in the rash of bank failures in the late 1980s extended the contours of traditional aiding-and-abetting doctrine to such an extent that traditional rules governing corporate representation are now in danger of being dramatically rewritten.[90]

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87. *See* David J. Baum, *The Aftermath of Central Bank of Denver: Private Aiding and Abetting Liability Under Section 10(b) and Rule 10(b)-5*, 44 AM. U. L. REV. 1817, 1829 (1995) (stating that aiding-and-abetting liability has been used extensively by federal courts over last quarter-century in securities litigation); Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting By Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14, 15–16 (1993) (stating that "explosion" of aiding-and-abetting cases involving attorneys providing assistance in securities law violations began in mid-seventies); David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy*, In Pari Delicto, *Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 598–99 (1972) (declaring that "explosive" growth of securities fraud cases reflects reliance on aiding-and-abetting theories to bring in those only secondarily responsible for harm).

88. *See, e.g.*, Lowen v. Tower Asset Mgmt., Inc., 829 F.2d 1209, 1220 (2d Cir. 1987) (stating that defendants who knowingly participate in breaches of fiduciary duties are as liable as errant fiduciaries under ERISA); Thornton v. Evans, 692 F.2d 1064, 1078 n.34 (7th Cir. 1986) (opining that conspiracy with fiduciary is necessary element to hold non-fiduciary liable under ERISA); Arakaelian v. National W. Life Ins. Co., 748 F. Supp. 17, 20 (D.D.C. 1990) (asserting that standard of knowing-and-substantial-aid must be demonstrated to hold non-fiduciary liable under ERISA); Foltz v. U.S. News & World Report, 627 F. Supp. 1143, 1168 (D.D.C. 1986) (stating that degree of participation required to hold non-fiduciary liable for aiding and abetting under ERISA is not same as level required to prove assistance of fraud); Christopher G. Sablich, Note, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 CHI.-KENT L. REV. 517, 540–41 (1992) (stating that ERISA federal pension laws spawned substantial portion of federal aiding-and-abetting case law).

89. *See* J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. REV. 803, 803–04 (1994) (observing that agencies such as FDIC and RTC have gone after both accountants and lawyers for their roles in national banking crisis in attempt to recoup losses from failed banks); Steve France, Commentary, *Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability*, 7 GEO. J. LEGAL ETHICS 725, 725–26 (1994) (stating that government has investigated, settled, and fought actions against numerous law firms following nation's "worst-ever financial scandal—the collapse of the savings and loan industry"); Christopher G. Sablich, Note, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 CHI.-KENT L. REV. 517, 539–40, 547 (1992) (asserting that banking attorneys have drawn criticism for role in S&L crisis and may now have to pay their portion of lost assets to receivers of failed banks).

90. John K. Villa, *Liabilities of Bank and Thrift Counsel*, *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 504–06 (1993) (PLI Corp. Law & Practice

IV. Aiding and Abetting a Breach of Fiduciary Duty: Elements and Precedent

A. *The Elements and the Trend of Cases*

If a third party knowingly and actively participates in the breach of fiduciary duties by another, liability may attach for aiding and abetting the principal actor's breach.[91] In other words, the third party is considered a "joint tort-feasor with the fiduciary."[92] Courts are split as to whether the claim of aiding and abetting a breach of fiduciary duty is a viable cause of action.[93] A majority of courts recognize the claim but

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Handbook Series No. A-666). Some of the fundamental changes to corporate attorney-client relations that the new aiding-and-abetting theory would trigger include: 1) forcing counsel to second-guess management decisions on both legal and financial grounds to determine if the proposed action is a potential breach of fiduciary duty on the part of management; 2) antagonism between management and their hired lawyers stemming from the justifiable resentment by management when their decisions are called into question by attorneys who do not generally possess the requisite expertise in financial matters; and 3) forcing lawyers deeper into the evaluation of the financial and business dimensions of transactions, thereby exposing lawyers to greater potential liability on the grounds that the lawyers are just as liable to breach of fiduciary claims as management, because they have taken part in the decision to an approximately equal degree. *Id.*

91. *See* Oil & Gas Ventures-First 1958 Fund, Ltd. v. Kung, 250 F. Supp. 744, 749 (S.D.N.Y. 1966) (imposing joint and several liability on one who knowingly participates or joins in actions which constituted breach of fiduciary duty); Restatement (Second) of Torts § 874 cmt. c (1979) (stating 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"); Marcia L. Walter, *Aiding and Abetting the Breach of Fiduciary Duty: Will the Greenmailer Be Held Liable?*, 39 Case W. Res. L. Rev. 1271, 1273 (1989) (concluding that joint and several liability may be imposed on those who knowingly participate in breach by corporate officers).

92. Herider Farms-El Paso, Inc. v. Criswell, 519 S.W.2d 473, 477 (Tex. Civ. App.—El Paso 1975, writ ref'd n.r.e.); 1 J. Hadley Edgar, Jr. & James B. Sales, Texas Torts and Remedies § 3.02(2), at 3–12 (1995); *see also* Jackson v. Smith, 254 U.S. 586, 589 (1921) (stating general proposition that all who knowingly join fiduciary in illegal enterprise are liable as joint tortfeasors); Laventhol, Kreckstein, Horwath & Horwath v. Tuckman, 372 A.2d 168, 170 (Del. 1976) (asserting that those who knowingly assist fiduciary in breach of fiduciary duties "are jointly and severally liable for any injury which results"); Kinsbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 514 (Tex. 1942) (stating general rule of joint and several liability in case of employee oil field tool maker accepting secret commission from seller of contract rights); Restatement (Second) of Torts § 874 cmt. c (1979) (stating that one who knowingly aids fiduciary in executing breach of trust is guilty of tortious conduct and is liable for resulting harm).

93. *See* Q.E.R., Inc. v. Hickerson, 880 F.2d 1178, 1183 (10th Cir. 1989) (finding that claim of aiding and abetting breach of fiduciary duty would be recognized under Colorado law); Whitney v. Citibank, 782 F.2d 1106, 1115 (2d Cir. 1986) (setting out "well settled" elements of cause of action in partnership dispute and commenting that claim has long been recognized in New York courts); Pierce v. Rossetta Corp., No. 88-5873, 1992 WL 165817, at *8 (E.D. Pa. June 12, 1992) (asserting that Pennsylvania courts would acknowl-

differ as to the formulation of the elements. For example, a New York bankruptcy court required the plaintiff to prove: "(a) that the fiduciary's conduct was wrongful; (b) that the defendant had knowledge that the fiduciary's wrongful conduct was occurring; and (c) that the defendant's conduct gave substantial assistance or encouragement to the fiduciary's wrongful conduct."[94] Other courts have emphasized different elements, such as proving the plaintiff suffered damages as the result of the defendant's knowing inducement or participation in the fiduciary's breach.[95] A minority of jurisdictions, including Illinois, hold that aiding and abetting a breach of fiduciary duties is not a viable cause of action.[96] A Texas case

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edge cause of action); Amerifirst Bank v. Bomar, 757 F. Supp. 1365, 1380 (S.D. Fla. 1991) (stating that majority of case law acknowledges aiding and abetting breach of fiduciary duty as valid cause of action); Lou v. Belzberg, 728 F. Supp. 1010, 1023 (S.D.N.Y. 1990) (stating that claims of aiding and abetting breach of fiduciary duty are concerned with internal workings of corporation and are controlled by state corporate law).

94. Crowthers McCall Pattern, Inc. v. Lewis, 129 B.R. 992, 999 (Bankr. S.D.N.Y. 1991); *see also* S & K Sales Co. v. Nike, Inc., 816 F.2d 845, 847 (2d Cir. 1987) (referring to elements of cause of action of claim in state of New York as "well settled"); Resnick v. Resnick, 722 F. Supp. 27, 37 (S.D.N.Y. 1989) (reciting elements in sustaining cause of action in case of bank aiding and abetting principal in breaching duties owed to corporation); *cf.* Feinberg Testamentary Trust v. Carter, 652 F. Supp. 1066, 1082 (S.D.N.Y. 1987) (asserting that elements of cause of action may be applied to allegations of corporate waste as well as breach of fiduciary duty).

95. *See* Whitney v. Citibank, 782 F.2d 1106, 1115 (2d Cir. 1986) (setting out elements to include knowing inducement in breach and proof of damages suffered by plaintiff); Penn Mart Realty Co. v. Becker, 298 A.2d 349, 351 (Del. Ch. 1972) (emphasizing that plaintiff must allege existence of fiduciary relationship in addition to breach of fiduciary's duty and defendants' knowing assistance of breach); Marcia L. Walter, Note, *Aiding and Abetting the Breach of Fiduciary Duty: Will the Greenmailer Be Held Liable?*, 39 CASE W. RES. L. REV. 1271, 1274 (1989) (asserting that while phrasing of elements differs among courts, common elements include affirmative action and knowledge of breach).

96. *See* Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1450 (1994) (commenting that with exception of securities laws, application of aiding and abetting doctrine has been "at best uncertain in application"). The Court mentions several recent cases that do not recognize the tort under RESTATEMENT (SECOND) OF TORTS § 876. *Id.*; *see, e.g.*, FDIC v. S. Prawer & Co., 829 F. Supp. 453, 457 (D. Me. 1993) (dismissing claim of aiding-and-abetting liability for fraudulent conveyances and commenting that aiding-and-abetting liability was nonexistent at common law); Wiebolt Stores, Inc. v. Schottenstein, No. 87C8111, 1989 WL 99545, at *1 (N.D. Ill. Aug. 23, 1989) (stating flatly that there is no such claim under Illinois law, or law of any other sister state); Meadow Ltd. Partnership v. Heritage Sav. & Loan Ass'n, 639 F. Supp. 643, 654 (E.D. Va. 1986) (stating that court cannot discern any basis for aiding-and-abetting claim under § 876 of Restatement (Second) of Torts); Plaintiff's Original Petition for Money Damages at 7, RTC v. Bonner, No. H-92-430 (S.D. Tex. Nov. 10, 1992) (on file with the *St. Mary's Law Journal*) (dismissing aiding-and-abetting claims against directors of Entex and Arkla because RTC cited no case to support claim); *cf.* Sloane v. Fauque, 784 P.2d 895, 896 (Mont. 1989) (stating that issue of whether defendants were liable as joint tortfeasors acting in concert was one of first impression in Montana).

has avoided the issue by dismissing an aiding-and-abetting-a-breach-of-fiduciary-duties claim because the RTC had cited no case to support its claim.[97] In those jurisdictions that do recognize the tort, a high level of scienter and substantial assistance in a clear violation of the law appear to be the prime limiting considerations in the contours of the cause of action.[98]

These elements become difficult to apply in the context of the lawyer and his or her corporate client.[99] As discussed above, Rule 1.13 suggests that the attorney's fiduciary duties, such as the duty of full disclosure and the duty to refrain from participating in another's breach, flow only to the organization, since in the ordinary case, only the entity is considered the client rather than the officers or directors.[100] The corporation's officers

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97. RTC v. Bonner, 1993 U.S. Dist. LEXIS 11107, at *7 (S.D. Tex. 1993).

98. *See* Terrydale Liquidating Trust v. Barness, 611 F. Supp. 1006, 1027 (S.D.N.Y. 1984) (stating that plaintiff must demonstrate that defendants possessed *actual* knowledge of breach of duty and that suspicion or recklessness with regard to breach is not enough). In actions holding professionals accountable for securities violations, the level of culpability, or knowledge of the wrong, was set out in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). In *Ernst*, the United States Supreme Court rejected the notion that negligence was sufficient to sustain a private cause of action under § 10(b) and § 10b-5 of the Securities and Exchange Act of 1934 in the absence of scienter. *Id.* at 194 n.12. The Court defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud." *Id.* at 194. In addition to the defendant possessing actual knowledge of the violation, some courts have held that recklessness, a lesser form of intentional conduct, could satisfy the culpability requirement in certain circumstances. *See* Lazzaro v. Manber, 701 F. Supp. 353, 369 (E.D.N.Y. 1988) (stating that proof of reckless conduct could satisfy knowledge requirement in securities fraud analysis). Other courts use a "sliding scale" approach, in which recklessness instead of actual knowledge could prove that the defendant had the necessary culpability if defendant substantially assisted the fraud. *See* Stokes v. Lokken, 644 F.2d 779, 784 (8th Cir. 1981) (stating that where there is slight demonstration of substantial assistance, increased level of scienter is required). Finally, some courts hold that recklessness will suffice to demonstrate that the defendant possessed the required culpability when the defendant owes a duty to the injured plaintiff. *See* National Union Fire Ins. Co. v. Turtur, 892 F.2d 199, 206–07 (2d Cir. 1989) (asserting that when one party has fiduciary relationship with another, reckless disregard of primary violation will satisfy culpability requirement).

99. *See* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 28 (1987) (describing complications that result from considering relationships between lawyer and corporate officers); Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who is the Client?*, 62 FORDHAM L. REV. 1319, 1319 (1994) (noting that attorney representing fiduciary entity is confronted with issue of whether attorney owes fiduciary duties to entity, fiduciary who hired entity, or beneficiaries of fiduciary entity); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 891 (asserting that issues raised by lawyer representing fiduciary include problem of identifying client, whether duties extend to beneficiary, and whether duties extend to non-clients, such as shareholders).

100. *See* Christopher G. Sablich, Note, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 CHI.-KENT L. REV. 517, 539 (1992) (delineating

and directors, on the other hand, also owe fiduciary obligations and general allegiance to the corporation, as well as duties to third parties, such as stockholders, depositors, or investors.[101] Rule 1.13 focuses on what the lawyer should do when faced with a constituent's imminent or actual breach of their fiduciary duties; that is, to act in the client's best interest either by negotiating with the co-agent to prevent the illegal conduct

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duties of bank attorney in complex, highly-regulated banking environment). An attorney's fiduciary duties to the client bank include: (1) the duty to refrain from assisting directors in any breach of the directors' fiduciary duties; and (2) the duty to report fully and fairly to the bank any facts that "materially affect its rights and interests," such as the improper conduct of bank officers. *Id.* at 535, 539–40. Fiduciary relationships have been notoriously difficult to define, because the duties involved encompass widely varied, complex relationships, and because of the elusive nature of the concept itself. *See, e.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J., 879, 879 (stating that "[f]iduciary obligation is one of the most elusive concepts in Anglo-American law"); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 896 (asserting that relationships have expanded to include partners, corporate managers and directors, and agents). The classic definition of a fiduciary relationship, which evolved from trust principles has been described as an extremely strict standard of *uberrima fides*, or "most abundant good faith," which requires absolute candor and openness. Perez v. Kirk & Carrigan, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied). Lawyers owe clients two elemental fiduciary duties: undivided loyalty and confidentiality. *See* Roy Ryden Anderson & Walter W. Steele, Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235, 240–41 (1994) (setting out parameters of fiduciary duty). Because the basis for the fiduciary responsibility of attorneys toward their clients is grounded in the assumption that attorneys have a dominant role in light of their expertise and legal experience, several duties attach to lawyers to prevent overreaching. *Id.* at 244. The primary duties of absolute fairness to clients, complete and full disclosure, and preservation of confidences result from the fundamental imbalance of power between the attorney and client. *Id.* at 240–41. Because lawyers have great discretion in acting on behalf of others, and because they generally have substantial control over their clients' assets, they are bound to exercise that discretion in the clients' best interests and subsume their own interests in the process. *See* Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 897–98 (describing obligation of lawyer to put aside self-interest and act in client's best interest); *see also* Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. App. Ct. 1978) (declaring that because attorney-client relationship is that of fiduciary relation, attorney has "duty to exercise in all his relationships with this client-principle the most scrupulous honor, good faith, and fidelity to his client's interest").

101. Lane v. Chowning, 610 F.2d 1385, 1388–89 (8th Cir. 1980) (asserting well-settled proposition that fiduciary duty of bank directors and managers flows to depositors as well as shareholders); Hoehn v. Crews, 144 F.2d 665, 672 (10th Cir. 1944) (declaring that bank directors owe high degree of duty to both stockholders and public at large); Gadd v. Pearson, 351 F. Supp. 895, 903 (M.D. Fla. 1972) (noting that bank managers have greater obligation to exercise duty of good faith and use powers in best interest of entity than other corporate officers); Christopher G. Sablich, Note, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 CHI.-KENT L. REV. 517, 526 (1992) (asserting that corporate directors are obliged to honor fiduciary duties of care and loyalty to corporation as well as its shareholders).

from beginning or continuing, by going up the ladder of command to disclose the officer's wrongdoing to the appropriate authorities, or if all else fails, by resigning.[102] Rule 1.13, however, permits disclosure only to those constituents who can take action on the organization's behalf and forbids disclosure to third parties who cannot take action, such as shareholders or regulatory agencies.[103] Thus, the banking attorney has a fiduciary duty to warn and disclose potential and actual wrongdoing, and Rule 1.13 tells the attorney how to do it. The new legal theory of aiding and abetting a breach of fiduciary duty would appear to require more by holding the attorney liable for not "blowing the whistle" when a co-agent has made a harmful policy decision.

B. *The S&L Mess: The Basis of New Theories of Aiding-and-Abetting Liability, or Pushing the Envelope of the Traditional Contours*

"Where were the lawyers?," a famous battle cry from one of the leading S&L cases, signaled an open litigation season on bank attorneys, who had become targets of congressional, judicial, and public wrath.[104] The

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102. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1995) (granting lawyers choice of remedial action to take when faced with illegal activity of constituent); Steve France, Commentary, *Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability*, 7 GEO. J. LEGAL ETHICS 725, 732–33 (1994) (asserting that majority of lawsuits against banking attorneys stem from questions relating to Rule 1.13, such as whether counsel should have recognized management's breach of duties and what steps attorney was then obligated to take); *see also* Christopher G. Sablich, Note, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 CHI.-KENT L. REV. 517, 536 (1992) (indicating that when boards of directors themselves are responsible for breach, intent of Rule 1.13 is frustrated).

103. *See* J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. REV. 803, 827 (1994) (arguing that government banking agencies' contention that lawyers owe fiduciary obligation to disclose potential violations to regulators contradicts general rule that lawyers owe no duty to disclose to anyone but their clients); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 926 (commenting that duty to disclose is function of whether constituent is active participant or passive shareholder); John K. Villa, *Liabilities of Bank and Thrift Counsel* (asserting that Rule 1.13 authorizes disclosure of questionable conduct *within* entity), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 543 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666).

104. *See* Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990) (asking, "where were [the] professionals" when illegal transactions were taking place). In *Wall*, U.S. District Judge Sporkin questioned why, with the amount of professional expertise involved, not one professional blew the whistle on the illegal transactions, and he opined that while government deregulation and the participation of government agencies have certainly helped fuel the crisis, the private sector needs to be subjected to tight scrutiny in the future. *Id.* Judge Sporkin suggested that the private sector should have a system that would prevent the excesses that occurred at Lincoln Savings & Loan from ever

fallout from the most costly financial debacle in United States history prompted the federal government to aim its guns at the attorneys and other professionals who allegedly helped loot the legions of failed S&Ls.[105] The Resolution Trust Corporation (RTC) was created to sell

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happening again. *Id.* As Judge Sporkin predicted, actions against lawyers who assisted the failed banks began to appear. *See, e.g.*, FDIC v. Shrader & York, 991 F.2d 216, 218 (5th Cir. 1993) (listing FDIC legal malpractice charges against law firm for negligently assisting in failure of two savings institutions); RTC v. Farmer, 823 F. Supp. 302, 304–05 (E.D. Pa. 1993) (describing RTC charges against law firm, that included negligence, breach of fiduciary obligations, and aiding and abetting); FDIC v. McGinnis, Juban, Bevan et al., 808 F. Supp. 1263, 1267 (E.D. La. 1992) (listing FDIC's malpractice claims to include breach of fiduciary duties by not informing board of failed S&L of problems with financing); *see also* Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 75 (1993) (stating that *Lincoln* involved several top law firms and that many other attorneys have been held accountable in similar banking fiascoes); Athelia Knight, *S&L Fury Engulfs Congress: Letter Writers Demand 'Villians' Be Punished*, WASH. POST, Oct. 26, 1990, at A25 (citing one letter writer who suggested that lawyers could actually help situation by offering them cut of government losses recovered, which should send them "into a feeding frenzy").

105. *See* Tracy Everbach, *RTC Alleges Law Firm Gave Faulty Advice*, DALLAS MORNING NEWS, Aug. 8, 1992, at 2F (recounting partner's outrage at $20-million suit against law firm for breach of fiduciary duties in $259-million bank failure); Fred Faust, *Lawyers, Directors Sued in Thrift Case*, ST. LOUIS POST-DISPATCH, Apr. 7, 1992, at 7B (reporting comment of lawyer facing $3.2-million suit by RTC that "RTC needs scapegoats. Unfortunately, if you had any association as a director or a lawyer with a failed S&L, you're going to be sued."); Charles Goldsmith & Milo Geyelin, *Britain Rules Libel Law Overhaul for Easier and Less Costly Process*, WALL ST. J., Dec. 30, 1992, at 12 (recounting statement of RTC spokesman who noted that agency tries to make sure that any professionals hired by S&Ls, including lawyers, act "prudently"). The story related how one former partner at a prominent national firm agreed to pay $375,000 to settle an RTC claim arising from the failed Lincoln Savings and Loan. Charles Goldsmith & Milo Geyelin, *Britain Rules Libel Law Overhaul for Easier and Less Costly Process*, WALL ST. J., Dec. 30, 1992, at 12; *see also* Alec Matthew Klein, *S&L Meltdown*, BALTIMORE SUN, May 7, 1995, at 1E (jolting reader with statement that more than 1,000 failed S&Ls cost American taxpayers $500 billion, which not only was more than cost of Vietnam War, but equated to "$2,000 for every man, woman, and child" in United States); Kathy Sawyer, *ESM Scandal Extinguished a Rising Star; Attorney for Failed Securities Firm Asserted Innocence in Suicide Note*, WASH. POST, July 28, 1985, at A14 (recounting suicide of lawyer who was involved in incident that allegedly triggered $150-million string of S&L failures in Ohio); Howard Schneider, *Lawyer Wore Many Hats at Failed S&L: Roles at Maryland Thrift Included Advisor, Borrower, Stockholder*, WASH. POST, Apr. 27, 1992, at B1 (detailing role of lawyer in $157-million collapse of Maryland bank); Amy Stevens, *Atlanta Firm, Troutman Sanders, Settles S&L Case for $20 Million*, WALL ST. J., Sept. 22, 1992, at B17 (reporting that prestigious Atlanta firm and Los Angeles law firm had to pay RTC millions for role in Lincoln Saving & Loan collapse); Robert Trigaux, *RTC Answers Law Firm with Lawsuit*, ST. PETERSBURG TIMES, Dec. 2, 1992, at 1E (reporting that largest Florida law firm was rocked with $10-million suit for breach of fiduciary duty for role in failed bank). *But see* Kimberly Blanton, *Task Force Gets Tough Convictions Gaining Weight with More Top-Level Executives Going Down*, BOSTON GLOBE, Jan. 6, 1996, at 33 (citing case in which

assets seized by the government from those failed S&Ls and was authorized to bring these suits.[106] With the passage of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) in August 1989, the RTC could sue attorneys under the federal statute as an "institution-affiliated party."[107] This term applies to any attorney who knowingly or recklessly commits or participates in (a) any violation of law or regulation; (b) any breach of fiduciary duty; or (c) any unsafe or unsound practice "that has caused or is likely to cause damage to the insured depository institution."[108] In November 1990, the RTC[109] announced its plans to add 140

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judge dismissed over 100 counts against attorney for involvement with Dime Savings Bank as "too technical" and chastised United States Attorney for not charging executives responsible for problems).

106. *See infra* note 126.

107. Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. 101–73, §§ 204, 901, 103 Stat. 190–94, 446–450 (codified as amended at 12 U.S.C. §§ 1813, 1818 (1994)); *see also* RTC v. Cedarminn Bldg. Ltd. Partnership, 956 F.2d 1446, 1456 (8th Cir. 1992) (stating that Congress passed FIRREA as "emergency legislation" to deal with unprecedented losses and problems stemming from savings and loan debacle); Lawrence F. Bates & Dennis S. Klein, *Overview of Financial Institution Liquidations and Recent Legislation* (explaining that purpose of FIRREA was to reform regulation of thrift industry and restore financial integrity to federal deposit insurance funds), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 395, 399 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666; John K. Villa, *Liabilities of Bank and Thrift Counsel* (warning that FIRREA is nearly "universally viewed" as extraordinary step in expanding potential liability against attorneys and others affiliated with thrift institutions), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 549 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666).

108. 12 U.S.C. § 1813 (1994). Punitive actions that can be brought against attorneys by the expanded scope of the Act include cease-and-desist orders, which can command the attorney to cough up restitution for past practices or limit the attorney's future actions. *Id.* § 1818(b)-(d). Attorneys can also be banned from participating in either the business of a specific banking institution, or from the industry altogether. *Id.* § 1818(e). Finally, the Act provides for three tiers of civil monetary penalties, which start at $5,000 per day for Tier I violations and progress to the lesser of $1,000,000 per day or 1% of the total assets of the institution for Tier III transgressions. *Id.* § 1818(i).

109. In 1995, the RTC was disbanded. Kirsten D. Grimsley, *After Closing Many Doors, RTC Shuts Its Own: Six Years After Its Creation, Agency Finishes Thrift Cleanup Amid Praise from Some Former Critics*, WASH. POST, Dec. 29, 1995, at D1. Government claims under this cause of action continue to be brought by other agencies, however. *See* FDIC, News Release, *FDIC Announces Plans for the Regulations and Contracts of the Resolution Trust Corporation*, Dec. 29, 1995 (announcing that FDIC will assume regulations and contracts of RTC after RTC shutdown), *available in* 1995 WL 768635. In addition, private litigants may sue under the cause of action. Interview with Vincent R. Johnson, Professor of Law at St. Mary's University School of Law in San Antonio, Texas (Oct. 13, 1995).

more attorney malpractice actions to the 50 that were already pending.[110] While many of those cases were settled, leaving sparse precedent testing the new theories, the settlement record is impressive.[111]

The government's claims against attorneys for aiding and abetting the breach of fiduciary duties essentially rest on three grounds. First, the government claims that attorneys failed to investigate the activities of the directors and officers to confirm the legality of their actions.[112] Second, the government asserts that attorneys failed to disclose to the board of directors potential illegal conduct of the officers or noncompliance with state and federal banking regulations.[113] Third, the government alleges that attorneys failed to disclose these problems to governmental regulators.[114] In addition to the core aiding-and-abetting claims, the govern-

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110. *See* Linda Himelstein, *Malpractice Mayhem: RTC Officials Eye 140 Suits Against Lawyers*, LEGAL TIMES, Nov. 19, 1990, at 1 (stating that most malpractice suits were launched by FDIC and other agencies that took over once banks were declared insolvent).

111. *See* J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. REV. 803, 824 (1994) (expressing surprise at large number of settlements in light of many cases not being reported). The authors speculate that the prime negotiating weapon in the Government's arsenal is the threat that courts may adopt the RTC's novel theories should the case go to trial. *Id.*; *see also OTS, Kaye, Scholer Agree to Settle; Firm Will Pay $41-Million Restitution*, 58 BNA BANKING REP. 472 (Mar. 16, 1992) (stating that firm settled Office of Thrift Supervision claim of $275 million for alleged misrepresentations to government regulators, which was declared insolvent in 1989 and cost taxpayers estimated $2 billion); Alison L. Cowan, *Settlements Alarming Auditors and Lawyers*, N.Y. TIMES, Apr. 1, 1992, at D5 (reporting that law firms reeling from series of multi-million-dollar settlements find it increasingly difficult to procure malpractice insurance); Alison L. Cowan, *Big Law Firms to Pay Millions in S&L Suit*, N.Y. TIMES, Mar. 31, 1992 at A1 (listing firms forced to settle Lincoln Savings & Loan Association case: Ernst & Young ($63 million), Jones, Day, Reavis & Pogue ($24 million), Sidley & Austin ($4 million), Drexel Burnham Lambert ($42 million), and Arthur Andersen ($30 million)).

112. *See, e.g.*, FDIC v. Clark, 978 F.2d 1541, 1551 (10th Cir. 1992) (finding ample evidence that attorneys breached duty to investigate and disclose client fraud); FDIC v. O'Melveny & Meyers, 969 F.2d 744, 749 (9th Cir. 1992) (noting that due diligence investigation means that counsel must make sensible, independent verification to uncover and correct informational materials which are misleading and distort truth); FDIC v. Wise, 758 F. Supp. 1414, 1418–19 (D. Colo. 1991) (finding merit in FDIC's allegations of legal malpractice for breach of fiduciary duties premised on attorneys' negligent failure to conduct investigation on behalf of client); Felts v. National Account Sys. Ass'n, 469 F. Supp. 54, 67 (N.D. Miss. 1978) (commenting that lawyer's duties include independent investigations of client statements that he or she knows or should know are false).

113. *See, e.g.*, FDIC v. Shrader & York, 991 F.2d 216, 218 (5th Cir. 1993) (alleging that law firm did not give competent legal advice to client, which triggered violations of federal banking laws); *Clark*, 978 F.2d at 1547–48 (remarking that attorney's failure to inform board of loan irregularities denied board chance to discover fraud).

114. *See In re* American Continental Corp., 794 F. Supp. 1424, 1452 (D. Ariz. 1992) (asserting that law firm Jones, Day, Reavis & Pogue may have known of client's fraud, but did not disclose any irregularities to regulators); *In re* Fishbein, OTS AP-92-19 (Dep't

ment has, unsuccessfully, advanced theories based on alleged ethical rules violations, including failure to comply with Rule 1.13 and the rule governing failure to withdraw.[115]

One final weapon in the government's arsenal, also unsuccessful, was the claim that the lawyer's breach of duty proximately caused whatever damages were sustained by the S&L, and that the attorney was therefore liable for *all* losses.[116] Because proximate cause is generally defined as

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Treas. 1992), *reprinted in* Appendix A, *In the Matter of Peter M. Fishbein, Karen E. Katzman and Lynn Toby Fisher, Kaye, Scholer, Fierman, Hays & Handler: No. OTS AP-92-19, March 11, 1992* (alleging that law firm engaged in withholding crucial information from Federal Home Loan Bank Board), *in* THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER, at 239, 257 (1992) (PLI Corp. Law & Practice Handbook Series No. 779); *see also* Susan Beck & Michael Orey, *They Got What They Deserved*, AMERICAN LAWYER, May 1992 (revealing detailed sequence of law firm's involvement in Lincoln Savings and Loan representation, and asserting that firm was victim of its own arrogance), *reprinted in* THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER, at 437, 441–49 (1992) (PLI Corp. Law & Practice Handbook Series No. 779).

115. *See* Schatz v. Rosenburg, 943 F.2d 485, 492 (4th Cir. 1991) (refuting argument that courts use ethical codes to define civil liability for attorneys and stating flatly that ethical rules are designed to regulate conduct of members of legal profession and not to impose actionable duties with respect to third parties); Tew v. Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, 655 F. Supp. 1571, 1573 (S.D. Fla. 1987) (scoffing at plaintiff's contention that violation of disciplinary rules create cause of action); Ayyildiz v. Kidd, 266 S.E.2d 108, 112 (Va. 1980) (arguing that Code of Professional Responsibility "is no basis for a private cause of action"); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Preamble, Scope & Terminology (1995) (stating bluntly that "violation of Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. . . . [The rules] are not designed to be a basis for civil liability."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1986) (stating that violations of Code provisions are not to be used as standards to define civil liability of lawyers in event of professional misconduct); John K. Villa, *Liabilities of Bank and Thrift Counsel* (summarizing FDIC's and RTC's novel theories of legal malpractice based on ethical violations), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 513 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666).

116. *See, e.g.* Huddleston v. Herman & MacLean, 640 F.2d 534, 549 (5th Cir. Unit A 1981) (holding that plaintiff must prove violation of securities transactional rules and that violation or untrue statement caused damage in question), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375 (1983); *Shrader & York*, 777 F. Supp. at 535 (chiding plaintiffs for failure to establish proximate cause). The Fifth Circuit held that inducing a party to enter into a transaction that results in a loss does not automatically make the inducing party liable for the loss sustained. *Id.*; *see also* De La Maria v. Powell, Goldstein, Frazer & Murphy, 612 F. Supp. 1507, 1513 (N.D. Ga. 1985) (stating that plaintiff's burden of proving malpractice claim was to show negligence and that negligence proximately caused plaintiff's damages); John K. Villa, *Liabilities of Bank and Thrift Counsel* (arguing that RTC and FDIC positions on proximate cause "contrast sharply" with general rules on such causation), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 514, 563 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666). The RTC's claim that "all losses that result from the transaction should be borne by the lawyer" is inconsistent with the general rule that the plaintiff must show that the lawyer is the proximate cause of both the

foreseeability and cause-in-fact, the test is whether "but for" the attorney's conduct, the harm would not have occurred.[117] This line of proximate-cause analysis, when applied to an aiding-and-abetting charge, represents a serious challenge to the way corporate attorneys do business with their clients.

C. *How the RTC's Novel Theory in* RTC v. Bonner *Weakens Rule 1.13: An Attorney May Be Liable for Assisting in a Bad Policy Decision*

The RTC's allegations in a recent Texas case involving the failure of University Savings Association (University Savings) illustrates how far the Government stretched the traditional contours of aiding and abetting.[118] University Savings was once among the fifty largest savings and loan institutions in the United States and at one time was the third-largest bank in Texas, with over eighty branch offices throughout the state.[119] The estimated cost of the bank's failure was a staggering $535 million dollars.[120] In *RTC v. Bonner*,[121] the RTC alleged that a prominent Texas

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transaction *and* the loss. *Id.* at 514, 565–66. Courts have held that establishing that the lawyer's negligence allowed the client to enter into the bad transaction is not enough—the plaintiff must also show that the transaction was the reason that the institution sustained its losses. *Id.* at 566.

117. *See* Rogers v. Norwell, 330 S.E.2d 392, 396 (Ga. App. 1985), (emphasizing that attorney negligence alone does not state cause of malpractice action without proof that negligence also proximately caused damages to plaintiff); Villarreal v. Cooper, 673 S.W.2d 631, 633 (Tex. App.—San Antonio 1984, no writ) (setting out elements of proximate cause: foreseeability and cause in fact); *see also* John K. Villa, *Liabilities of Bank and Thrift Counsel* (sketching contours of proximate causation), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 562–64 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666). Villa charges that the RTC's position is dangerous because the agency holds the lawyer liable for *all* losses that occur instead of holding the lawyer responsible for only those losses that result from the alleged breach of the attorney's obligations. John K. Villa, *Liabilities of Bank and Thrift Counsel*, *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 563 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666). Proximate cause is especially important to the success of RTC actions because it is a necessary element of proving legal malpractice allegations. *Id.*; *see* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 5.6.3, at 218 (1986) (stating that malpractice plaintiff must show that attorney's negligent actions were "cause in fact" of plaintiff's loss).

118. *See* Plaintiff's Original Petition for Money Damages, at 104-05, RTC v. Bonner (No. H-92-3479) (S.D. Tex. Nov. 10, 1992) (on file with the *St. Mary's Law Journal*) (alleging that law firm aided and abetted fiduciary in breaching duties to University Savings Association by knowingly assisting and participating in fiduciary's unwise decision to sell bank). The firm's sole contribution to the S&L was $500 worth of document preparation. Interview with Vincent R. Johnson, Professor of Law at St. Mary's University School of Law in San Antonio, Texas (Oct. 13, 1995).

119. Plaintiff's Original Petition at 10, *Bonner*, No. H-92-3479 (Nov. 10, 1992).

120. *Id.* at 105.

lawyer and his firm aided and abetted the directors and officers of Entex, Inc., the parent corporation of University Savings Association, and others in their breach of fiduciary duties that ultimately resulted in the insolvency of University Savings.[122]

Bonner involves an extremely complex set of facts. In 1977, Entex, Inc. (Entex) acquired University Savings Association.[123] Over the next decade, through a series of highly risky and speculative construction loans and other real estate investments, the bank earned tremendous profits.[124] The investment decisions, however, left the bank vulnerable to the vagaries of the construction and real estate markets. Both markets went sour in the mid-1980s, forcing the bank to foreclose on many loans and post sizable year-end losses.[125]

Entex had entered into a Capital Maintenance Agreement (CMA) with the Federal Home Loan Bank Board (FHLBB) when it acquired University Savings in 1977.[126] In general, the terms of the CMA obligated Entex to infuse cash whenever University Savings posted losses to insure that the bank's net capital was at a sufficient, statutorily-defined level.[127] In February 1987, with the alarming growth of the bank's losses, Entex hired a consultant to evaluate the situation.[128] The consultant concluded that University Savings was "hopelessly insolvent" and that the estimated losses could exceed $1 billion.[129] Entex ultimately sold University Sav-

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121. Plaintiff's Original Petition, *Bonner*, No. H-92-3479 (Nov. 10, 1992).

122. *Id.* at 104–05.

123. *Id.* at 10–12.

124. *Id.*

125. Plaintiff's Original Petition at 16–18, *Bonner*, No. H-92-3479 (Nov. 10, 1992).

126. *Id.* at 8. Before FIRREA was enacted in August 1989, the FHLBB had two distinct roles: it supervised and regulated viable savings-and-loan institutions, and it protected the insured depositors of failed S&Ls. *Id.* at 2. Two offices were created to carry out those respective responsibilities. *Id.* at 2–3. The FHLBB's Office of Examinations and Supervision (OES) was charged with performing regulatory check-ups of operating thrifts, and, when appropriate, supervising the institution or launching enforcement actions. *Id.* The second FHLBB office, the Federal Savings and Loan Insurance Corporation (FSLIC), was responsible for making sure the FSLIC Insurance Fund was healthy and able to protect depositors in the event of a bank failure. *Id.* at 3. Once the OES of the FHLBB declared a thrift insolvent, the FSLIC would step in as conservator or receiver to balance the institution's assets and liabilities and protect the depositors. *Id.* With the passage of FIRREA, both the FSLIC and the FHLBB were phased out. *Id.* The Office of Thrift Supervision (OTS) and the Resolution Trust Corporation (RTC) were created to continue the duties of regulation and protection. *Id.* The OTS took over the functions formerly discharged by the OES, namely to examine, supervise and sue "open thrifts." *Id.* The RTC now protects both creditors and depositors of insolvent thrifts, and steps in as conservator or receiver once the OTS determines that a thrift is insolvent. *Id.*

127. *Id.* at 8, 18.

128. *Id.* at 19.

129. Plaintiff's Original Petition at 19–20, *Bonner*, No. H-92-3479 (Nov. 10, 1992).

ings to avoid severe financial difficulties because of their obligations to University Savings, and successfully merged with another corporation.[130] One of the conditions of the sale was Entex's release from the CMA, which arguably deprived University Savings of its most valuable asset.[131] While giving that release may have been a bad policy decision, it was not illegal.

The FHLBB declared University Savings insolvent on February 10, 1989.[132] The RTC succeeded the Federal Saving & Loan Insurance Company (FSLIC) as receiver for the bank on August 9, 1989, and instituted a suit against numerous directors, officers, and the attorney who assisted the sale of University Savings.[133] The suit alleged, in part, that the attorney had aided and abetted the directors' breach of their fiduciary duties because the attorney and his firm had provided a small amount of legal representation in furtherance of the sale, which allegedly disposed of University Savings' most valuable asset for inadequate consideration. *Bonner* was settled without trial; therefore, there was no judicial determination of the merits of the RTC's aiding-and-abetting argument. Nevertheless, *Bonner* illustrates the perils of such an expansive interpretation of the aiding-and-abetting theory.

D. *Analysis of the RTC's Allegations and the Attorney's Participation in the Sale of University Savings Association*

Specifically, the RTC's allegations in Bonner included charges that the attorney "knew or should have known" of the directors' breach of fiduciary duties in the sale of University Savings,[134] that the attorney aided and abetted Entex and University Savings's Boards of Directors by knowingly assisting and participating in the violation of banking regulations and by failing to disclose the imprudence of the sale to the FHLBB,[135] and that the $535 million in damages it suffered was proximately caused by the attorney's conduct.[136] Astonishingly, these allegations implicated a law firm hired to play only a minimal role in the sale of the S&L, an activity that was in no way illegal. In addition, the decision to sell the bank was a policy determination, made by the highest level of

130. *Id.* at 20, 26.

131. *Id.* at 22.

132. *Id.* at 4.

133. Plaintiff's Original Petition at 4–5, *Bonner*, No. H-92-3479 (Nov. 10, 1992).

134. Plaintiff's Original Petition for Money Damages at 104–05, RTC v. Bonner, No. H-92-3479 (S.D. Tex. Nov. 10, 1992) (on file with the *St. Mary's Law Journal*).

135. *Id.* at 99, 104–05.

136. *Id.* at 105.

authority within the organization.[137] However, Rule 1.13 *excludes* policy decisions from the lawyer's province when contemplating disclosure to the proper authorities in the organization.[138] Thus, the attorney in *Bonner* was under no duty to disclose anything to anyone because the transaction was within the ethical bounds of the law.

A decision to sell a bank or any financial entity is squarely within the realm of the business judgment of the institution's directors and, as such, is presumed to be in the best interests of the corporation.[139] The general duty of care that corporate directors owe to the corporation extends to the issues presented by *Bonner*, such as whether the sale price for the bank is the best under the circumstances and whether to sell now rather than later because of a good-faith belief that conditions will likely worsen.[140] In *Bonner*, the attorney merely made a cameo appearance in

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137. *See* Plaintiff's Original Petition at 21, *Bonner*, No. H-92-3479 (Nov. 10, 1992) (lacking viable alternative to salvage institution, directors devised plan "to divest itself of any future obligations to University Savings").

138. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 4 (1995).

139. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (citing to "business judgment rule," which presumes that directors of corporation made informed, good-faith decisions in sincere belief that action was in best interests of organization); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (stating that business judgment rule is recognition of "managerial prerogatives" of corporate directors under Delaware law); Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981) (asserting that purpose of business judgment rule is to grant managers wide deference in exercising their powers); Warshaw v. Calhoun, 221 A.2d 487, 492–93 (Del. 1966) (defining business judgment rule); Porges v. Vadsco Sales Corp., 32 A.2d 148, 151–52 (Del. Ch. 1943) (citing Cole v. National Cash Credit Ass'n, 156 A. 183, 187 (Del. Ch. 1931) to bolster presumption that judgment of directors is made in good faith and guided by genuine purpose); Robinson v. Pittsburgh Oil Refining Corp., 126 A. 46, 48 (Del. Ch. 1924) (citing business judgment rule in directors' decision to sell company assets).

140. *See* MODEL BUS. CORP. ACT § 8.30(a) (1984) (setting out general duty of care for directors). The definition of the duty of care commands a director to execute his duties: (1) in good faith; (2) with the care a reasonably prudent person in similar circumstances would exercise; and (3) in a manner the director reasonably believes to be in the corporation's best interests. *Id.*; *see also* Northwest Indus. v. B.F. Goodrich Co., 301 F. Supp 706, 711 (N.D. Ill. 1969) (defining honest business judgment in terms of Model Business Corporation Act); Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985) (asserting that overall duty of care obliges director to make informed business judgment and to avoid gross negligence in exercising sufficient caution); Cheff v. Mathes, 199 A.2d 548, 554 (Del. 1964) (noting board would not be liable for decision that in hindsight was not "wisest course," because directors were motivated by genuine belief in efficacy of transaction); Moran v. Household Int'l, 490 A.2d 1059, 1074 (Del. Ch. 1985) (noting that even though directors are considered fiduciaries, in absence of bad faith or outright fraud, directors will not be held liable for decisions made in corporation's best interests); Kaplan v. Goldsamt, 380 A.2d 556, 568 (Del. Ch. 1977) (stating that presumption in favor of directors' sound business judgment will be upheld if "any rational business purpose" can be read into their decision). Courts will generally defer to decisions that show an honest, informed business

the chain of events that led to the sale of University Savings.[141] The Board approved the sale after the bank's financial consultants strongly urged the directors to do so.[142] While the typical bank attorney may be called upon to evaluate the legal consequences of such a sale, the RTC's theory essentially imposes a duty on the attorney to guarantee the wisdom of a business transaction.[143] Under this theory, the attorney would be placed in a position analogous to ensuring the safety and financial viability of the institution, a role that should be filled instead by the bank's directors and the small army of government regulators.[144] Finally, the RTC's claim that the attorney's minuscule actions in assisting a perfectly legal policy decision proximately caused over a half-billion dollars in losses because the sale did not ultimately result in the bank being saved is simply unfair.[145]

V. The Case for Extending Aiding-and-Abetting Liability to Include Participation in a Bad Policy Decision: Strategic Considerations and Public Policy Concerns

There are, however, proponents of such an expansive interpretation of aiding-and-abetting liability. From the plaintiff's perspective, for example, there are generally many parties involved in complex financial trans-

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judgment, even though hindsight shows that the decision was not the best or most prudent. *See* Marcia L. Walter, Note, *Aiding and Abetting the Breach of Fiduciary Duty: Will the Greenmailer Be Held Liable?*, 39 Case W. Res. L. Rev. 1271, 1290 (1989) (describing scope of fiduciary duties as well as liabilities of corporate managers).

141. Interview with Vincent R. Johnson, Professor of Law at St. Mary's University School of Law in San Antonio, Texas (Oct. 13, 1995). Professor Johnson stated that based on the documents he reviewed, the attorney had a good-faith belief that the transaction was in the best interests of University Savings. *Id.* Additionally, the scope of the attorney's representation was confined to literally walking documents across the street to the Texas Saving and Loan Department, for which he was compensated approximately $500. *Id.*

142. Plaintiff's Original Petition at 19–20, *Bonner*, No. H-92-3479 (Nov. 10, 1992).

143. *See* Christopher G. Sablich, Note, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 Chi.-Kent L. Rev. 517, 529–30 (1992) (declaring that bank attorney's duties include advising board about flaws in their risk management systems, but that attorney is not responsible for ensuring safety and soundness of the bank).

144. *See* J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. Rev. 803, 836 (1994) (opining that failure of regulators in banking crisis may be motive behind shifting regulatory responsibilities to lawyers and others who represent savings institutions).

145. Plaintiff's Original Petition at 104–05, *Bonner*, No. H-92-3479 (Nov. 10, 1992).

actions, some of whom cannot be reached directly.[146] In these situations, aiding-and-abetting theories directed at those who assisted or facilitated the transaction may possibly force an early settlement, or even increase the chance that the plaintiff will prevail on at least some of the claims.[147]

Extending liability may also guarantee that these plaintiffs recover their losses. Deep-pocket defendants, including attorneys, may provide recovery through their insurance policies.[148] For example, if the plaintiff frames the action in terms of fraud, most attorney malpractice insurance policies would reject the claim, thereby depriving the plaintiff of potential recovery.[149] However, framing the action in terms of aiding and abetting

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146. *See* J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. REV. 803, 823 (1994) (quoting Linda Himelstein, *Malpractice Mayhem: RTC Officials Eye 140 Suits Against Lawyers*, LEGAL TIMES, Nov. 19, 1990, at 1) (highlighting remark of then assistant general counsel to FDIC that "in most cases, it's much easier for us to sue attorneys than directors and officers because they have insurance"); *Bulk of Recoveries Over? RTC PLS Lawsuit: $942 Million in the Till*, 21 BANKING ATT'Y, May 30, 1994, at 1 (claiming that RTC took aim at lawyers and accountants because directors and officers who committed fraud and other crimes were not covered under insurance policies); *Malpractice Suits: A Secondary RTC Strategy*, 45 BANKING ATT'Y, Nov. 28, 1994, at 4 (stating that federal agencies trained their attention on accountants and lawyers to recover taxpayer money spent on S&L bailout "only after finding that suits against officers and directors of these institutions was a dry hole").

147. *See* David F. Heroy & Lee C. Carter, *Alternative Liability Theories for Fraudulent Conveyances: Breach of Fiduciary Duty, Conspiracy, Aiding and Abetting, Negligence and Contribution Rights* (stating that plaintiff has great incentive to join as many defendants as possible to pressure other side to settle quickly and to increase probability of settlement), *in* FRAUDULENT CONVEYANCES, PREFERENCES AND VALUATION, at 275, 279 (1994) (PLI Corp. Law & Practice Handbook Series No. A-684).

148. *See* David J. Baum, *The Aftermath of Central Bank of Denver: Private Aiding and Abetting Liability Under Section 10(b) and Rule 10(b)-5*, 44 AM. U. L. REV. 1817, 1819 (1995) (remarking that professionals were targets of choice for plaintiffs seeking hefty settlements and that many times lawyers were only source of compensation because primary tortfeasor was broke); Harvey L. Pitt, *The Demise of Aiding and Abetting Liability*, 211 N.Y. L.J. 1, 1 (1994) (complaining that plaintiffs target "deep-pocketed securities professionals often sued not for what they did, but for what their clients did or the size of their insurance policies"); David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy*, In Pari Delicto, *Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 604 n.22 (1972) (speculating that "deep-pocket" doctrine originated from notion that those best able to bear loss should be held liable); *see also* Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 79 (1993) (noting that plaintiffs sue lawyers to get large monetary awards). *But see* Dennis J. Block & Jonathan M. Hoff, *Liability for Aiding, Abetting Securities Fraud*, 210 N.Y. L.J. 5, 5 (1993) (decrying use of aiding-and-abetting claims to "seek recovery from 'deep-pocket' defendants who have not committed any fraud").

149. *See* Bettina M. Lawton & Thomas W. MacIsaac, *Attorney and Accountant Liability to Financial Institutions*, C620 ALI-ABA 531, 540 (1991) (asserting that direct charge of

puts the claim squarely in the realm of negligence, and within reach of the insurance company's coffers.[150]

Additionally, some argue that the general principles underlying the decision to hold an attorney jointly and severally liable with the primary tortfeasor are obviously sound. Those injured should be compensated, according to this argument, and if the attorney assists in a clearly illegal act, then the attorney should be as morally responsible as the actor.[151] 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.

These arguments are easy to make in the context of the S&L debacle. Certainly, the government and the public have strong interests in maintaining the soundness and safety of our banking system.[152] Given the

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fraud on part of government regulators would preclude or diminish recovery under lawyers' malpractice insurance policies). Generally, malpractice policies do not cover fraudulent acts or omissions. *Id.*

150. *See* Federal Sav. & Loan Ins. Corp. v. McGinnis, Juban, Bevan, Mullins & Patterson, 808 F. Supp. 1263, 1268 (E.D. La. 1992) (stating that in order to recover for malpractice, plaintiffs must prove: (1) existence of duty owed to plaintiff, which generally arises out of attorney-client relationship; (2) that attorney was negligent in representing client; and (3) that this negligence proximately caused some injury or loss to plaintiff). The standard of care in measuring malpractice is "that degree of care, skill, and diligence which is exercised by prudent practicing attorneys in his locality." Ramp v. St. Paul Fire & Marine Ins. Co., 269 So. 2d 239, 244 (La. 1972). Lastly, mere proof of negligence is not sufficient; the plaintiff must prove that "but for" the attorney's negligence, the harm would not have occurred. *See, e.g.*, Meyers v. Imperial Cas. Indem. Co., 451 So. 2d 649, 654 (La. Ct. App. 1984) (setting out proximate causation element of malpractice claim); Ganey v. Beatty, 391 So. 2d 545, 547 (La. Ct. App. 1980) (articulating causal relation between actor's conduct and harm as "necessary antecedent" without which injury would not have occurred); State Farm Mut. Ins. Co. v. South Cent. Bell Tel. Co., 343 So. 2d 758, 759–60 (La. Ct. App. 1977) (explaining concept of "cause-in-fact").

151. *See* RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979) (explaining that liability should be imposed when advising or encouraging tortfeasor to act equates to moral support of wrongful conduct); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 7 (1994) (stating that compensation of accident victims is one of several basic public policy goals advanced by tort law). Additional important public policy reasons for holding an aider and abettor liable may well include the principles that liability should be premised on fault, liability should be assessed in proportion to fault, and that liability should be used to deter persons from aiding and abetting tortious conduct. *Id.* at 4–5; *see also* 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 12.1, at 106 (2d ed. 1986) (remarking that fault principle does not generally seek to punish tortfeasors, but to compensate victims).

152. *See* JONATHAN R. MACEY & GEOFFREY P. MILLER, BANKING LAW AND REGULATION 67 (1992) (asserting that rationale of banking regulations was to ensure banks fulfilled crucial function of providing stable money supply); Eugene M. Katz, *A Summary of Issues Concerning the Liability of Attorneys Representing Financial Institutions* (noting that OTS theory of fiduciary responsibility is grounded in protecting both broad public interest

grave consequences of massive bank failures and the sheer magnitude of the cost to taxpayers,[153] some argue that it makes sense to charge all parties responsible, regardless of the size of their role.

Similarly, aiding-and-abetting claims have long been major weapons in the government's fight against securities fraud.[154] The primary purpose of the Securities and Exchange Act, which is the protection of investors and depositors,[155] also makes sense in the context of the S&L failures. Thus, it is not surprising that the government sought to litigate a previously successful cause of action under a new banner.

Finally, some would argue that attorneys should be held accountable for their actions, particularly in failing to stop the looting of the S&Ls.[156]

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in preventing bank failures and interest of federal government in limiting insurance risk), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 591, 597 (1992) (PLI Corp. Law & Practice Handbook Series No. 625); Christopher G. Sablich, Note, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 CHI.-KENT L. REV. 517, 521 (1992) (stating that banking system serves numerous essential functions in national economy, including monitoring flow of money and credit worldwide).

153. *See* Christopher G. Sablich, Note, *Duties of Attorneys Advising Financial Institutions in the Wake of the S&L Crisis*, 68 CHI.-KENT L. REV. 517, 521 n.22 (1992) (estimating that cost of savings-and-loan crisis could reach $500 billion); Bill Atkinson, *Senate Banking Panel Backs $25 Billion in RTC Funding; Committee Rejects New-Powers Amendments*, AM. BANKER, Mar. 25, 1992, at 2 (reporting that Senate Banking Committee voted to pump additional $1.85 billion into troubled saving and loans as crisis deepens); Murray Cohen, *S&L Debacle Doesn't Justify Making a Mess of the Cleanup*, AM. BANKER, Jan. 29, 1992, at 4 (citing General Accounting Office's range of price tag for clean up at $70 billion to $500 billion); Barbara A. Rehm, *RTC Downsizes Bailout Estimate Price Tag of $130 Billion Foreseen for S&L Debacle*, AM. BANKER, May 19, 1992, at 13 (estimating final cost of nation's worst financial mess to be $130 billion).

154. *See* David J. Baum, *The Aftermath of Central Bank of Denver: Private Aiding and Abetting Liability Under Section 10(b) and Rule 10b-5*, 44 AM. U.L. REV. 1817, 1819 (1995) (stating that aiding and abetting was formidable weapon in combating securities fraud from 1968 until recent United States Supreme Court decision eliminated aiding and abetting as private cause of action).

155. *See* James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30 (1959) (citing one reason for Securities Act as restoring public faith in integrity of financial institutions and securities professionals); Ginger E. Margolin, Case Note, 26 ST. MARY'S L.J. 601, 609–11 (1995) (stating that aiding-and-abetting liability could be seen as means of fulfilling goals of 1934 Securities Act).

156. *See* Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990) (implying that lawyers and other professionals should have known better than to have gone along with overreaching that took place in savings and loan crisis); *cf.* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.81, at 746 (1986) (noting that lawyers have been labeled as "high priests of politics" because of noteworthy contributions in shaping legislation and public policy over last 200 years of American history); Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics*, 76 MICH. L. REV. 423, 429 (1978) (defending historical role of corporate lawyer as beneficial, because lawyers work to persuade clients to behave according to socially approved standards). Unfortunately, the benefits of ethical representation are rarely acknowledged, while failures

Lawyers have fiduciary relationships with their clients, relationships that impose the highest duties of good faith and fair dealing.[157] The trust that flows from that relationship affects the profession's public reputation. Moreover, ethical rules exalt the profession as a self-regulating body of men and women who are held to a high standard of moral character and who are dedicated to unswerving loyalty and honesty in the service of their clients and the law.[158] Thus, to allow the lawyer to hide behind the tradition-encrusted duty of keeping client confidences from any and all outsiders, even when the client is engaged in the most outrageous behavior, can seem illogical and unjust.[159] The enormous sums recovered by the RTC's aiding-and-abetting actions to date could arguably serve as a

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are trumpeted widely. Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics*, 76 MICH. L. REV. 423, 429 (1978).

157. *See* Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics*, 76 MICH. L. REV. 423, 428 (1978) (arguing that there will always be pressure for lawyer to breach duty of confidentiality to prevent monetary losses or other social harm, and that these should be considered "inherent cost of confidentiality").

158. *See, e.g., The Texas Lawyers Creed—A Mandate for Professionalism* (citing aspirational goals of maintaining public confidence in profession by demonstrating "highest degree" of ethical and professional behavior), *reprinted in* TEXAS RULES OF COURT at 501 (West 1995); Rules Governing Admission to the Bar, Rule IV (amended Feb. 15, 1995) (requiring that all candidates for Texas Bar possess good moral character and fitness), *reprinted in* TEXAS RULES OF COURT at 499 (West 1995); MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1995) (spelling out professional duties of lawyer to include competence, zealous advocacy, and service to persons who cannot afford legal assistance). The Preamble also notes that the professional is "largely self-governing" and that special ethical responsibilities come with such autonomy so that lawyers can fulfill their "vital role in the preservation of society." *Id.* at 6.

159. *Cf.* People v. Belge, 376 N.Y.S.2d. 771, 771–72 (N.Y. App. Div. 1975) (dismissing complaint against attorneys who refused to divulge to police location of bodies of two young women whom client had murdered), *aff'd*, 359 N.E.2d 377 (1967). The lawyers, following the directions provided by the client, photographed the bodies in place, and told no one of their discovery, including the frantic parents of the victims. *See* GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING 53–54 (2d ed. 1994) (detailing gruesome crimes client committed and noting community outrage over lawyers' silence). While the appellate court admitted that the attorney-client privilege "shielded" the attorneys from actions that would otherwise have been violations of public health laws, the court commented that ethical rules mandating silence should yield to other "basic standards of human decency." *See Belge*, 376 N.Y.S.2d at 771–72 (noting serious concern over claim that attorney-client privilege is absolute). Similarly, Judge Sporkin's scalding indictment of the legal profession in *Lincoln Savings* made the case for disclosing client information to prevent greater harm to the American public from the S&L debacle. *See* Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990) (querying why no lawyers blew whistle on overreaching in thrift industry which resulted in savings and loan crisis).

substantial deterrent to any lawyer who contemplates potential acts of wrongdoing.[160]

VI. The Case for Limiting Aiding-and-Abetting Liability: The Impact on the Nature of Corporate Representation

In spite of the strength of these arguments, however, 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. Under the expanded theory, the attorney's long-established role as advisor would effectively be transformed into that of full-time investigator.[161] The attorney would have no choice but to second-guess policy decisions of management, which would invariably cause con-

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160. *See* David J. Baum, Comment, *The Aftermath of Central Bank of Denver: Private Aiding and Abetting Liability Under Section 10(b) and Rule 10b-5*, 44 Am. U. L. Rev. 1817, 1843 (1995) (stating that private aiding-and-abetting actions played "substantial role" in deterring would-be violators of securities laws). In one notorious case of government action against a law firm, the OTS filed a $275-million suit and subsequently froze the assets of Kaye, Scholer, Fierman, Hays and Handler. *See* Edward A. Adams, *Negative Fallout Seen Hurting Kaye, Scholer*, N.Y. L.J., Mar. 10, 1992 (noting that aggressive OTS action triggered partner unrest and insurance problems in aftermath of bank's refusal to allow firm to use lines of credit), *reprinted in* The Attorney-Client Relationship After Kaye, Scholer, at 517, 517–18 (1992) (PLI Corp. Law & Practice Handbook Series No. 779). The freeze and magnitude of the penalty prompted the law firm's banks to shut off credit to the firm unless they settled with OTS. *Id.* The banks' actions in turn forced the partners into frantic negotiations for a fast $41-million settlement to avoid defaulting on bills and payrolls due the following week. *Id.* Such strong-arm tactics sent shock waves through the legal profession. *See* Edward Brodsky, *The 'Kaye Scholer' Case*, N.Y. L.J., May 22, 1992 (stating that freeze order posed danger to firm's ability to survive, and would chill attorney-client relations), *reprinted in* The Attorney-Client Relationship After Kaye, Scholer, at 523, 525 (1992) (PLI Corp. Law & Practice Handbook Series No. 779); Daniel Wise, *OTS's "Hardball Tactic" Decried by Bar*, N.Y. L.J., Mar. 10, 1992 (quoting past president as stating that if OTS can "hammer" powerhouse firm like Kaye, Scholer into submission, no firm is safe), *reprinted in* The Attorney-Client Relationship After Kaye, Scholer, at 521, 521 (1992) (PLI Corp. Law & Practice Handbook Series No. 779).

161. *See* J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. Rev. 803, 827 (1994) (noting government position that attorneys have duty to investigate, or perhaps even regulate, activities and decisions of client is definite departure from traditional scope of liability); David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy*, In Pari Delicto, *Indemnification, and Contribution*, 120 U. Pa. L. Rev. 597, 632–33 (1972) (warning that great burden would be imposed upon day-to-day business activities if attorneys were required to investigate activities and decisions of clients); John K. Villa, *Emerging Theories of Liability for Lending Counsel* (arguing that as policy consideration, general rule has been that attorney should not be expected or required to investigate business activity of client), *in* The Attorney-Client Relationship

siderable strain in the working relationship.[162] Additionally, the attorney would have less incentive to explore options with management and instead may attempt to restrict exposure by offering narrow, technical opinions that are less useful to management in evaluating a course of action. Such a diminution of the advisor role and the resulting chilling effect on the free flow of information could conceivably lead to more illegal activity because management would have little incentive to share information with its new corporate sleuth.[163]

AFTER KAYE, SCHOLER, at 93, 130 (1992) (PLI Corp. Law & Practice Handbook Series No. 779).

162. *See* ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT §§ 91:2401 (1991) (reminding lawyers that Rule 1.13 stands for proposition that lawyers are not paid to second-guess policy decisions of management); John K. Villa, *Emerging Theories of Liability for Lending Counsel* (asserting that one result of expanded liability under RTC theories is that lawyers will second-guess business judgments of directors and officers in effort to protect themselves against attacks from government regulators), *in* THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER, at 93, 153 (1992) (PLI Corp. Law & Practice Handbook Series No. 779); John K. Villa, *Liabilities of Bank and Thrift Counsel* (warning that counsel would be forced to figure out whether each management action represented breach of duty if aiding-and-abetting theories were recognized), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 504–05 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666). Additionally, friction would inevitably arise between the managers and attorneys, because management generally has "little tolerance for lawyers who attempt to second-guess their business decisions." John K. Villa, *Liabilities of Bank and Thrift Counsel*, *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 504–05 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666). Last, by putting forth the aiding-and-abetting theory, the RTC may force lawyers into evaluating financial and business aspects of activity for which they are not adequately trained, further straining management's good will. *Id.* Directors of thrift institutions would be justifiably irked at having to pay for essentially self-protective business judgments on the part of lawyers, in addition to high-priced legal advice. *Id.*

163. *See* State v. Zwillman, 270 A.2d 284, 289 (N.J. App. Div. 1970) (stating that lawyer is not entitled to act as judge and jury when weighing truth of client's statements, unless lawyer has actual knowledge or reasonable grounds for suspecting that client's statements are false); J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. REV. 803, 835 (1994) (noting lawyer's alleged duty to investigate and disclose client wrongdoing to government regulators would chill attorney-client communications). Reticence on the part of bank directors to inform their attorneys of all relevant information regarding the legality of financial transactions may well result in more regulatory violations. *Id.*; *see also* John K. Villa, *Emerging Theories of Liability for Lending Counsel* (asserting that even when express duty to investigate exists, doubting or questioning client statements would undermine ability of both parties to trust one another), *in* THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER, at 93, 137–38 (1992) (PLI Corp. Law & Practice Handbook Series No. 779).

Further, the theory would effectively override the traditional deference that the lawyer grants to client decisions.[164] While 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.[165] In short, as an advocate, the lawyer is hired to zealously execute the client's directives, not to second-guess them.

Rule 1.13 acknowledges the necessity of this role by clearly limiting the scope of the lawyer's duty to disclose imminent or actual wrongdoing for violations of law which could be imputed to the organization.[166] Under

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164. *See* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 commentary at 217 (1992) (asserting that lawyer must generally defer to policy and operational judgment of management and that lawyer has no duty to evaluate purely business matters); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1995) (mandating that lawyer shall abide by client decisions in determining overall goals of representation); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.7.5, at 742 (1986) (asserting that manager's duty is to maximize profit for corporation and that lawyer's advice on non-legal matters would normally not be welcome unless relevant to other useful legal issues).

165. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) cmt. 1 (1995) (explaining that clause (a) of Model Rule 1.2 was meant to vest ultimate authority of determining purposes of legal representation in client); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7–8 (1983) (reminding lawyer that client has ultimate say in goals of representation). Indeed, two major sources of the S&L crisis were arguably a combination of sharply changing economic conditions and ill-conceived business decisions on the part of bank management, and not garden-variety legal malpractice actions on the part of lawyers, such as giving bad legal advice. *See* John K. Villa, *Liabilities of Bank and Thrift Counsel* (stating that lawyers for most part faithfully executed decisions of bank managers, and were not subject to malpractice liability), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 489 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666). Therefore, any malpractice charge by the RTC would fail in the face of the defense that the lawyer did precisely what the client had directed, sanctioned, or confirmed. *Id.* at 503. The entire effort on the part of the RTC to haul lawyers in the net of aiding-and-abetting liability, then, can be seen as an attempt to short circuit this strong defense by holding the lawyer accountable for assisting in the lousy decisions made by management, rather than by any substandard legal performance on the part of the lawyer. *Id.* at 489, 503.

166. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) & (c) (1995) (making clear that lawyer has two choices when faced with clearly illegal conduct of constituent—disclose to higher authorities within organization, or withdraw). The Rule sets out several limiting criteria that must be met before the lawyer takes remedial action: the violation must be serious, must be likely to result in "substantial injury" to the corporation, and must be within the scope of the lawyer's representation. *Id.* Finally, the lawyer must take measures designed to "minimize the disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization." *Id.*; *see also* ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 90–91 (1987) (describing amendment to Rule 1.13 that would have allowed lawyer to take additional remedial action should highest authority balk at preventing illegal conduct); Steve France, Commentary, *Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability*, 7 GEO. J. LEGAL ETHICS 725, 732–33 (1994) (asserting that Rule 1.13

the rule, a lawyer has no duty to ascend the chain of command when faced with a policy decision the lawyer considers unwise or imprudent.[167] Thus, holding an attorney liable for aiding and abetting a breach of fiduciary duty on behalf of the directors because of their ill-advised policy decision would effectively undermine the rule. Furthermore, the careful qualifying language signaling the rulemakers' clear intent to restrict those instances in which an attorney goes beyond his or her immediate superiors in order to minimize any internal disruption would be negated.[168] Instead, the net result would likely be intra-organization disruption and understandable resentment on the part of management.

Another result of this new theory will be the extension of potentially unlimited liability. Because it is often difficult or impossible to determine whether a policy decision is going to be in the best interest of the organization at the time the decision is made, *any* policy decision that, in hindsight, appears to be harmful to the organization would presumably be grounds for an aiding-and-abetting claim. Additionally, given the elusive nature of the elements of this cause of action, the pressure on courts to

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assumes that corporate attorneys should accept management's view of what corporation's interests and wishes are unless action is considered violation of law that can be laid at corporation's door and cause substantial harm). The amendment was vigorously denounced and ultimately rejected by the ABA delegates. ABA, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT 90–91 (1987). The delegates feared that the lawyer would in effect become a whistle blower rather than a trusted counselor and that communications between the lawyer and corporate client would be chilled as result of potential for outside disclosure. *Id.*

167. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 3 (1995) (emphasizing that lawyer must abide by corporate client's decision, regardless of utility, or prudence, or degree of risk). The comment stresses that, ordinarily, decisions concerning policy and operations that might even pose substantial risk to the corporation are not the lawyer's concern. *Id.*; *see also* 1 GEOFFREY C. HAZARD, JR., & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.13:111, at 403 (2d ed. Supp. 1996) (emphasizing that Rule 1.13 imposes obligation on lawyer to go up chain of command only when lawyer knows of *illegal* conduct that may cause serious harm to organization); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.7, at 744 (1986) (observing that Rule 1.13 is road map to guide lawyer's quest for constituent *within* organization who is willing to stop subordinate's clearly *illegal* conduct).

168. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 3 (1995) (emphasizing that "clear justification" must exist to warrant lawyer seeking review of constituent's actions); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.7, at 744 (1986) (calling attention to language in rule that specifically limits scope of lawyer's duty to proceed up chain of command to instances of illegality related to lawyer's representation). Wolfram explains that the conditions in the rule further the goal of discouraging lawyers from disrupting the normal flow of daily corporate work by responding to insubstantial violations of law. *Id.*; *see also* John K. Villa, *Liabilities of Bank and Thrift Counsel* (listing qualifying language in Rule 1.13 that restrains lawyer from climbing chain of command except in certain narrow circumstances), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 545–46 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666).

hold lawyers accountable may result in a very low threshold for the requisite knowledge and substantial assistance. The government's claims against attorneys arising from the S&L crisis demonstrate just how low that threshold can be. For example, the facts in *Bonner* suggest that a lawyer need only do a little to be considered a legitimate target.[169] Given the continuing climate of hostility surrounding the S&L debacle and the incentive for the federal government to recover billions in lost assets, it is probable that the pressure to cast the lawyer as a scapegoat will not abate any time soon.[170]

It is reasonable to assume that these pressures will give rise to similar arguments in other areas of law, such as environmental law or products liability litigation.[171] Such success may lead to suits launched by shareholders and other interested third parties, thus further expanding the scope of attorney liability for policy decisions.[172]

The consequences of this expansion of liability will not escape the political arena. The government's current investigation into the failed S&L in the notorious Whitewater land deal could signal another milestone along

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169. *See supra* note 118.

170. *See* Lincoln Sav. & Loan Ass'n v. Wall, 743 F. Supp. 901, 920–21 (D.D.C. 1990) (articulating position that blame for banking crisis should be placed on professionals who did not blow whistle to stop pillaging and overreaching during S&L crisis); J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. REV. 803, 836 (1994) (speculating that many may feel that expanding grounds for attorney liability is positive step in light of their perception that S&L crisis was result of "failure of professionals to police their own ethical conduct"); John K. Villa, *Emerging Theories of Liability for Lending Counsel*, *in* THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER, at 93, 97–98 (1992) (PLI Corp. Law & Practice Handbook Series No. 779). The political pressures exerted on courts to find the thieves may well result in courts giving their blessing to novel RTC theories. John K. Villa, *Emerging Theories of Liability for Lending Counsel*, *in* THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER, at 98 (1992) (PLI Corp. Law & Practice Handbook Series No. 779). Once the theories are accepted, application to a broad spectrum of cases will probably not be far behind. *Id.*

171. *See* Steve France, Commentary, *Unhappy Pioneers: S&L Lawyers Discover a "New World" of Liability*, 7 GEO. J. LEGAL ETHICS 725, 734 (1994) (warning that other highly regulated practice areas, such as food and drug regulation, may likely follow lead of banking regulators in launching aiding-and-abetting actions).

172. *See* Eugene M. Katz, *A Summary of Issues Concerning the Liability of Attorneys Representing Financial Institutions* (noting that success of RTC claims would likely encourage similar claims by parties such as shareholders and insiders), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 591, 606 (1992) (PLI Corp. Law & Practice Handbook Series No. 625); John K. Villa, *Liabilities of Bank and Thrift Counsel* (asserting that possible consequence of RTC litigation may be that shareholders will use aiding and abetting as cause of action in derivative suits), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 505 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666).

the road of launching politically expedient actions against attorneys under the guise of accountability.[173] In this volatile election year, as Republican officials continue their investigation on the evening news and in public hearings and hint of the President's and Hillary Clinton's involvement in the scandal, they will surely exaggerate Mrs. Clinton's arguably minimal role as an attorney in the affair.[174] Furthermore, as long as intense public hostility toward attorneys exists, the short-term pressure on the government to recover against attorneys will probably garner public approval, despite the significant long-term damage to the legal profession and to the legal system itself.

Finally, the pressure to disclose imminent or actual wrongdoing to government regulators transforms the corporate lawyer into a watchdog with great incentive to disclose out of sheer self-defense.[175] Given the govern-

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173. Richard Keil, *Whitewater No-Win for S&L Lawsuit: RTC Advised to Spare the Clintons, Others*, SAN DIEGO UNION-TRIB., Dec. 19, 1995, at A13 (reporting that RTC was advised to spare Clintons over Whitewater charges, but may go after other entities, such as Hillary Clinton's law firm); *Mrs. Clinton to Answer RTC Query on Land Deal*, NEW ORLEANS TIMES-PICAYUNE, Jan. 4, 1996, at A10 (detailing RTC's action against First Lady after discovery that she allegedly worked on land transaction documents that ultimately cost S&L $3.8 million); *RTC Again Questions Mrs. Clinton: New Inquiry Stems from Rose Law Firm*, ST. LOUIS POST-DISPATCH, Jan. 4, 1996, at 5A (reporting that RTC sent new series of interrogatories to Mrs. Clinton concerning alleged sham loan transaction).

174. *See* Angie Cannon, *The Never-Ending Saga of Whitewater: Credibility a Continuing Concern for Clintons*, SACRAMENTO BEE, Jan. 14, 1996, at A3 (noting that as 1996 presidential campaign gets under way, Whitewater has caused embarrassment at White House, much as it did during 1992 campaign); Thomas Oliphant, *D'Amato Isn't Interested in Hillary Clinton's Testimony*, SACRAMENTO BEE, Jan. 11, 1996, at B7 (asserting evidence of Mrs. Clinton's minimal role that included 68 phone calls, drafts of legal opinions that were apparently never acted upon, and no proof at all that she served as S&L's attorney in any capacity); William Scally, *Ex-Colleague Backs Some Whitewater Points About Mrs. Clinton's Law Work Role*, PITT. POST-GAZETTE, Jan. 12, 1996, at A8 (quoting Senator Christopher Dodd, panel member on Whitewater committee, as saying "We have become players in the opening act of the 1996 political campaign."); Pete Yost, *Investigations Will Dog Clintons in Election Year: Documents Surface at Crucial Time*, NEW ORLEANS TIMES-PICAYUNE, Jan. 7, 1996, at A13 (observing that Clinton administration faces "grim prospect" of Senate and House investigations throughout key election year).

175. *See* Schatz v. Rosenberg, 943 F.2d 485, 493 (4th Cir. 1991) (declaring that "better rule—that attorneys have no duty to 'blow the whistle' on their clients—allows clients to repose complete trust in their lawyers"). The court also points out that if clients could confide in their attorneys, secure in the knowledge that the lawyer is duty-bound not to repeat their secrets, the lawyer would be in a good position to prevent any questionable conduct. *Id.*; *see also* Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986) (remarking caustically that lawyers "are not required to tattle on their clients in the absence of some duty to disclose"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995) (establishing strict mandate that lawyer *shall not* reveal client confidences short of preventing "imminent death or substantial bodily harm"); J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established*

ment's expansive reading of proximate cause, which results in attorney liability for all harm flowing from the alleged breach of fiduciary duties, the lawyer is forced to choose between two options. First, the attorney can breach the traditional duties of confidentiality owed to the corporate client, and disclose information to regulatory authorities. This reduces the law firm's risk of potential bankruptcy and avoids the problems of internal turmoil, negative publicity, clients alienated by the prospect of their attorney facing criminal charges, and lost profits that accompany a government action. This option, however, carries risks. The bond of trust and confidentiality between a corporate attorney and the corporation's officers and directors would be replaced with a working atmosphere permeated with mutual suspicion, secrecy, and hostility.[176] Second, the at-

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and Emerging Bases of Liability, 45 S.C. L. REV. 803, 835 (1994) (remarking that if attorneys are forced to disclose suspected improprieties to regulators, lawyers would be confronted with Hobson's choice—breach lawyer's duty of confidentiality to client and disclose violations, or pay regulators for any and all losses government may incur as result of client's conduct); Steve France, Commentary, *Unhappy Pioneers: For S&L Lawyers Liability Has Displaced Ethics*, L534 ALI-ABA 517, 523 (1993) (warning that damaging publicity following massive RTC settlements could wreck reputation of law firms and result in sizable lost profits). France also mentions that the real problem in the RTC's theory that lawyers owe a fiduciary duty to the RTC is that lawyers are essentially being forced to "police their clients" and serve "two masters: the client and the regulator." Steve France, Commentary, *Unhappy Pioneers: For S&L Lawyers Liability Has Displaced Ethics*, L534 ALI-ABA 517, 523 (1993). Lawyers basically assumed that they were immune from government lawsuits, because they were not in privity with the agencies—in short, the government was not their client. *Id.* Banking attorneys, however, failed to take into account the government's enormous stake in the health and safety of the banking industry, and, in particular, "the Government's right to recover damages after taking over an insolvent client." *Id.*; *see also* John K. Villa, *Liabilities of Bank and Thrift Counsel* (stating general rule that absent duty to disclose, attorney must keep client information absolutely confidential), *in* LITIGATING FOR AND AGAINST THE FDIC AND THE RTC, at 483, 524–25 (1993) (PLI Corp. Law & Practice Handbook Series No. A-666).

176. *See* Joseph C. Daley & Roberta S. Karmel, *Attorneys' Responsibilities: Adversaries at the Bar of the SEC*, 24 EMORY L.J. 747, 757 (1975) (quoting Statement of Policy on Lawyers' Responsibilities and Liabilities when Advising with Respect to Law Administered by the SEC, adopted by ABA Aug. 12, 1975, which asserts that forced disclosure to SEC "would seriously and adversely affect the lawyers' function as counselor and may seriously affect the ability of lawyers as advocates to represent and defend their clients' interests"); J. Randolph Evans & Ida P. Dorvee, *Attorney Liability for Assisting Clients with Wrongful Conduct: Established and Emerging Bases of Liability*, 45 S.C. L. REV. 803, 835 (1994) (warning that exposing lawyers to greater liability would chill attorney-client relationship and crimp attorney's ability to represent and advise clients effectively); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 80 (1993) (noting that Model Rules envision "gatekeeper" as opposed to "whistle blower" role in commanding lawyer to withdraw instead of disclosing fraud to probable victims); Frederick D. Lipman, *The SEC's Reluctant Police Force: A New Role for Lawyers*, 49 N.Y.U. L. REV. 437, 448 (1974) (holding that disclosure to regulatory authorities would chill attorney-client relationship and

torney can remain silent and risk a lawsuit by the government, as well as the possibility of having to pay out a potentially huge settlement that may be only partially covered by malpractice insurance.[177]

VII. CONCLUSION

The evolution of corporate representation of modern organizational entities has added a new dimension to traditional concepts of lawyering. While the general practitioner, who meets face-to-face with real-life clients, still exists, he or she is now joined by the corporate attorney. A corporate attorney's duties of loyalty and confidentiality flow not to a single, familiar client, but to a business and its many representatives, who also owe a duty to the corporation. The new aiding-and-abetting-a-breach-of-fiduciary-duty claim attempts to define and place ethical restraints on these complicated relationships.

It can be argued that such restraints are necessary to curb the ethical temptations faced by corporate attorneys. However, the new claim, some contend, fairly holds attorneys responsible for advice that can result in their clients' unwise policy decisions. In the wake of the S&L fiasco, it is understandable that society would desire such accountability, if only to prevent similar fiascos in the future.

Although these arguments for extending aiding-and-abetting liability to include an attorney's participation in a legal, yet harmful policy decision are significant, the potential damage to attorney-client relations exceeds any benefits that may flow from extending the contours of this cause of action. The cause of action should be limited to attorneys who knowingly and substantially assist their clients' clear violations of positive law. This

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that conflict between duty to zealously represent client and obligation to government agency would seriously undermine relationship); Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics*, 76 MICH. L. REV. 425, 495 (1978) (warning that recent developments that signal a change in role for corporate legal advisor portend disaster).

177. *See* Central Bank v. First Interstate Bank, 114 S. Ct. 1439, 1454 (1994) (stating reasons for eliminating aiding and abetting under § 10b–5 of 1934 Securities Exchange Act included "uncertainty of governing rules," forcing those held secondarily liable to pay settlements rather than litigate). The Court also pointed out that the "ripple effects" of uncertainty, as well as excessive settlements, could lead to the increased costs of defense being passed on to clients and that new, small businesses may find it tough to get advice from professionals. *Id.* at 1454; *see also* David S. Margolick, *Lawyers Under Fire*, N.Y. TIMES, Mar. 10, 1992, at A1 (asserting that with aggressive government campaign against law firms, more whistle blowing is probable). Margolick quotes a noted legal ethics expert, Steven Gillers, as stating that law firms may ditch their clients in a defensive measure instead of blowing the whistle after pressuring the client to go to the regulators first. David S. Margolick, *Lawyers Under Fire*, N.Y. TIMES, Mar. 10, 1992, at A1.

limitation would prevent changing the role of the corporate attorney from that of a useful legal counsel to that of detrimental whistle-blower.