SEE NO FIDUCIARY, HEAR NO FIDUCIARY: A LAWYER'S KNOWLEDGE WITHIN AIDING AND ABETTING FIDUCIARY BREACH CLAIMS

*Brinkley Rowe**

> To me, a lawyer is basically the person that knows the rules of the country. We're all throwing the dice, playing the game, moving our pieces around the board, but if there's a problem, the lawyer is the only person that has read the inside of the top of the box.
>
> –Jerry Seinfeld[1]

Fiduciary liability for attorney conduct generally extends only to direct clients of legal services. Over the last few decades, however, the lawyer's role has expanded. Following this trend, fiduciary liability also has expanded to allow third-party claims in certain limited circumstances. One example is the attorney aiding and abetting a client's fiduciary breach claim.

One of the key requirements for liability under this claim is the attorney's knowledge of his client's fiduciary relationship with the third party alleging the breach. Within those jurisdictions that have accepted the claim, there are two approaches to the knowledge element. The first is the constructive knowledge standard that permits liability if the attorney knew or reasonably should have known of the fiduciary relationship. The second approach is the actual knowledge standard that requires overt and obvious evidence of fiduciary knowledge. In addition to these standards, a third approach ignores the knowledge element entirely: the qualified immunity standard that protects attorneys against third-party liability as long as the conduct falls within an attorney-client relationship. This Note argues for the rejection of constructive knowledge and adoption of either the qualified immunity or actual knowledge standard for numerous doctrinal and policy reasons while maintaining the claim's original policy goals.

* J.D. Candidate, 2017, Fordham University School of Law; B.A., 2011, Tufts University. Thank you to Professor Martin Gelter for his advice and expertise throughout this process. I also want to thank my wife Anna and my family for their unwavering support through this process. In loving memory of my grandfather and namesake, Brinkley Snowden Rowe (1928–2015), who passed away as this work was taking shape.

1. *The Visa*, SEINFELD SCRIPTS, https://www.seinfeldscripts.com/TheVisa.html (last visited Nov. 19, 2016) [https://perma.cc/BNJ4-3M3K].

INTRODUCTION 1391
I. A BRIEF HISTORY OF GENERAL CIVIL LIABILITY 1394
A. *The Origins of Civil Liability* 1394
B. *The Rise of Fiduciary Liability* 1396
C. *The Claim of a Lawyer's Aiding and Abetting a Client's Fiduciary Breach* 1396
II. THE THIRD ELEMENT: LAWYERS' FIDUCIARY KNOWLEDGE IN CIVIL AIDING AND ABETTING CLAIMS 1397
A. *The Constructive Knowledge Standard* 1398
1. Commentary Surrounding the Constructive Knowledge Standard 1398
2. South Dakota's Constructive Knowledge Standard: *Chem-Age Industries, Inc. v. Glover* 1399
3. Minnesota's Constructive Knowledge Standard: *Witzman v. Lehrman, Lehrman & Flom* 1401
B. *Doctrinal Alternatives: The Actual Knowledge and Qualified Immunity Standards* 1403
1. Commentary Surrounding the Actual Knowledge and Qualified Immunity Standards 1404
a. *Judicial Resource Concerns* 1404
b. *Professional Responsibility and Counsel Availability Concerns* 1404
c. *Disruption of Existing Professional and Economic Frameworks* 1405
2. Illinois's Actual Knowledge Standard: *Hefferman v. Bass* 1406
3. Delaware Law's Actual Knowledge Standard in New York Bankruptcy Court: *In re Ticketplanet.com* 1407
4. The Texas Qualified Immunity Standard: *Alpert v. Crain, Caton & James, P.C.* and *Cantey Hanger, LLP v. Byrd* 1408
III. RESOLVING THE DISPUTE: THE REJECTION OF CONSTRUCTIVE KNOWLEDGE FRAMEWORKS AND GUIDELINES FOR THE FUTURE 1412
A. *The Constructive Knowledge Standard Is Incomplete* 1412
B. *Existing Pleading Standards as Instructive Evidentiary Guidelines* 1413
C. *Professional Responsibility Concerns* 1414
1. The Zealous Advocacy Doctrine and the Need for a Conflict-Warning System 1414
2. Availability of Counsel Concerns: Ensuring Accurate Information Within the Legal Marketplace 1415
3. Undermining Attorney-Client Confidentiality 1416
D. *Economic Efficiency Concerns* 1417

1. Lawyers Are Not the Cheapest Cost Avoiders 1417
2. Economic Burdens of Constructive Knowledge Liability 1419
a. Direct Economic Costs 1419
b. Indirect Costs: Erosion of Existing Economic Structures 1420
E. Doctrinal Consistency Concerns 1420
1. Adequate Existing Liability 1421
2. Hydraulic Balancing and the Nexus of Proportionality ... 1421
a. From Macpherson *to* Meinhard 1421
b. From Direct Negligence Liability to Vicarious Negligence Liability 1422
F. Future Guidelines: When to Apply Actual Knowledge Versus Qualified Immunity Standards 1423
1. Evidentiary Knowledge Versus Relationships as a Basis of a Claim 1423
2. Clarity of Law Versus Meritorious Conduct Inquiry 1423
3. Within Qualified Immunity: Broad Versus Narrow Application 1424
CONCLUSION 1424

INTRODUCTION

In 1992, a venture capital firm called Founders Funding Group, Inc. (FFG) was incorporated in the State of Oregon.[2] By early 1993, William Granewich II, Ben Harding, and Jeannie Alexander-Hergert each owned one-third of the voting shares of FFG.[3] On May 5, 1993, Harding and Alexander-Hergert informed Granewich that he was "relieved . . . of his executive position, and terminated him as an employee, all effective immediately."[4] To give effect to this action, Harding and Alexander-Hergert hired the law firm of Martin, Bischoff, Templeton, Langslet & Hoffman ("the Lawyers") for the purpose of "drafting and sending two letters to [Granewich] . . . containing statements that the lawyers knew to be false concerning the effectiveness of Harding's and Alexander-Hergert's previous efforts to remove [Granewich] from [FFG]."[5] Going forward, the Lawyers then "assisted Harding and Alexander-Hergert in exercising actual control of the management and policies of FFG . . . by calling special meetings, amending corporate by-laws, removing [Granewich] as a director, and taking other actions to dilute the value of [Granewich's] FFG stock."[6] Accordingly, Granewich sued his former partners for breach of fiduciary duty,[7] including a claim against the Lawyers

2. *See* Granewich v. Harding, 985 P.2d 788, 791 (Or. 1999).
3. *See id.*
4. *Id.*
5. *Id.*
6. *Id.* at 791–92.
7. *See id.*

alleging that they aided and abetted the breach of Harding's and Alexander-Hergert's fiduciary duty owed to Granewich as a business partner.[8]

The Oregon Supreme Court ruled that Granewich had adequately alleged a valid cause of action against the Lawyers under Oregon law.[9] In doing so, this decision echoed a recent trend that extends a lawyer's liability beyond the traditional bounds of the attorney-client relationship: recognition of a lawyer's liability to a nonclient for aiding and abetting a breach of her client's fiduciary duty owed to a third party.[10] Within those jurisdictions that have accepted this doctrine,[11] most acknowledge the same basic framework of the claim.[12] However, there is a significant divide among state jurisdictions as to the degree of a lawyer's fiduciary knowledge required to adequately show a valid claim: while some states, such as Delaware or Illinois, require an attorney to have "actual knowledge" of her client's fiduciary relationship (and associated breaches) with the allegedly injured third party, other states, such as Minnesota and South Dakota, only require that a lawyer had "constructive knowledge."[13]

This divergence of knowledge standards is important for a few reasons. First, the expansion of the lawyer's role within society has led to an increasing number of fiduciary breach claims against attorneys leveled by nonclient parties in the last ten to fifteen years.[14] One of the primary examples of such claims is the assertion that an attorney aided and abetted a client's fiduciary breach.[15] This trend accordingly emphasizes the importance of the fault lines within each of the claim's defining elements. This Note focuses on the element of a lawyer's knowledge.[16]

---

8. *See id.* Specifically, the claim proceeded by alleging that the Lawyers knowingly facilitated Granewich's removal from FFG by calling unauthorized meetings of shareholders and made unauthorized changes to FFG's operating documents.

9. *See id.* at 795–96.

10. *See* Katerina P. Lewinbuk, *Let's Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client's Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. 135, 135–36 (2008).

11. All state supreme courts that have addressed these claims, with the exception of Georgia, have recognized a cause of action for a lawyer's aiding and abetting a breach of fiduciary duty (totaling twenty-one states, albeit with different elements and caveats attached). *See id.* at 136; *see also* Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135, 1159 (2006).

12. *See* Lewinbuk, *supra* note 10, at 143–46.

13. *See id.* at 151–53 (articulating the standard as to whether the lawyer in question knew or reasonably should have known of the fiduciary relationship between her client and the plaintiff third party). Notably, this requirement can often be satisfied by a mere showing of a long-term or close relationship as well as other similarly minor showings of a reasonable basis for knowledge of a fiduciary relationship.

14. "[A]s individuals and business associations have become increasingly reliant upon experts and specialists to provide ever more critical advice and professional services, it should come as no surprise that [fiduciary breach] claims, especially against attorneys, are on the rise." Terry Jennings, *Fiduciary Litigation in Texas*, 69 TEX. B.J. 844, 850 (2006).

15. *See* Stanley Pietrusiak, Jr., *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST. MARY'S L.J. 213, 241 (1996).

16. *See id.* at 242.

Second, the aiding and abetting cause of action overall provides an exception to a well-established rule of lawyer-client relationships.[17] As this Note discusses, attorney liability for malpractice is generally limited only to conduct that falls within the direct attorney-client relationship.[18] The aiding and abetting doctrine deviates from this maxim by providing an avenue for attorney liability to nonclient third parties.

Third, the validity of the aiding and abetting fiduciary breach cause of action has not been assessed in twenty-nine states.[19] As a result, the application of the doctrine's elements in new jurisdictions to new factual contexts has the potential to entirely change the logical contours of the claim. Thus, it is critical to identify doctrinally beneficial approaches and jettison those that are not. This Note marks a beginning to the required elemental analysis starting with the claim's knowledge element.

Finally, the definition of a lawyer's fiduciary knowledge remains an unresolved question among the jurisdictions that have already deemed the overall claim valid.[20] Resolution of this latchkey element can provide a cohesive evidentiary framework that not only results in efficient and fair policy outcomes but also fits well within the wider doctrine of civil liability. Such a result will then also provide effective guidance for jurisdictions examining the claim for the first time. Conversely, failure to articulate a doctrinally and socioeconomically sound analysis of the knowledge element could lead to unbridled liability against lawyers, erosion of the trust central to the attorney-client relationship, and disruption of economic frameworks that take the stability of attorney-client relationships for granted.[21]

To date, other works have examined the genesis and subsequent evolution of the aiding and abetting doctrine as well as commented generally upon the

---

17. *See, e.g.*, *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1552 (1994).

18. *See infra* Part II (articulating the general rule of no attorney liability to nonclient third parties for malpractice).

19. At the time of writing, California, Colorado, Delaware, the District of Columbia, Florida, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, South Dakota, Texas, Virginia, and Wisconsin have recognized the claim of aiding and abetting a client's fiduciary breach as a valid basis for liability. *See* Mason, *supra* note 11, at 1159 (noting that Georgia has affirmatively denied the claim's existence and Pennsylvania law remains conflicted on the existence of the claim). While Illinois has not formally recognized this cause of action, the Illinois Supreme Court has recognized an analogous tort of knowingly participating in, or intentionally inducing, a breach of fiduciary duty. *See In re* Chi. Trading Grp., Inc., No. 97 B 19843, 2001 WL 40071, at *5 (Bankr. N.D. Ill. Jan. 17, 2001). Notably, the aiding and abetting doctrine impacts fiduciary liability for many professions in addition to the law. *See* Lesavoy v. Gattullo-Wilson, 170 F. App'x 721, 723–24 (2d Cir. 2006) (concerning extension of nonclient fiduciary liability to brokers); *In re* Sharp, 302 B.R. 760, 784 (E.D.N.Y. 2003) (concerning extension of nonclient fiduciary liability to bankers); N.J. Dep't of Treasury v. Qwest Commc'ns Int'l, Inc., 904 A.2d 775 (N.J. Super. Ct. App. Div. 2006) (concerning extension of nonclient fiduciary liability to accountants).

20. *See* Lewinbuk, *supra* note 10, at 145–48.

21. *See infra* Part III.

divergence of knowledge standards among the currently accepting states.[22] However, this Note is the first effort to both specifically examine the merits of the various approaches to the knowledge element and make appropriate recommendations for a future approach. Part I provides a background to civil liability leading to the advent of the attorney aiding and abetting fiduciary breach claim. Part II then examines the existing conflict between jurisdictions concerning the knowledge element. Finally, Part III argues for the rejection of constructive knowledge frameworks and provides guidelines in favor of either qualified immunity or actual knowledge standards (depending on the circumstances and policy objectives of an examining court) as superior replacements.

I. A BRIEF HISTORY OF GENERAL CIVIL LIABILITY

This part outlines the history that lays the groundwork underlying civil liability as a precursor to the aiding and abetting fiduciary breach doctrine. Part I.A outlines the common law "privity" liability requirement, initially translated into American law from English origins, and its subsequent downfall with then-Judge Benjamin Cardozo's famous articulation of the duty of care. Part I.B then summarizes the later evolution of fiduciary duty doctrine as a higher degree of obligation owed by parties to each other within particular relationships. Finally, Part I.C culminates with the outline of the attorney aiding and abetting fiduciary breach claim in its most typically accepted form.

A. The Origins of Civil Liability

Prior to the twentieth century, the duty owed by one party to another in tort was restricted to instances where the injured party was in privity with the alleged wrongdoer.[23] In the seminal case of *Winterbottom v. Wright*,[24] the English Court of the Exchequer held that an injured party must be in a direct contractual relationship with the manufacturer or caretaker of a product in order to bring a valid claim for civil liability against another party.[25]

In a decision that directly addressed a question of attorney tort liability, the U.S. Supreme Court explicitly adopted *Winterbottom*'s privity requirement in *Savings Bank v. Ward*[26] by holding that an injured party could not sustain

---

22. *See* Lewinbuk, *supra* note 10, at 135–36; *see also* Colin P. Marks, *Piercing the Fiduciary Veil*, 19 LEWIS & CLARK L. REV. 73 (2015); Mason, *supra* note 11; Pietrusiak, Jr., *supra* note 15.

23. Often referred to as a "tortfeasor." While some jurisdictions observe fiduciary breach claims as a separate species of claim, this Note accepts the use of the language surrounding tort doctrine for the purposes of discussion.

24. (1842) 152 Eng. Rep. 402.

25. *See id.* The product in question here was a mail coach serviced by Winterbottom for the postmaster general. However, Winterbottom's contract was only with the postmaster general and not with individual mail carriers employed by the postmaster (such as the injured party, Wright).

26. 100 U.S. 195 (1879). This case provides an early example of the general rule of no malpractice liability of attorneys to nonclients.

a claim against an attorney with whom there was no privity of contract.[27] The majority opinion in *Savings Bank* provides policy justifications for privity as a general boundary line for tort liability, including the unwarranted and unlimited extension of liability beyond contracting parties.[28] Further, the Court articulates the concern that extension of liability beyond the attorney-client relationship would be tantamount to taking control of a contract away from the parties by allowing liability outside of the relationship defined by that contract.[29] However, Chief Justice Morrison Waite's dissent provides a glimmer of justification for rejecting the privity limitation by articulating, "I think if a lawyer . . . knows or ought to know [his work product] is to be used by the client in some business transaction with another person[,] . . . he is liable to such other person relying on his certificate for any loss resulting from [the lawyer's] failure" to adequately advise his client.[30] The dissent's reasoning laid the groundwork for (arguably) the most famous case in all of tort doctrine addressing the duty of care.

Conversely, *Macpherson v. Buick*[31] later rejected *Winterbottom*'s privity-based liability limitations in favor of allowing negligence claims asserting a duty of care to persist.[32]

Judge Cardozo's opinion famously dismissed the privity limitation by asserting that "[i]f the nature of a thing is such that it is reasonably certain to . . . [cause] peril when negligently made, it is then a thing of danger . . . . [If] there is added knowledge that the thing will be used by persons other than the purchaser . . . irrespective of contract, the manufacturer . . . is under a duty to make it carefully."[33] While *Macpherson* created and oriented a general duty of care within the negligence claim, the doctrine remained unresolved as to how liability of parties to one another should be addressed within close-knit "fiduciary" relationships surrounding claims beyond negligence. As this Note underscores, privity and similarly relationship-based definitions of liability remain important doctrinal fault

27. *See id.* at 207.

28. Thereby overwhelming judicial resources, according to the reasoning of the Court at the time.

29. *See Sav. Bank*, 100 U.S. at 203. Further justification of privity as a limitation on liability in this particular instance could be supported by a desire to preserve the relationship of trust that exists between a lawyer and their client. *See* William L. Siegel, *Attorney Liability: Is This the New Twilight Zone?*, 27 U. MEM. L. REV. 13 (1996).

30. *Sav. Bank*, 100 U.S. at 207. Interestingly, even at this early stage, the language of the dissent implies a constructive knowledge standard when addressing liability outside of an attorney-client relationship.

31. 111 N.E. 1050 (N.Y. 1916).

32. *See id.* The case presented facts shockingly similar to *Winterbottom*, involving a claim asserted by the purchaser of a car from a middleman dealership against the original manufacturer. For a full discussion of this shift away from privity and toward the present negligence framework incorporating the duty of care, see John C.P. Goldberg & Benjamin C. Zipursky, *Moral of* Macpherson, 146 U. PA. L. REV. 1733 (1998). For a full historical treatment of privity's original role in civil liability doctrine and the subsequent shift away from its use as an analytical tool, see Douglas A. Cifu, *Expanding Legal Malpractice to Nonclient Third Parties—at What Cost?*, 23 COLUM. J.L. & SOC. PROBS. 1, 3–14 (1989).

33. *Macpherson*, 111 N.E. at 1053. Notice again that the language of departure from privity is centered around the requirement of knowledge on the part of the alleged tortfeasor as to the connection between the contracting party and the injured party bringing the claim.

lines for limiting the extension of fiduciary liability beyond the norm of the attorney-client relationship.[34] However, Judge Cardozo recognized the doctrinal gap of liability-defining obligations for fiduciaries beyond the negligence doctrine defined by *Macpherson*.

B. The Rise of Fiduciary Liability

The seminal case of *Meinhard v. Salmon*[35] took civil liability a step further: it analyzed the duties owed by fiduciaries to each other beyond the negligence-based duty of care defined in *Macpherson*.[36] Judge Cardozo's *Meinhard* opinion famously defined the duty owed by one business owner to his partner as "the duty of the finest loyalty . . . . A [fiduciary] is held to something stricter than [a regular duty of care] . . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[37] Since *Meinhard*, the doctrine of fiduciary duty has been characterized as consisting of subdivisions varying by situation.[38] Accordingly, the fiduciary duty doctrine has evolved to be highly scenario specific.[39] Amid the existing liability questions surrounding relationships between parties, the current state of the doctrine revives the question posed by Justice Waite's dissenting *Savings Bank* opinion[40]: Can lawyers ever be liable when their clients breach a fiduciary duty owed to a third party? The answer is a very qualified "yes."

C. The Claim of a Lawyer's Aiding and Abetting a Client's Fiduciary Breach

An attorney generally does not owe a fiduciary duty to a nonclient and thus is not typically susceptible to liability stemming from a fiduciary breach injuring a nonclient.[41] However, within the wider realm of civil aiding and

---

34. *See infra* Part III.

35. 164 N.E. 545 (N.Y. 1928).

36. It did so by addressing disputes between parties within a closer, "fiduciary" relationship, triggering obligations beyond the negligence framework addressed in *Macpherson*.

37. *Meinhard*, 164 N.E. at 546.

38. Some courts and scholars have articulated fiduciary duty as consisting of two distinct subdivisions: the duty of care normally imposed under a negligence framework and the duty of loyalty as a separate framework. Others characterize the doctrine as further incorporating the duties of honesty, disclosure, and candor. For a full examination of the varying scholarly lenses surrounding fiduciary duty obligations, see Mark Klock, *Lighthouse or Hidden Reef?: Navigating the Fiduciary Duty of Delaware Corporations' Directors in the Wake of* Malone, 6 STAN. J.L. BUS. & FIN. 1, 14 n.96 (2000).

39. For a further exploration of the varying manners and degrees of judicial fiduciary liability application, see Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879 (characterizing fiduciary liability as "situation-specific" applying with "greater or lesser force in different contexts involving different types of parties and relationships"). For an illustrative example of the placement of good faith within the doctrine of fiduciary duty, see Stone v. Ritter, 911 A.2d 362, 366–71 (Del. 2006).

40. *See* Sav. Bank v. Ward, 100 U.S. 195, 195 (1879).

41. *See* Lewinbuk, *supra* note 10, at 137; *see also* Jessica Palvino, *Aiding-and-Abetting Liability: Is Privity Making a Comeback?*, 70 TEX. B.J. 52 (2007) (discussing the response of Texas courts to the rise of the aiding and abetting doctrine); Siegel, *supra* note 29, at 16

abetting claims, recent state supreme court decisions,[42] the Restatement (Second) of Torts,[43] and the Restatement (Third) of Law Governing Lawyers[44] permit a cause of action for a lawyer's aiding and abetting her client's breach of fiduciary duty.[45] While the elements necessary to qualify for this relatively new cause of action vary by jurisdiction, they generally consist of the following: (1) the presence of a fiduciary duty owed by the attorney's client to a nonclient third party, (2) breach of that fiduciary duty by the attorney's client, (3) the attorney's fiduciary knowledge,[46] and (4) substantial assistance provided by the attorney to her client in propagating the breach.[47] While certain jurisdictions have not addressed the validity of this liability, all jurisdictions that have examined it have accepted the doctrine as valid.[48] Within these accepting jurisdictions, state courts differ as to the required degree of knowledge that an attorney must have of (1) the fiduciary relationship between her client and the nonclient injured party and (2) breach by her client of their fiduciary duty as a result of her legal advice.[49]

II. THE THIRD ELEMENT: LAWYERS' FIDUCIARY KNOWLEDGE IN CIVIL AIDING AND ABETTING CLAIMS

Focusing now beyond the claim's background, this part delves into the different approaches taken by various state courts that have accepted the cause of action. Part II.A outlines the constructive knowledge standard from the standpoint of supporting policy arguments advanced by legal scholarship as well as through case examples of constructive knowledge in action provided by the Minnesota and South Dakota Supreme Courts. Part II.B delves into the arguments against the constructive knowledge standard and examines two alternative approaches to the knowledge element: the

("[V]irtually every jurisdiction recognize[s] that an attorney does not owe a duty to exercise care for the benefit of opposing parties or non-clients.").

42. *See infra* Part II.

43. *See* RESTATEMENT (SECOND) OF TORTS § 874 (AM. LAW INST. 1975).

44. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51 (AM. LAW INST. 2000).

45. While the scope of this Note concerns only the aiding and abetting of fiduciary breach claim, there are various other doctrines providing further exceptions to the general "no liability" rule of lawyers to nonclients. For an opinion supporting the recognition of a lawyer's full fiduciary duty to nonclients in certain instances, see Leroy v. Allen, 872 N.E. 2d 254, 286 (Ohio 2007) ("[A]n attorney retained by a fiduciary owes a similar duty to those with whom the client has a fiduciary relationship.").

46. *See* RESTATEMENT (SECOND) OF TORTS § 876 (articulating that an attorney is liable if she "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself"); *see also* Lewinbuk, *supra* note 10, at 151–53. While the knowledge element is not incorporated by all states accepting the aiding and abetting cause of action, "[a] number of jurisdictions that have examined the issue, including New Jersey, Oregon, Colorado, South Dakota, New York, Illinois and Minnesota [incorporate this element into the aiding and abetting analysis]." *See id.* at 151–52.

47. *See* Lewinbuk, *supra* note 10, at 150. Notably, Colorado does not incorporate the substantial assistance element in its analysis. *See* Anstine v. Alexander, 128 P.3d 249, 254 (Colo. App. 2005) (articulating only the first three elements of the traditional aiding and abetting a fiduciary breach claim's framework), *reversed on other grounds by* 152 P.3d 497 (Colo. 2007).

48. *See* Lewinbuk, *supra* note 10, at 141–45.

49. *See id.* at 151–53.

alternative knowledge standard, as applied in Illinois and Delaware, and the qualified immunity standard adopted by Texas.

A. *The Constructive Knowledge Standard*

Multiple state court opinions have articulated the constructive knowledge standard as a requirement that a lawyer knows, or reasonably should know, of fiduciary relationships and surrounding breaches in order to satisfy the knowledge element.[50] Part II.A.1 provides the scholarly commentary surrounding this standard. Part II.A.2 provides an example of the standard's application to a business-partner dispute analyzed under South Dakota law. Finally, Part II.A.3 provides a corollary application of constructive knowledge to a dispute surrounding trust and estate administration under Minnesota law.

1. Commentary Surrounding the Constructive Knowledge Standard

Stanley Pietrusiak Jr. once commented that "[l]awyers' position in society, and their collective legal experience, suggest that they should 'know better' than to aid in another's breach of fiduciary duties."[51] Pietrusiak thus advances what the law and economics school has termed a "cheapest cost avoider" argument.[52] He proceeds by linking the expansion of the lawyer's role to the expectation that a lawyer should be held responsible for those aspects of their craft that are reasonably known to competent practitioners.[53] The Restatement (Third) of Law Governing Lawyers echoes the argument linking a lawyer's expanded role to his ability to reasonably perceive the contours of fiduciary relationships with which she is involved.[54]

This policy viewpoint arguably has become the standard view of liability for attorney malpractice liability generally. In his seminal article exploring the fault lines of attorney liability, Professor Geoffrey Hazard articulates a widely accepted view providing the constructive knowledge standard as sufficient to trigger a red flag for attorney liability.[55] While this view does not necessarily argue that constructive knowledge is (or should be) dispositive of attorney malpractice liability, it presents a key evidentiary indicator.[56] As a result, an argument in favor of constructive knowledge as a doctrinal standard organically emanating from existing attorney conduct is

50. *See infra* Part II.A.2–3.

51. Pietrusiak, Jr., *supra* note 15, at 256.

52. The "cheapest cost avoider" argument is that lawyers are in the most economically efficient position to identify fiduciary relationships and assess the associated risks. This Note discusses (and rejects) this view *infra* Part III.B.3.

53. *See* Pietrusiak, Jr., *supra* note 15, at 256.

54. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51 cmt. h (AM. LAW INST. 2000) ("A Lawyer is usually so situated as to have special opportunity to observe whether the fiduciary is complying with [her] obligations.").

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

56. *See id.*

possible.[57] To assess these ideas in action, this Note now turns to examples provided by the South Dakota and Minnesota Supreme Courts.

2. South Dakota's Constructive Knowledge Standard: *Chem-Age Industries, Inc. v. Glover*

In one of the clearest state court opinions explaining a jurisdictional application of the aiding and abetting claim to lawyers, *Chem-Age Industries, Inc. v. Glover*[58] provides a further example of a business partnership gone awry. In March of 1997, an entrepreneur named Byron Dahl approached two potential investors in Watertown, South Dakota (Roger O. Pederson and Garry Shepard).[59] The proposed venture was to be called "Chem-Age Industries": "Dahl would contribute equipment and expertise," while Pederson and Shepard would contribute capital.[60] Following the initial investment by Pederson and Shepard and the formation of the new business, "Pederson obtained a report from a private investigator warning him that Dahl was a 'crook'": one of Dahl's prior investors had lost his home, while another investor lost $300,000.[61] Despite the report, Pederson and Shepard continued to invest with Dahl.[62] As a condition of further investment, however, Pederson and Shepard required "the business to be incorporated . . . [and] Dahl to get an attorney involved to set up the corporation."[63] Dahl accordingly engaged his attorney of twenty years, Alan Glover, to prepare and distribute the articles of incorporation.[64]

The day after the South Dakota secretary of state issued the certificate of incorporation, Sam's Club approved corporate credit for the business and similar credit approvals for the business from Bank One, American Express, and Norwest Bank followed shortly.[65]

Soon after credit was secured for the business, Pederson and Shepard began to suspect Dahl of misappropriating corporate funds.[66] As an investigation later revealed, "Dahl had accumulated large balances on the company's credit cards for what appeared to be personal items."[67] Further,

---

57. *See id.* However, this argument ignores the gulf between the consequences of failure to follow "best practices" for attorney conduct and full-blown malpractice liability: while constructive knowledge may work as an indicator of dangerous waters for attorney conduct under the Hazard test, these prudent practices do not inherently endorse constructive knowledge as a basis for a valid malpractice claim asserted by a nonclient.

58. 652 N.W.2d 756 (S.D. 2002).

59. *See id.* at 761.

60. *See id.* It is unclear exactly what the business operations purportedly were.

61. *Id.*

62. *See id.*

63. *Id.*

64. *See id.* at 761–62. The articles of incorporation were dated October 30, 1997, and the South Dakota secretary of state issued the final certificate of incorporation on November 6, 1997. *See id.*

65. *See id.* at 762. The Norwest Bank loan amounted to approximately $140,000; the bank's understanding was that the money was to be used by the business itself rather than Dahl or any other individual associated with the venture. *See id.*

66. *See id.*

67. *Id.* at 762 n.2 ("Items charged included 'Hamburger Helper'; 'Bailey's 750 ml'; and 'Food & Beverage' at the 'Princess Tower Hotel, Freeport, Bahamas.'").

while Glover and Dahl later informed both investors that they were negotiating the sale of the business's assets to New Age Chemical, Inc., they did not disclose that the seller was actually listed as "Byron Dahl d/b/a BMD Associates, a South Dakota sole proprietorship" on the agreement dated as of November 11, 1998.[68]

Moreover, the secretary of state sent Glover a "Notice of Pending Administrative Dissolution" for Chem-Age Industries, Inc.[69] After consulting Dahl, Glover made the decision not to complete the filing required to stop the dissolution.[70] Accordingly, the secretary of state issued a "Certificate of Administrative Dissolution" on September 19, 1999.[71]

In October of 2000, Pederson and Shepard filed suit against Dahl and Glover,[72] claiming that Glover breached his fiduciary duty to the corporation and investors, both directly and indirectly.[73] Among other claims, the investors alleged that Glover aided and abetted Byron Dahl's breach of fiduciary duty owed to his business partners.[74] As authority, the court looked to the Restatement (Second) of Torts for guidance on the degree of knowledge required for an attorney to be found liable under the aiding and abetting doctrine.[75] Additionally, examining the case law from other jurisdictions surrounding the knowledge requirement, the court held that while "actual knowledge may be required [in some cases], constructive knowledge will often suffice. Constructive knowledge is adequate when the [defendant] has maintained a long-term or in-depth relationship with the fiduciary."[76] As a result, the court established an aiding and abetting claim incorporating constructive knowledge as the main trigger for attorney liability.[77]

---

68. *See id.* at 762–63 ("When later questioned, Glover was not sure of the relationship between Chem-Age Industries, Inc., and BMD Associates.").

69. *See id.* at 763 ("Glover was thereby notified that Chem-Age Industries, Inc., was delinquent in filing its annual report as required by SDCL 47-9-1 and that the corporation would be . . . dissolved [without a completed filing] before September 13, 1999.").

70. *See id.* While Glover did consult Pederson and Shepard's investigating attorney, Glover never directly notified either investor despite his role as the corporation's attorney.

71. *See id.* Notably, the corporation was reinstated about a year later in anticipation of a lawsuit against Dahl and Glover.

72. Among other related parties. *See id.*

73. Liability was asserted via (1) a claim of fraud by failing to disclose Dahl's past scams, (2) a claim of conversion due to misallocated attorney's fees and a gift of an office desk (from Dahl to Glover, charged to the corporate credit card), and (3) claims of legal malpractice under both a direct theory (as Glover's client) and an indirect theory (the aiding and abetting of Dahl's fiduciary breach). *See id.* at 763–76.

74. *See id.* at 773 ("Although he may not have directly breached a fiduciary duty, if Glover assisted Dahl in a breach of Dahl's fiduciary duty, Glover may still be subject to liability.").

75. *See id.* at 775 ("Another condition to finding liability for assisting in the breach of a fiduciary duty is the requirement that the assistance be 'knowing.' Knowing participation in a fiduciary's breach of duty requires both knowledge of the fiduciary's status . . . and knowledge that the fiduciary's conduct [breaches] a fiduciary duty." (citation omitted)).

76. *Id.* (citation omitted). From an overall doctrinal perspective, this holding lessens the showing that is required to satisfy the third element of the claim relative to the actual knowledge standards adopted under Illinois and Delaware law. *See infra* Part II.B.

77. *See Chem-Age Indus.*, 652 N.W.2d at 775.

In its formulation of a knowledge standard for this new claim under South Dakota law, the court acknowledged key policy arguments in favor of an actual knowledge standard in the overall context of limiting attorney liability to nonclient third parties.[78] However, the court decided to allow third-party liability in scenarios of long-term relationships between fiduciaries, thereby establishing a constructive knowledge standard.[79] Application of this framework to Glover's relationship with Dahl led the court to find Glover's acceptance of a gift[80] from Dahl, coupled with his actual knowledge of Dahl's prior scams, as sufficient to defeat summary judgment for the knowledge element.[81] Overall, the court "affirm[ed] summary judgment for Glover on the claims of fraud and legal malpractice pertaining to [Pederson and Shepard as individuals] . . . . [Yet, the court] reverse[d] and remand[ed] for trial the claims of conversion and aiding and abetting the breach of fiduciary duty."[82] The South Dakota court's comfort with extending lawyer's liability via application of the constructive knowledge standard mirrored a case decided by the Minnesota Supreme Court three years prior.

3. Minnesota's Constructive Knowledge Standard: *Witzman v. Lehrman, Lehrman & Flom*

The 1999 case of *Witzman v. Lehrman, Lehrman & Flom*[83] provides a corollary application of the constructive knowledge standard to aiding and abetting fiduciary breach claims against accountants.[84] Following the death of Wilfred Wolfson in 1968, Blair Wolfson and his mother, Elizabeth Wolfson, were named trustees of the two trusts maintaining the estate's remaining property following the resolution of probate in 1977.[85] In 1991, Elizabeth Wolfson created "the Revocable Trust,"[86] naming Blair Wolfson

---

78. *See id.* at 769–70 ("First, the [traditional no third-party liability] rule preserves an attorney's duty of loyalty to and effective advocacy for the client. Second, adding responsibilities to non-clients creates the danger of conflicting duties. Third, once the [traditional] rule is relaxed, the number of persons a lawyer might be accountable to could be limitless." (citations omitted)). In addition, the opinion also addressed the issue of putting attorney-client confidentiality at risk with the opening of nonclient liability via mechanisms such as relaxed knowledge standards. *See id.*

79. The South Dakota Supreme Court here, mirroring other jurisdictions, viewed long-term relationships as inherently putting advising lawyers on constructive notice of a fiduciary relationship's existence. *See id.* at 775.

80. The gift was a desk for Glover's office. *See id.* at 762.

81. *See id.* at 776–77 ("Accepting such a 'gift' from a client like Dahl, who Glover knew had longstanding financial problems, raises a [valid] question of constructive knowledge and exposes the problem of improper, personal financial gain in assisting Dahl.").

82. *Id.* at 773. Notably, the court also found that a material question of fact existed as to the substantial assistance element, allowing the claim overall to be considered on the merits. *See id.*

83. 601 N.W.2d 179 (Minn. 1999).

84. *See id.* at 181–83. While *Witzman* concerns accountants, it remains highly instructive as an application of a constructive knowledge standard within an aiding and abetting claim against lawyers.

85. Specifically, Blair Wolfson was designated the trustee of the "Residuary Trust" and Elizabeth Wolfson the trustee of the "Marital Trust." *See id.* at 182.

86. While the opinion does not explicitly clarify the relationship between the Revocable Trust and the two trusts originally emanating from Wilfred Wolfson's estate, it seems to imply

and Harvey Flom[87] trustees yet "reserved for [herself] complete authority over the trust until her death [in April 1992]."[88] Shortly after her death, Flom resigned authority over the Revocable Trust, leaving only Blair Wolfson as trustee.[89]

Joyce Witzman[90] was a beneficiary under all three trusts emanating from the estate.[91] In 1993, Witzman brought a claim alleging that Wolfson breached his fiduciary duty as trustee.[92] While Witzman's direct claim against Wolfson reached a mediated settlement in 1994,[93] Witzman filed a separate aiding and abetting claim against Lehrman, Lehrman & Flom (LL&F) for its role as Wolfson's accountant during the alleged breach of trustee fiduciary duties.[94] While the lower district court granted LL&F's motion for summary judgment denying liability,[95] the Minnesota Supreme Court examined the recognition of a cause of action for aiding and abetting fiduciary breach.[96] Contrary to the lower court's assessment, the court here found that "Witzman does not ask us to recognize a new cause of action," rather, Minnesota has always "relied on the 'well recognized' rule 'that all who actively participate in any manner in the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission.'"[97] Applying this principle to LL&F, the court defined the elements of an aiding and abetting claim under Minnesota law that generally mirror the doctrinal structure recognized in other states.[98] The court then examined Witzman's

---

that the Revocable Trust exists alongside the original two trusts, encompassing separate baskets of assets. *See id.*

87. A certified public accountant. *See id.*

88. *See id.*

89. *See id.*

90. Ms. Witzman is Wilfred Wolfson's daughter. *See id.* at 181–82.

91. *See id.* Notably, Witzman's brother Blair was also a cobeneficiary under the trusts at the time this case was originally brought before the court in addition to his role as sole trustee of all three trusts.

92. Specifically, Witzman filed three separate claims, each specifying that Wolfson "failed to provide accountings for the trusts, had paid himself excessive compensation and charged excessive fees to the trusts, had engaged in self-dealing and imprudent investments, and had taken advantage of opportunities as an individual." *Id.* at 182.

93. Following payments to Witzman and retention of the remaining assets by Wolfson, all three trusts were then dissolved. *See id.*

94. *See id.* at 182–83. The complaint against LL&F alleged a total of four counts: "professional negligence, negligent misrepresentation, 'Aiding and Abetting Breach of Trusts,' and violation of the RICO Act." *Id.* at 183. Notably, Witzman also filed a claim against Wolfson's attorney asserting the same claims, yet the Eighth Circuit affirmed the federal district court's dismissal of all claims due to an inadequate evidentiary showing. *See id.* at 183 (citing Witzman v. Gross, 148 F.3d 988 (8th Cir. 1998)).

95. The court granted the motion "because 'no confidential or fiduciary relationship existed between [Witzman] and [LL&F] . . . [and] Minnesota did not recognize a 'common law cause of action for aiding and abetting' [fiduciary breach]." *See id.* at 183.

96. *See id.* at 185–87.

97. *Id.* at 185–86 (quoting Greenwood v. Evergreen Mines Co., 19 N.W.2d 726, 733 (Minn. 1945)). Further, the court referenced section 876 of the Restatement (Second) of Torts and concluded that "Minnesota law does recognize a claim based on aiding and abetting the tortious conduct of another." *Id.* at 186.

98. *See id.* at 187 ("A claim for aiding and abetting . . . has three basic elements: (1) the primary tort-feasor must . . . [cause] an injury to the plaintiff; (2) the defendant must know

claim against LL&F and held that, while the first element of injury was satisfied, neither the requisite showing of knowledge nor a sufficient showing of substantial assistance was present in Witzman's claim.[99] Defining the Minnesota knowledge element, the court accepted the constructive knowledge standard allowing liability for allegations of a long-term or close relationship.[100] Interestingly, however, the court qualified constructive knowledge as being an appropriate alternative to actual knowledge only when there is a finding that the conduct is "a facial breach" of fiduciary duty.[101] Here, the court found no such facial breach for Wolfson's applicable conduct[102] and that LL&F reasonably could have believed that its client's actions were "legitimate exercises" of a trustee's authority.[103] This result, in addition to a failure to show the other elements of the newly defined cause of action, led the Minnesota Supreme Court to affirm the lower court's grant of LL&F's motion for summary judgment in the defendant's favor.[104] While constructive knowledge remains an important approach to the knowledge element, there are two alternative frameworks: the actual knowledge and qualified immunity standards.

B. Doctrinal Alternatives: The Actual Knowledge and Qualified Immunity Standards

As opposed to the less demanding reasonable knowledge requirement of the constructive knowledge standard, the actual knowledge standard requires a greater showing of direct lawyer fiduciary knowledge. The qualified immunity standard presents an even greater bar to liability by eliminating the knowledge inquiry entirely: it specifies that liability to nonclient third parties is invalid so long as the attorney's conduct falls within the attorney-client relationship. Part II.B.1 outlines the arguments against the adoption of the constructive knowledge standard. Part II.B.2 illustrates the application of the

---

that the primary tort-feasor's conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tort-feasor.").

99. *See id.* at 187–88.

100. *See id.* at 188 ("[C]ourts have held that a defendant with a long-term or in-depth relationship with that [primary] tortfeasor may be deemed to have constructive knowledge that the conduct was indeed tortious."). This closely matches the standard outlined by the South Dakota Supreme Court in *Chem-Age*.

101. *See id.* While the court inputs this qualification as a part of its knowledge analysis, it does not explicitly define this concept beyond the insufficiency of LL&F's conduct in the instant case.

102. *See id.* The court acknowledges that Wolfson's failure to provide annual accountings of the three trusts was a facial breach of his fiduciary duty, yet "[the court] cannot infer that [LL&F] had [adequate knowledge] that Wolfson was engaging in tortious conduct damaging to Witzman." *Id.* Interestingly, this seems to add a second qualification to Minnesota's application of constructive knowledge: even if a facial breach is found in the context of a close relationship between the secondary and primary tortfeasors, the court still may engage in an additional inquiry as to reasonable knowledge. *See id.* Thus, a close relationship here is seen as a sufficient showing of knowledge only at the court's discretion.

103. *See id.* It remains an open question whether the court would have held similarly for a lawyer as a defendant (rather than the instant case of defendant accountants) given a lawyer's greater knowledge of a trustee's fiduciary obligations.

104. *See id.*

Illinois actual knowledge standard to the familiar business-partner dispute scenario, while Part II.B.3 provides an example of the actual knowledge standard applied in the bankruptcy context under Delaware law. Then, Part II.B.4 shifts focus to the qualified immunity standard in both the divorce and trust administration contexts.

1. Commentary Surrounding the Actual Knowledge and Qualified Immunity Standards

This subsection examines the arguments against constructive knowledge in favor of the actual knowledge and qualified immunity standards as superior alternatives. Specifically, the commentary focuses on three areas: (1) judicial resource concerns, (2) professional responsibility concerns, and (3) disruption of existing professional and economic structures.

a. Judicial Resource Concerns

The debate between constructive and actual knowledge standards begins with the original concerns voiced by the Supreme Court's majority opinion in *Savings Bank*: without restriction of attorney liability to privity,[105] there are concerns that attorney malpractice claims would be unlimited and thus have the dual effect of overwhelming judicial resources while also crippling the availability of counsel to American citizens.[106] State courts cite this argument to this day, generally drawing a doctrinal line surrounding viable liability claims that require the conduct at issue to be outside, rather than inside, a clearly defined attorney-client relationship to be open to nonclient third-party liability.[107]

b. Professional Responsibility and Counsel Availability Concerns

Professor Katerina Lewinbuk summarized the doctrinal problems arguably associated with a potential conflict between a lawyer's duty to her client and exposure to liability from a third party: "Attorneys [subject to third-party liability] will constantly try to balance their duty to zealously represent their clients with the fears of potential exposure to liability in instances where their legal advice may disregard the interests of the third parties."[108] As a result, the argument for the actual knowledge standard asserts that higher evidentiary requirements allow attorneys and their clients to rest easy

105. In the context of the case, the boundaries of liability defined by "privity" were taken to be synonymous with the attorney-client relationship outlined by contract. *See* Sav. Bank v. Ward, 100 U.S. 195, 207 (1879).

106. *See id.*

107. *See, e.g.*, Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015) ("Texas common law is well settled that an attorney does not owe a [fiduciary duty] to third parties . . . . Texas courts have [accordingly] developed a . . . defense protecting attorneys from liability to non-clients, stemming from the broad declaration over a century ago [of the professional responsibility concerns surrounding such third party claims against lawyers].").

108. Lewinbuk, *supra* note 10, at 169–70; *see also* Cifu, *supra* note 32, at 17–23.

knowing that liability runs only to direct clients, barring truly overt knowledge of fiduciary breach.[109] The Texas courts take this argument further, stating that even overt attorney knowledge is not enough for liability to attach if the alleged conduct occurred outside of the attorney-client relationship.[110] In essence, the Texas qualified immunity standard returns to the classic rule of privity for attorney malpractice, providing a bright, doctrinal line defining liability along existing fault lines surrounding the attorney-client relationship.[111]

c. Disruption of Existing Professional and Economic Frameworks

Further, an increase in attorney liability caused by constructive knowledge standards arguably triggers an increase in economic costs surrounding legal services. In addition to the *Savings Bank* argument of increasing direct litigation costs stemming from unrestricted attorney liability,[112] Professor Jeremy McClane's recent article "The Sum of Its Parts: The Lawyer-Client Relationship in Initial Public Offerings" provides a look at many of the transactional cost concerns surrounding initial public offerings.[113] A key assertion the article posits is that disruption of a clarified attorney-client relationship leads to heightened transactional costs.[114] Particularly, trust is often cited as a key requirement for allowing clients to focus on their commercial operations with the comfort of knowing that their attorney's interests lie only with them.[115] Again, the Texas qualified immunity standard of liability on precisely this basis arguably promotes clarity of relationships leading to more effective economic outcomes.[116] Similarly, actual knowledge standards arguably have the practical effect of restricting attorney liability to third parties only when fiduciary knowledge is truly overt.[117] Ultimately, the argument posits that actual knowledge standards have the

---

109. *See* Lewinbuk, *supra* note 10, at 169–70.

110. *See, e.g.*, Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 405 (Tex. App. 2005).

111. *See id.* This clarifies and reinforces attorney duties only to their clients and eliminates concerns over third-party liability, which exist under a constructive knowledge theory.

112. *See* Sav. Bank v. Ward, 100 U.S. 195, 203 (1879).

113. *See* Jeremy R. McClane, *The Sum of Its Parts: The Lawyer-Client Relationship in Initial Public Offerings*, 84 FORDHAM L. REV. 131 (2015).

114. *See id.* at 150 ("Practitioner accounts are useful for understanding how lawyers and their clients perceive the impact of team dynamics on [deal] outcomes. The lawyers interviewed for this study routinely listed familiarity and trust as key hallmarks of IPO deals that they experience as successful.").

115. *See id.* at 150–51 ("[B]etter deals result when all the parties working on the deal seem to have a common vision . . . . Further, when lawyers and clients work together frequently, they develop greater mutual trust . . . . Trust allows clients to feel less need to monitor their lawyer-agents, freeing the client to focus on marketing and other commercial aspects.").

116. *See* Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477 (Tex. 2015).

117. *See, e.g.*, Hefferman v. Bass, No. 04C5748, 2005 WL 936900 (N.D. Ill. Apr. 15, 2005), *rev'd*, 467 F.3d 596 (7th Cir. 2006) (applying the actual knowledge standard to a business-partnership scenario, explicitly denying application of a constructive standard, when it held that "nothing in the allegations even suggests that [the attorney] knew (as opposed to should have known) either that St. Pierre was engaged in a [breach]").

effect of promoting the clarity and "common vision" that Professor McClane links to economically efficient transactional outcomes.[118]

2. Illinois's Actual Knowledge Standard: *Hefferman v. Bass*

Illinois law provides a further example of actual knowledge application in the classic context: a dispute between business partners. Presenting facts similar to *Granewich*, the Seventh Circuit's decision in *Hefferman v. Bass*[119] illustrated the application of Illinois's actual knowledge standard to an aiding and abetting fiduciary breach claim leveled against a lawyer from the business-partnership context. In 2003, John St. Pierre approached Glen Hefferman, a former public school teacher, concerning the possibility of "becom[ing] [business] partners in a car wash [lease] in Skokie, Illinois."[120] Hefferman agreed and "supplied about $25,000 for start-up costs, such as equipment and a lease. Later on, Hefferman provided another $25,000 [and] also worked at the car wash several hours a day during the summer of 2003 [without pay]."[121] During that first summer, St. Pierre and Hefferman agreed that attorney Yale P. Bass would provide them legal advice and prepare any paperwork.[122] "Bass assured Hefferman, 'I'm your guy. I'll make sure you're protected and you get what's been agreed.' Hefferman contend[ed] that Bass did no such thing."[123] Specifically, Hefferman alleged that Bass helped St. Pierre trick Hefferman into releasing his interest:

> [Bass] prepared a release . . . . St. Pierre [then] showed up at Hefferman's house in the middle of the night . . . and convinced Hefferman to sign [the release] by showing him only the second page, [stating] that St. Pierre indemnified and held Hefferman harmless from any liability under the lease of the car wash building.[124]

Unbeknownst to Hefferman, the release's first page specified that Hefferman relinquished his interest as an officer and stockholder in the car wash.[125]

Hefferman then brought suit[126] against St. Pierre and Bass. The issue before the Seventh Circuit was whether Hefferman's complaint stated a claim against Bass under Illinois law.[127] The court ultimately reversed the lower court's decision and held that Hefferman adequately pleaded a valid claim

---

118. *See* McClane, *supra* note 113, at 150.
119. 467 F.3d 596 (7th Cir. 2006).
120. *Id.* at 598.
121. *Id.*
122. *See id.*
123. *Id.*
124. *Id.*
125. *See id.*
126. Hefferman originally brought suit in the Northern District of Illinois under federal diversity jurisdiction. *See* Hefferman v. Bass, No. 04C5748, 2005 WL 936900 (N.D. Ill. Apr. 15, 2005), *rev'd*, 467 F.3d 596. While St. Pierre defaulted, Bass moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion, holding that Hefferman had failed to state a claim against the attorney under Illinois law. *See id.* Hefferman then appealed to the Seventh Circuit.
127. *Hefferman*, 467 F.3d at 598.

against Bass for aiding and abetting St. Pierre's breach of the fiduciary duty he owed to Hefferman as a business partner.[128] In examining the validity of the aiding and abetting claim under Illinois law, the court articulated that Hefferman's allegation of Bass's knowledge was sufficient by pleading that "Bass's participation in St. Pierre's . . . breach of fiduciary duty was knowing and intentional."[129] While this court provides a first look at the actual knowledge standard's presence within the aiding and abetting doctrine, New York offers an example of Delaware Law's application of the doctrine in the bankruptcy context.

3. Delaware Law's Actual Knowledge Standard in New York Bankruptcy Court: *In re Ticketplanet.com*

Departing from the partnership freeze-out scenario, *In re Ticketplanet.com*[130] concerned an internet-based travel agency, Ticketplanet.com ("the Debtor"), filing for bankruptcy on October 18, 2001.[131] The dispute involved the Debtor's controlling shareholder, Ross H. Mandell, one of the Debtor's directors, Michael Recca, the Debtor's president, Michael Passaro, and the Debtor's attorneys, Golub & Golub, LLC.[132]

Prior to its bankruptcy filing, the Debtor "entered into a series of loan agreements with an entity called TPAC, LLC. TPAC is owned and controlled by [the Debtor's controlling shareholder, Ross Mandell,] and . . . [allegedly] was formed [solely] to advance funds to the Debtor and obtain a [resulting] security interest in substantially all of the Debtor's assets."[133] Thus, at the time of the Debtor's Chapter 11 filing, TPAC claimed a "first priority security interest" in the Debtor's assets.[134] As a result, the trustee's claim asserts that the defendants schemed to defraud the Debtor's estate and creditors and that the Debtor's attorneys aided and abetted their breach of fiduciary duty.[135] Beyond their status as the Debtor's attorneys, however, the trustee's complaint does not provide any further evidence that Golub & Golub had any knowledge of plans or intent to breach the fiduciary duty owed to the Debtor's estate and creditors.[136]

---

128. *See id.* at 601–02.

129. *Id.* at 602. Interestingly, the court links this higher knowledge standard within Federal Rule of Civil Procedure 9(b): "Rule 9(b) requires that facts . . . be alleged in detail." *See id.* at 601 (citing FED. R. CIV. P. 9(b)). Greater specificity of pleadings conceivably correlates with a more detailed actual knowledge standard rather than a less demanding constructive knowledge requirement, as Illinois law reflects with their articulation of a "knowing and intentional" standard within the aiding and abetting doctrine. *See id.* at 602.

130. 313 B.R. 46 (Bankr. S.D.N.Y. 2004).

131. *See id.* at 54.

132. *See id.* at 46.

133. *Id.* at 54–55.

134. Seemingly to the detriment of external creditors. *See id.*

135. *See id.* at 55–57.

136. *See id.* Notably, even if such a showing of actual knowledge had been made, there is no evidence further showing that Golub & Golub substantially participated in such a scheme—failing the final prong of the aiding and abetting doctrine.

In its analysis of the aiding and abetting claim against Golub & Golub, the court invoked pleading standards under Federal Rule of Civil Procedure 9(b) as a corollary to the aiding and abetting knowledge standard under New York law: "[t]o pass muster under Rule 9(b) 'a complaint must allege with some specificity the acts [at the core of the claim,] . . . conclusory allegations . . . are not enough.'"[137] Applying this standard to the degree of knowledge that Golub & Golub had of their alleged participation in fiduciary breach through their status as Debtor's attorneys, the court held that "the allegations of the [trustee's] complaint are insufficient to state a claim against the law firm, whether stated as an aiding and abetting claim or otherwise, and they are dismissed."[138] The subtext provided by the court seems to indicate a rejection of sufficient knowledge showings on the sole basis of the close ties between Mandell, TPAC, and the Debtor itself.[139] This division between Delaware's and Illinois's actual knowledge standard and a constructive knowledge basis for satisfying the doctrine's third element represents a key conflict among jurisdictions that have accepted the aiding and abetting cause of action.

4. The Texas Qualified Immunity Standard: *Alpert v. Crain, Caton & James, P.C.* and *Cantey Hanger, LLP v. Byrd*

The 2005 Texas Court of Appeals case *Alpert v. Crain, Caton & James, P.C.*[140] illustrates the final approach to the aiding and abetting doctrine's knowledge element: the qualified immunity standard defining third-party liability in attorney-client relationships.

From 1994 through 1998, Mark R. Riley acted as Robert Alpert's attorney, both for the administration of personal trusts as well as the administration of multiple businesses in which Alpert was interested.[141] In 1998, Riley and Alpert's relationship deteriorated into a lawsuit surrounding administration of Alpert's personal trusts in probate court.[142] During that suit, Riley was represented by Crain, Caton & James, P.C. ("Crain Caton").[143] Alpert filed

---

137. *Id.* at 59 (third alteration in original) (quoting Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings, Ltd., 85 F.Supp.2d 282, 293 (S.D.N.Y. 2000)); *see id.* at 64 ("A conclusory statement, in the absence of facts from which one can infer knowing participation in a breach of duty, will not suffice."). Mirroring the Seventh Circuit's reasoning in *Hefferman*, the court here relates specificity of pleadings required under Rule 9(b) to the greater specificity found within an actual knowledge standard relative to a constructive knowledge standard. *See id.*

138. *Id.* Notably, the court further dismissed two related claims: first, the court dismissed the claim of direct breach of a fiduciary duty owed by Golub & Golub to the Debtor's estate and creditors (despite an overt admission by Golub & Golub that the attorneys directly owed a fiduciary duty to the Debtor). *See id.* at 64 n.11. Second, the court dismissed an analogous claim that Michael Passaro aided and abetted Mandell and Recca's fiduciary breach by hiring Golub & Golub (again due to an insufficient showing of knowledge). *See id.* at 64.

139. *See id.*

140. 178 S.W.3d 398 (Tex. App. 2005).

141. *See id.* at 402.

142. *See id.*

143. *See id.*

an additional claim against Crain Caton alleging that it, as Riley's attorney, aided and abetted Riley's fiduciary breach by "(1) concealing Riley's malpractices and breaches of fiduciary duty; (2) filing frivolous lawsuits against Alpert in probate court; and (3) disparaging Alpert's reputation in the business community."[144] Following the trial court's dismissal order in 2004,[145] Alpert unsuccessfully appealed, resulting in an affirmation of the trial court's dismissal of the claims against Crain Caton.[146]

Specifically, the court of appeals examined the facts surrounding Alpert's aiding and abetting fiduciary breach claim.[147] The claim centered on multiple sets of alleged facts[148] surrounding Crain Caton's conduct during its representation of Riley during the trust litigation.[149] In response, Crain Caton filed "special exceptions," relying on Texas's qualified immunity rule protecting a lawyer's conduct from liability provided that the conduct is within the lawyer-client relationship.[150] This qualified immunity was at the core of the trial court's decision to dismiss the aiding and abetting claims against Crain Caton and accordingly formed the reasoning behind the court of appeals's affirmation of the dismissal.[151] Here, the court scrutinized Crain Caton's actions in its representation of Riley and held that the conduct existed fully within the bounds of the attorney-client relationship.[152]

In its discussion of the dismissal, the court cited key policy arguments supporting the boundaries of lawyer liability around the contours of a lawyer-client relationship rather than making the more typical inquiry into the lawyer's knowledge.[153] First, the court asserted existing standards of lawyer liability at common law as defined by privity within the lawyer-client

144. *Id.*

145. *See id.* The trial court dismissal included an order for Alpert to pay sanctions amounting to $12,831.56, covering Crain Caton's attorney's fees. *See id.*

146. *See id.*

147. *See id.* at 403–05.

148. The alleged facts surrounding the aiding and abetting claims included (1) "withholding and concealing the fact that he was turning Alpert over to government entities in order to obtain monies for himself and [Crain Caton]," (2) "making statements such as there were never any loans by Alpert to the Trusts when Riley and [Crain Caton] knew that such statements were false because . . . [Riley himself noted] that loans in fact were made," and (3) "diverting more than Ninety Five Thousand Dollars ($95,000.00) of income tax returns from the [IRS] which were due to the Trusts and taking a substantial amount of that money and paying it to Riley and [Crain Caton]." *Id.* at 403–04.

149. *See id.*

150. *See id.* at 404–05 ("[The] special exceptions, [contend] that Alpert's petition fails to state any cause of action against it. Specifically . . . Alpert's petition 'fails to state a claim under Texas law for which relief can be granted' because '[a]ll of the conduct made [on] the basis of [Alpert's] claims occurred during the discharge of [Crain Caton's] duties in representing their client . . . .'").

151. *See id.* at 402, 404–05.

152. *See id.* at 407 ("Here, the acts [by Crain Caton] that Alpert alleges in his petition to support his claim of aiding and abetting a breach of fiduciary duty occurred during Crain Caton's representation of Riley . . . . Absent any allegation that Crain Caton committed an independent tortious act or misrepresentation, we decline Alpert's invitation to expand Texas law to allow a non-client to bring a cause of action for 'aiding and abetting' a breach of fiduciary duty, based [solely] upon the rendition of legal advice to an alleged tortfeasor client.").

153. *See id.* at 405.

relationship.[154] The court thus asserted a type of stare decisis argument in favor of the qualified immunity standard, arguing that an incorporation of the knowledge inquiry by all state courts would be an untenable expansion of liability under Texas law.[155] Second, the court outlined possible conflicting interests between a lawyer's client and a third party to whom a lawyer might be liable as a key argument against the expansion of a lawyer's liability beyond the attorney-client relationship.[156] Third, the court echoed the Supreme Court's original argument in *Savings Bank* concerning unlimited attorney liability[157]: by extending liability outside of a relationship defined by privity (i.e., to third parties), liability for lawyers arguably has no limit.[158] Fourth, and finally, the opinion continually asked whether an "independent right of recovery"[159] was available. While indirect, the Texas appellate court's particular framing of the immunity standard within the doctrine implies an argument that potential plaintiffs already have adequate existing methods of recovery via direct suits against the primary tortfeasor.[160]

Ten years later, the Texas Supreme Court cited the appellate court's decision in *Alpert* while applying the qualified immunity standard to the divorce context in *Cantey Hanger, LLP v. Byrd*.[161] In 2006, Philip Byrd and Nancy Simenstad initiated "highly contentious" divorce proceedings and Cantey Hanger, LLP represented Simenstad through the process.[162] As part of the resolution of the divorce proceedings, Simenstad was awarded ownership of a Piper Seminole aircraft previously owned by Lucy Leasing Co., LLC.[163] Specifically, the trial court ordered that "the parties . . . 'execute with[in] ten days . . . any documents necessary to [complete] the transfers contemplated [in the court's decree], which shall include . . . documents necessary to transfer ownership of airplanes and the like."[164] The dispute before the Texas Supreme Court concerned these transfer documents: the complaint filed by Byrd alleged that Cantey Hanger aided and abetted the execution of a falsified "bill of sale transferring the Piper Seminole from

154. *See id.* ("At common law, the rule of privity limits an attorney's liability to those in privity with the attorney.").

155. *See id.* ("If an attorney could be held liable to an opposing party . . . he would be forced constantly to balance his own potential exposure against his client's best interest . . . . Such a conflict hampers the resolution of disputes through the court system and the attainment of justice. Thus, to promote zealous representation, courts have held that an attorney is 'qualifiedly immune' from civil liability, with respect to non-clients, for actions taken in connection with representing a client in litigation.").

156. *See id.*

157. *See supra* note 28 and accompanying text.

158. *See Alpert*, 178 S.W.3d at 405.

159. *See, e.g.*, *id.* at 406 (discussing the qualified immunity standard's limitation of attorney liability to scenarios of independently tortious conduct even in cases of wrongful attorney conduct).

160. *See id.* This framing also seems to exemplify a subtext of suspicion against plaintiffs asserting an additional claim against a defendant's lawyer for purely economic reasons.

161. 467 S.W.3d 477 (Tex. 2015).

162. *See id.* at 479. The trial court eventually entered an agreed divorce in 2008. *See id.*

163. *See id.* at 479–80. Notably, ownership of Lucy Leasing was awarded to Byrd. *See id.*

164. *See id.* at 479.

Lucy Leasing to a third party."[165] This sale shifted associated taxes from Simenstad onto Byrd, as the sole owner of Lucy Leasing, following the divorce settlement.[166]

In response, Cantey Hanger filed a motion for summary judgment asserting, among other things, the Texas qualified immunity standard as a defense for its conduct.[167] While the trial court agreed and dismissed Byrd's claims against Cantey Hanger with prejudice, the court of appeals reversed, finding Cantey Hanger's conduct to be outside the parameters of the attorney-client relationship.[168] Thus, the Texas Supreme Court's decision centered on the "scope and application" of the qualified immunity standard within the aiding and abetting doctrine.[169]

While making its determination, the court articulated the standard as "a more comprehensive affirmative defense protecting attorneys from liability to non-clients."[170] Further, the court emphasized the wide degree of protection offered within the attorney-client relationship as covering even wrongful conduct.[171] However, the court reiterated the appellate court's reasoning in *Alpert* by specifying that the immunity does not alleviate attorney liability to nonclients for conduct that exists outside of the attorney-client relationship.[172] Application of the standard to Cantey Hanger's conduct led the court to hold that the drafting of aircraft sale documents following a divorce proceeding lies within the bounds of the attorney-client relationship, and thus the claim failed.[173]

Interestingly, the dissenting opinion offered an alternative option to the broad application of the qualified immunity standard: interpret the standard narrowly to apply immunity from attorney liability only to the original subject matter of the legal advice provided by the attorney.[174] The dissent

165. *See id.* ("Specifically, the plaintiffs alleged that[,] [through Cantey Hanger's aid,] Simenstad executed the bill of sale as 'Nancy Byrd,' a 'manager' of Lucy Leasing, even though her last name had previously been legally changed to Simenstad and she 'was never an owner, officer, or manager' of Lucy Leasing.").

166. *See id.* at 479–80, 484.

167. *See id.* at 479–80.

168. *See id.* at 480–81 ("The [appellate] court concluded that Cantey Hanger's [alleged] . . . conduct involving the 'subsequent sale' of the plane awarded to Simenstad 'was not required by, and had nothing to do with, the divorce decree,' and thus was 'outside the scope of representation of a client.'").

169. *See id.* at 481.

170. *Id.* This description orients the qualified immunity standard as going further than the general rule of no attorney liability to nonclients for legal malpractice—it is targeted to negate exceptions to the general rule (such as the aiding and abetting fiduciary breach claim). *See id.*

171. *See id.* at 481–82.

172. Hence "qualified" immunity. *See id.* at 482 ("[I]t is the kind of conduct that is controlling, and not whether that conduct is meritorious or sanctionable." (quoting Chapman Children's Tr. v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 442 (Tex. App. 2000))). Thus, the court seems to draw justification for the immunity by emphasizing availability of attorney liability for claims such as fraud or conversion.

173. *See id.* at 484–85 ("Cantey Hanger is entitled to summary judgment on its immunity defense if it conclusively established that its alleged conduct was within the scope of its legal representation of Simenstad in the divorce proceedings. We hold that it did.").

174. *See id.* at 486 (Green, J., dissenting) ("While I agree with much of the [majority]'s description of the attorney immunity doctrine and the purposes underlying it, I think the

looked to the history of Texas's qualified immunity standard as the justification for its argument to restrict the immunity (and thus open attorney liability) to a greater extent than the majority opinion articulates.[175]

III. RESOLVING THE DISPUTE: THE REJECTION OF CONSTRUCTIVE KNOWLEDGE FRAMEWORKS AND GUIDELINES FOR THE FUTURE

In this Note, the knowledge element is discussed not only for its value as an interesting element of the claim on its own but also as a key barrier to attorney liability overall.[176] As a result, arguments surrounding attorney liability to nonclients can be appropriately considered surrogates for arguments surrounding the stringency of knowledge standards. In other areas of the law, a defendant's knowledge is held as a key evidentiary step in a showing of a valid cause of action.[177] The same logic applies here, and the discussion of higher or lower evidentiary standards for this element can correctly be viewed as a proxy for effective restraint of the aiding and abetting doctrine. This part first argues for the rejection of the constructive knowledge standard by examining the key fault lines of the debate: (1) the incomplete nature of the constructive knowledge standard itself, (2) existing pleading standards, (3) professional responsibility concerns, (4) economic inefficiency, and (5) doctrinal consistency. Second, this part provides guidance as to which scenarios seem ideal for the application of the actual knowledge standard rather than the qualified immunity standard.

A. The Constructive Knowledge Standard Is Incomplete

State supreme courts have sometimes limited the practical effect of the constructive knowledge standard. The South Dakota court's *Chem-Age* opinion provides a look into the reasoning of a jurisdiction willing to accept the constructive knowledge standard by acknowledging that "in some instances actual knowledge may be required."[178] This admission that the constructive knowledge standard is not sufficient in certain scenarios characterizes it as incomplete unto itself, only to be applied in particular

---

[majority] overlooks an important element of the form of attorney immunity at issue in this case—that the attorney's conduct must have occurred in litigation—and applies the attorney immunity doctrine in a manner that results in a much broader, more expansive liability protection.").

175. Specifically, the dissent noted that the historic application of the immunity and the supporting policy reasons under Texas law pertain only to actions taken "in serious contemplation of a judicial or quasi-judicial proceeding." *See id.* at 487.

176. As a key evidentiary requirement of the aiding and abetting fiduciary breach claim, tougher knowledge standards theoretically decrease the extent to which a defendant is liable, making it more difficult for plaintiffs to bring a successful claim.

177. Referencing parol evidence concerns in contract law, mens rea restrictions found throughout criminal law, and similar inquiries into a defendant's knowledge in other areas of tort law as key limitations on liability in various contexts. For a discussion of barriers to recovery for criminal attorney malpractice, see David H. Potel, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 DUKE L.J. 542.

178. *See* Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756, 775 (S.D. 2002).

instances.[179] The Minnesota Supreme Court echoed the partial applicability of constructive knowledge in *Witzman* by holding that constructive knowledge can apply only in scenarios of obviously wrongful attorney conduct.[180] In effect, the Minnesota court justifies the lower evidentiary requirement of constructive knowledge by relying on stronger showings for a separate doctrinal element.[181] Further, the court carefully articulated that, "where the conduct is not a facial breach of duty, courts have been reluctant to impose liability on an alleged aider and abettor for anything less than actual knowledge."[182] All in all, the constructive knowledge standard is incomplete in its application and relies upon actual knowledge as a doctrinal backup. Thus, rejection in favor of the doctrinally sound standards that already exist (actual knowledge and qualified immunity) would allow for clarity and ease of application looking forward.

B. Existing Pleading Standards as Instructive Evidentiary Guidelines

As a key indicator of a claim's sufficiency before a court, a growing chorus of state court opinions examining the aiding and abetting doctrine refers to Federal Rule of Civil Procedure 9(b)'s requirement that claims are pleaded "with particularity."[183] Courts accordingly require a greater evidentiary showing for the elements of applicable causes of action, including aiding and abetting fiduciary breach claims.[184] Against this backdrop, constructive knowledge fails to require an adequately specific showing of attorney fiduciary knowledge for applicable claims: rather than demanding particular evidence of attorney knowledge, constructive knowledge is satisfied even

---

179. Such as where a fiduciary duty was patently obvious to a reasonable attorney, despite a lack of an actual knowledge showing. *See, e.g.*, *id.*

180. *See* Witzman v. Lehrman, Lehrman & Flom, 601 N.W.2d 179, 188 (Minn. 1999).

181. Such as a greater showing of the "substantial assistance" element of the claim. *See id.* Effectively, the Minnesota Supreme Court ignores a poor showing of knowledge in such instances of egregious wrongdoing by lawyers.

182. *Id.*

183. FED. R. CIV. P. 9(b).

184. While Federal Rule of Civil Procedure 9(b) directly applies only to claims of fraud or mistake, courts often articulate this pleading standard as instructive to the analysis of evidence within aiding and abetting claims. *See, e.g.*, *Witzman*, 601 N.W.2d at 187 ("[I]n cases where aiding and abetting liability is alleged against [lawyers], we will narrowly and strictly interpret the elements of the claim and require the plaintiff to plead with particularity facts establishing each of these elements."); *see also In re* Ticketplanet.com, 313 B.R. 46, 59 (Bankr. S.D.N.Y. 2004) ("The [plaintiff] alleges that the Defendants . . . knowingly made misrepresentations in connection with the Debtor's bankruptcy petition . . . . To pass muster under Rule 9(b) 'a complaint must allege with some specificity the acts constituting [the claim,] . . . conclusory allegations . . . are not enough.'" (quoting Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings, Ltd., 85 F.Supp.2d 282, 293 (S.D.N.Y. 2000))). This argument acknowledges that Rule 9(b) allows assertions of knowledge to be alleged "generally," yet state courts have nonetheless interpreted "knowledge" to refer to actually, rather than constructively, alleged facts. *See, e.g.*, Hefferman v. Bass, 467 F.3d 596, 601 (7th Cir. 2006) (holding that an allegation of an attorney's participation in fraud and breach of fiduciary duty as "knowing and intentional" was sufficient, despite relaxed pleading standards for knowledge under FED. R. CIV. P. 9(b)).

when no specific showing is made.[185] Within this analysis, many courts reiterate the knowledge element's roots in the Restatement (Second) of Torts.[186] This basis, in conjunction with the tendency of state courts to interpret a claim's elements "strictly," should lead to higher evidentiary standards.[187] Thus, constructive knowledge fails to reflect the evidentiary requirements of preexisting standards adopted by state courts in the analysis of aiding and abetting claims.

C. Professional Responsibility Concerns

Prior to the initial adoption of the aiding and abetting doctrine, states "feared that a more expansive duty to third parties would in some cases require an attorney to choose between advocating his client's position and protecting a third party."[188] This concern, that an extension of liability beyond the attorney-client relationship will endanger the relationship itself, lies at the heart of the argument for the rejection of the constructive knowledge standard. For this reason, bolstered by the following subarguments, the general rule for attorney liability has been to restrict malpractice claims only to direct attorney-client relationships. Specifically, the argument can be articulated along three axes: (1) the zealous advocacy doctrine, (2) availability of counsel concerns, and (3) the undermining of attorney-client confidentiality.

1. The Zealous Advocacy Doctrine and the Need for a Conflict-Warning System

The key concern of the zealous advocacy doctrine is a conflict of interest between an attorney's duty to their client and an attorney's understandable action to safeguard against potential third-party liability.[189] As Professor Lewinbuk and others have argued, the availability of nonclient fiduciary breach liability against an attorney creates an interest that competes with the attorney-client relationship due to the attorney's fear of liability from a source other than her client.[190] The key to solving this problem is to implement a conflict-warning system within the doctrine: by defining the

185. Such as when long-term relationships are held to be an adequate showing of constructive attorney knowledge of fiduciary relationships and associated breaches. *See* Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756, 775 (S.D. 2002) ("Constructive knowledge is adequate when the aider and abettor has maintained a long-term or in-depth relationship with the fiduciary.").

186. *See id.* ("Another condition to finding liability . . . is the requirement that the assistance be 'knowing.'").

187. *See Chem-Age Indus.*, 652 N.W.2d at 775.

188. *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, *supra* note 17, at 1552 (underscoring the policy reasoning behind the traditional "no liability" standard concerning malpractice claims against lawyers from nonclients).

189. For a full discussion of the zealous advocacy doctrine and its application to government advocacy, see Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991).

190. *See* Lewinbuk, *supra* note 10, at 169–70.

knowledge element in a way that ensures attorneys and their clients can clearly identify and efficiently manage any liability interests that run counter to the direct attorney-client relationship, state courts have an opportunity to strengthen a lawyer's ability to zealously advocate on her client's behalf while still maintaining policy goals within the doctrine surrounding tort liability.

One way to accomplish this conflict-warning goal is to define the boundaries of liability along the existing fault lines of the attorney-client relationship. The qualified immunity standard accomplishes this directly by denying liability to third parties provided that the attorney's conduct falls within the attorney-client relationship.[191] Taken in isolation, the concerns surrounding the zealous advocacy doctrine's protection of the attorney-client relationship favor the application of the qualified immunity standard to attorney aiding and abetting fiduciary breach claims. Actual knowledge is similarly favored by the zealous advocacy doctrine for the same reasons.

While less direct, the application of the actual knowledge standard also provides a conflict-warning system that allows attorneys to practice without undue fear of interests that run counter to the attorney-client relationship. If evidence of attorney knowledge must be truly overt for third-party liability to be possible, attorneys and their clients have a clear and tangible indicator of potential countervailing interests far beyond that of constructive knowledge.[192] This would then allow the attorney-client relationship to proceed comfortably without fear of nonobvious countervailing interests.

2. Availability of Counsel Concerns: Ensuring Accurate Information Within the Legal Marketplace

Following a successful aiding and abetting fiduciary breach claim against an attorney by a nonclient, lawyers, potential clients, and other groups surrounding the legal profession will bear this result in mind when judging that attorney's ability to provide counsel. Thus, malpractice claims effectively serve as an important source of evaluative professional information for colleagues and potential clients within the legal marketplace. It follows that unrestricted nonclient attorney liability will lead potential clients to form opinions of an attorney's ability based on nonclient conduct rather than her direct client representation.[193] This incongruence between direct client and nonclient malpractice information can be easily overlooked and lead an observer to draw inaccurate and unfounded conclusions. Accordingly, it behooves jurisdictions that have accepted the claim to articulate a knowledge standard that protects the legal marketplace. By ensuring the accuracy and relevance of malpractice information to direct

191. *See* Cantey Hanger, LLC v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015).

192. The mere existence of long-standing and often nonobvious relationships between parties (defining a satisfactory showing of constructive knowledge) does not provide the same degree of warning as the overt and direct evidence required by actual knowledge, particularly in complex transactional or dispute scenarios. *See, e.g.*, McClane, *supra* note 113.

193. *See* Lewinbuk, *supra* note 10, at 168–72.

client conduct rather than confusing the marketplace with nonclient malpractice information, a potential client can then make accurately informed decisions for her own direct representation. Without an accurate and relevant marketplace for information, potential clients will be deprived of otherwise valuable legal counsel due to incongruence between the direct client relationship they seek and the nonclient evaluative information provided.

The constructive knowledge standard already has allowed attorney aiding and abetting fiduciary breach claims to succeed on the basis of long-term party relationships.[194] This ease of access to liability provides no safeguard that malpractice information will be limited only to direct-representation scenarios relevant to the legal marketplace. Conversely, the qualified immunity standard solves the problem by limiting aiding and abetting fiduciary breach liability to only those scenarios where an attorney's conduct falls outside of the attorney-client relationship. As a result, malpractice claims will inform the marketplace only of instances that actually speak to a lawyer's ability to directly represent their clients. The actual knowledge standard also provides a solution: an attorney that has overt and direct knowledge of potential fiduciary liability is on direct notice of a potential risk. This standard thus ensures that malpractice information is, at minimum, an adequate reflection of an attorney's ability to perceive and react to known risks emanating from relationships between parties. Therefore, while it offers a less direct safeguard to information accuracy than qualified immunity, the actual knowledge standard provides comfort that malpractice claim information in the legal marketplace is informed by direct representation scenarios and associated risk assessments made by an attorney.

3. Undermining Attorney-Client Confidentiality

In the context of aiding and abetting fiduciary breach disputes, previously confidential attorney-client information will necessarily be entered into the public record due to the claim's knowledge requirement.[195] As a result, the attorney aiding and abetting fiduciary breach doctrine poses a serious risk to confidentiality that lies at the heart of the attorney-client relationship, and the knowledge element accordingly defines this risk within a given state by forming a weaker or stronger barrier to liability depending on the adopted knowledge standard.[196] In fact, the possibility of nonclient liability will likely affect an attorney's approach to confidentiality before a claim is even brought—a prudent attorney would then be forced to, at least in some

194. *See, e.g.*, Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756 (S.D. 2002).

195. Professor Lewinbuk underscores the need to show a lawyer's knowledge surrounding her representation of a client as the primary source of this problem: "Such disclosure [of otherwise confidential information] will likely be unavoidable in a majority of aiding and abetting cases as the attorney will need to establish how much she knew or did not know about her client's alleged breach of fiduciary duty." Lewinbuk, *supra* note 10, at 170.

196. *See, e.g.*, Reynolds v. Schrock, 142 P.3d 1062, 1068–69 (Or. 2006) ("[A] third party's claim against the lawyer that puts the lawyer at odds with the client will compromise the lawyer-client relationship . . . . [A]llowing a claim against the lawyer may raise issues of lawyer-client privilege, if the preparation of an adequate defense for the lawyer would require the disclosure of [confidential] communications.").

manner, anticipate disclosure of otherwise confidential information. The mere anticipation of breaching confidentiality can diminish, if not destroy, the trust that lies at the core of the attorney-client relationship.[197]

Again, the qualified immunity standard provides a solution: by eliminating liability for conduct within the attorney-client relationship, no need for disclosure of that conduct or associated information would ever arise. Actual knowledge also provides an answer by restricting the scope of an examining court's inquiry to explicit evidence of a lawyer's knowledge rather than engaging in the normative inquiry of relationship length and depth that defines the constructive knowledge standard. As a result, both qualified immunity and actual knowledge preserve attorney-client confidentiality to a far greater extent than constructive knowledge.

D. Economic Efficiency Concerns

This section shifts to the goal of economic efficiency as a backdrop to this Note's argument for the rejection of constructive knowledge. Accordingly, this section focuses on two main arguments: (1) the rejection of lawyers as cheapest cost avoiders and (2) the heavy economic burdens associated with unrestricted liability of lawyers to nonclients.

1. Lawyers Are Not the Cheapest Cost Avoiders

Judge Richard Posner defines a goal of judicial policy as finding the lowest cost avoider and placing the applicable responsibility on them.[198] This tool of the law and economics school acts as a policy guide in scenarios where a doctrine must decide which parties are suited to bear a legal responsibility in the most efficient manner. In the attorney aiding and abetting context, this is the logic underlying the conclusions of scholars like Pietrusiak, who argue that the expansion of the lawyer's role justifies the lawyer's doctrinal mantle as a cheapest cost avoider.[199] This argument is wrong.

While the lawyer's role has expanded within society and the wider economy, that expansion does not necessarily indicate a greater ability to perceive relationship structures and associated risks. Particularly among increasingly complex transactional contexts,[200] the direct participants are in the best position to perceive the nature of those relationships. While lawyers are increasingly more involved in guiding and advising the formation of

---

197. *See id.*

198. Richard A. Posner, *Guido Calabresi's* The Costs of Accidents*: A Reassessment*, 64 MD. L. REV. 12, 16 (2005) ("[T]he goal is defined as finding the 'cheapest cost avoider' and putting the legal responsibility on him. It provides a useful way of beginning to think about legal doctrines [and] procedures . . . .").

199. *See* Pietrusiak, Jr., *supra* note 15, at 256.

200. Fortune Magazine recently noted that global mergers and acquisitions activity "hit $3.5 trillion in 2014, which is up 47% from [2013] . . . . Thomson Reuters also reported that there was nearly $562 billion of global private equity activity in 2014. That's the industry's highest mark since 2007, and a 43% bump over 2013." Dan Primack, *2014 Was a Huge Year for M&A and Private Equity*, FORTUNE (Jan. 5, 2015), http://fortune.com/2015/01/05/2014-was-a-huge-year-for-ma-and-private-equity/ [https://perma.cc/R3VC-VSY3].

fiduciary relationships, the true architects are the fiduciaries themselves. In the *Granewich* case, the partners directly participating in the business were in the best position to assess their relationship because it was conceived of, and ultimately formed, by the business participants themselves rather than their lawyers.[201] In fact, there are entire professions organized around making financial and business judgments that advise fiduciaries of the ideal pathways to initiating a relationship.[202] While a lawyer is sometimes involved in this process as well, the exercise of business judgment is not an attorney's primary role. Direct fiduciary participants, however, play the primary role of defining those relationships. As a result, the cheapest cost avoiders are the direct participants in fiduciary relationships because they can most easily be depended on to know the nature of the relationships they craft. Accordingly, adopting jurisdictions need to define the aiding and abetting knowledge element in a way that primarily targets direct fiduciary participant knowledge in the resolution of disputes rather than less efficient alternatives. Once again, qualified immunity and actual knowledge provide solutions.

The qualified immunity standard allows fiduciary knowledge to be efficiently maximized by restricting liability only to those instances in which the conduct was not that of an attorney but a direct fiduciary participant whose primary role is to define and act within the fiduciary relationship in question. Rather than engaging in a subjective inquiry surrounding the lawyer's knowledge, qualified immunity makes an objective inquiry asking simply whether the attorney conduct falls within the direct attorney-client relationship.[203] Effectively, this eliminates subjective dependence on a lawyer's knowledge and shifts the knowledge inquiry onto the cheapest cost avoiders: direct relationship participants.

Actual knowledge similarly allows for normative inquiries surrounding fiduciary relationships to be isolated only to direct relationship participants rather than attorneys. The standard's requirement of overt and direct evidence of lawyer's knowledge provides the solution: rather than constructively look to a lawyer as the primary source of any such knowledge, we consider the claim viable only if the lawyer has overt and obvious knowledge beyond what would be initially expected of a typical attorney-client relationship. In this sense, actual knowledge also does not engage in any subjective analysis of the lawyer's knowledge of the relationship, because a key tenet of this approach is its requirement that the degree of knowledge actually demonstrated by the facts exceeds a typical attorney-client interaction. As a result, this option provides some flexibility to account for the lawyer's expanding role: when a lawyer is engaged in defining relationships to such an extent that she essentially behaves as a direct participant and have overt and obvious fiduciary knowledge, then that knowledge is still being efficiently maximized. Thus, actual knowledge also

201. *See* Granewich v. Harding, 985 P.2d 788 (Or. 1999).
202. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51 (AM. LAW INST. 2000).
203. *See supra* Part II.B.

remains an effective tool to restrict normative judicial inquiries into party relationships only to direct participants rather than attorneys.[204]

2. Economic Burdens of Constructive Knowledge Liability

This subsection addresses the economic costs, both direct and indirect, that are triggered by a constructive knowledge framework for the aiding and abetting fiduciary breach doctrine. Specifically, this section addresses (1) direct economic costs of these disputes and (2) indirect costs emanating from the resulting erosion of economic structures surrounding the attorney-client relationship.

a. Direct Economic Costs

With each aiding and abetting claim successfully leveled against attorneys, direct costs materialize in the form of judicial docket overcrowding and increasingly severe costs within each claim. Professor Lewinbuk has noted that courts have already seen an increase in nonclient attorney malpractice claims,[205] and recent data indicates that costs associated with each such claim against lawyers also are rising.[206] As mentioned, the aiding and abetting claim's evidentiary elements act as controls on these costs.[207] Accordingly, the knowledge element plays a key role in determining not only the number of claims brought against attorneys but also the level of cost associated with each claim. While a lax knowledge standard (i.e., constructive knowledge) ostensibly leads to greater costs and docket flooding, a more demanding standard (such as actual knowledge) would sufficiently mitigate these concerns by requiring evidence that a lawyer's fiduciary knowledge was truly overt to trigger a claim's validity. Considering also the potential for frivolous claims raised by nonclients against attorneys, the adoption of a constructive knowledge standard leads to potential misallocation of judicial and economic resources, both in the macro sense of case backlog as well as the micro sense of rising individual case costs. As a result, adopting jurisdictions should weigh direct judicial and economic costs against any inclination to implement lax evidentiary standards, particularly against the implementation of a constructive knowledge standard.

---

204. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51.

205. *See* Lewinbuk, *supra* note 10, at 137–41. Arbitrary increases in attorney liability hearken directly to the *Savings Bank*'s majority opinion's worry of overwhelming judicial resources with such claims. *See* Sav. Bank v. Ward, 100 U.S. 195, 199 (1879).

206. For a survey detailing the increasing severity of recent legal malpractice claims, see AMES & GOUGH, LAWYERS' PROFESSIONAL LIABILITY CLAIMS TRENDS: 2015 INSURER SURVEY (2015), http://www.law.uh.edu/faculty/adjunct/dstevenson/007a%20Legal%20Malpractice%20Claims%20Survey%202015%20Final.pdf [https://perma.cc/7XMA-TF5F].

207. *See Sav. Bank*, 100 U.S. at 207.

b. Indirect Costs: Erosion of Existing Economic Structures

Changing any professional relationship's core framework endangers not only the direct relationship's participants but also the economic structures that depend upon it. As the lawyer's role expands and the attorney-client relationship evolves accordingly, it is essential to note the orientation of the surrounding economic systems: as the attorney's role deepens, the transactions and disputes at the core of modern legal work have become increasingly more complex. In these contexts, clients understandably trust in the exclusive loyalty of their attorney rather than considering third party conflicts triggered by nonclient liability.[208] As Professor McClane addresses in his analysis of initial public offerings, the possibility of diminished trust between an attorney and client can be fatal to a complex transaction.[209] The ease of nonclient access to attorney liability through a constructive knowledge standard underscores these concerns: by allowing an adequate knowledge showing from such a low evidentiary bar as the duration of a fiduciary relationship, it is possible that constructive knowledge is satisfied even in complex scenarios where lawyers truly have no fiduciary knowledge. As a result, the attorney-client relationship surrounding complex transactions and disputes is eroded due to the possibility of nonclient attorney liability. Legal and economic costs to clients associated with those transactions and disputes, although not necessarily a direct result of an aiding and abetting claim, will then increase due to the ever-present specter of potential conflict.[210] Thus, constructive knowledge liability triggers widespread risk by eroding attorney-client trust of the core of these relationships and the framework of the economic structures they govern.[211] Again, the qualified immunity and actual knowledge standards provide key safeguards against this risk by limiting liability only to conduct outside the attorney-client relationship (in the case of qualified immunity) or those instances of overt attorney fiduciary knowledge (in the case of actual knowledge).

E. Doctrinal Consistency Concerns

This section now addresses the negative effects that adoption of constructive knowledge has upon the soundness of tort doctrine. This section

---

208. Their lawyers also make this assumption too, following the general rule of no civil liability to nonclient third parties. *See supra* Part III.C.

209. *See* McClane, *supra* note 113, at 150–51.

210. Decisions based on trust within an attorney-client team that are normally quick and efficient will take longer and require a less efficient use of resources. *See id.*

211. *See generally* Kathryn Judge, *Fragmentation Nodes: A Study in Financial Innovation, Complexity, and Systemic Risk*, 64 STAN. L. REV. 657 (2012) (discussing increasing complexity of financial transactions in the modern context and the associated systemic risks); Eugene M. Katz & Theodore M. Claypoole, *Willie Sutton Is on the Internet: Bank Security Strategy in a Shared Risk Environment*, 5 N.C. BANKING INST. 167 (2001) (addressing the increasing complexity of technological security concerns surrounding interbank and intrabank transactions); Natalie A. Turchi, Note, *Restructuring a Sovereign Bond Pari Passu Work-Around: Can Holdout Creditors Ever Have Equal Treatment?*, 83 FORDHAM L. REV. 2171, 2188–92 (2015) (discussing problematic structural disruptions in complex transactional and dispute resolution scenarios).

comprises two arguments: (1) adequate existing liability from a policy standpoint and (2) hydraulic balancing and the maintenance of a consistent nexus of proportionality for tort liability.

1. Adequate Existing Liability

Notably, claims such as fraudulent attorney conduct, misappropriation, and conversion often are considered totally separate claims from aiding and abetting fiduciary breach. Thus, these claims are not foreclosed by failure to satisfy the aiding and abetting doctrine. Rather, these actions are considered outside the boundaries of a professional relationship between attorney and client. Thus, the attorney's allegedly tortious conduct is analyzed as that of an ordinary party.[212] Again, this illustrates, from a policy perspective, the unnecessary nature of aiding and abetting claims falling short of, at minimum, actual attorney fiduciary knowledge. Moreover, aiding and abetting fiduciary breach claims exist in the context of direct liability claims against the attorney's client. Thus a nonclient third party already has sufficient recourse against both attorney and client by way of direct fiduciary breach claims without the second bite at the apple provided by a constructive knowledge standard.

2. Hydraulic Balancing and the Nexus of Proportionality

Within the aiding and abetting claim's extension of attorney liability beyond traditional boundaries, firm evidence of fiduciary knowledge must be required to preserve the central nexus of proportionality that has defined the development of tort liability. By ensuring a hydraulic adjustment of evidentiary standards when liability arises from increasingly attenuated relationships,[213] tort doctrine maintains its status as an objective standard of liability proportionate to the closeness of party relationships and the evidence of wrongdoing between those parties. There are two doctrinal examples that can be used to show hydraulic balancing of relationship closeness against evidentiary requirements as applied to the aiding and abetting claim: (1) the adjustment from the duty of care (under a negligence rubric) to the duty of loyalty (under a fiduciary rubric) and (2) the comparison of direct negligence liability to vicarious negligence liability under the doctrine of respondeat superior.

a. From Macpherson *to* Meinhard

The original formulation of fiduciary liability under *Meinhard* established a direct hydraulic association between the closeness of the relationship between the parties and the required evidentiary showings for liability of

212. *See, e.g.*, Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398, 406–07 (Tex. App. 2005).

213. In this instance, fiduciary breach liability outside of a fiduciary relationship (between an attorney and a nonclient).

those parties to each other.[214] The extension of lawyer fiduciary liability to nonclients under the aiding and abetting claim can effectively be viewed as an analogous increase in the obligations that a lawyer owes to a party outside of the attorney-client relationship (being elevated from negligence duty to fiduciary duty), yet the relationship between an attorney and a nonclient remains attenuated and thus disrupts the relationship-evidence balance. Following the doctrinal "ratcheting" that balances the closer relationship of the fiduciaries in *Meinhard* with greater evidentiary obligations[215] than were required under the negligence-based analysis of *Macpherson*, it follows that aiding and abetting fiduciary breach claims should require greater evidence of knowledge than negligence-like constructive knowledge requirements.[216] Thus, constructive knowledge is an inappropriate standard for jurisdictions wishing to maintain this balance because constructive knowledge would effectively equate fiduciary and negligence evidentiary standards despite the closer nature of relationships in a fiduciary context.

b. From Direct Negligence Liability to Vicarious Negligence Liability

A second example of hydraulic balancing of the closeness of party relationships against greater evidentiary requirements is the existing extension of negligence liability from employer to employee under respondeat superior. This doctrine preserves proportionality by balancing the extension of liability beyond an employee to an employer against greater evidentiary requirements demonstrating an employer-employee relationship between the primary tortfeasor (the employee) and the secondary tortfeasor (the employer) in applicable claims.[217] As with the move from negligence to fiduciary liability, this shift from direct to vicarious liability provides guidance for arguing that evidentiary requirements should heighten as the relationship defining liability becomes more attenuated. Thus, vicarious liability provides an analog arguing for a knowledge standard more rigorous than constructive knowledge. For this reason, qualified immunity or actual knowledge are more favorable options for application within the aiding and abetting claim.

---

214. *See generally* Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928). A closer relationship triggers a fiduciary duty rather than a negligence-oriented duty of care. The obligations of a fiduciary are strict—"the punctilio of an honor the most sensitive"—compared to the "morals of the marketplace" that guide the negligence-based duty of care. *See id.* at 546. As relationships between parties become more attenuated, more evidence is thus required for a valid claim.

215. For example, higher fiduciary obligations only attach upon the finding of a prior business partnership. *See id.*

216. Such a standard would require only that the lawyer "reasonably should have known" of the impending fiduciary breach for liability to attach.

217. For a discussion of the requirements for a finding of employer-employee vicarious liability, see generally Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995).

F. Future Guidelines: When to Apply Actual Knowledge Versus Qualified Immunity Standards

The above arguments leave courts with two options for the knowledge standard: qualified immunity or actual knowledge. This section considers two decisive axes that courts must consider when choosing the ideal standard: (1) whether liability should be based on evidentiary knowledge or preexisting standards surrounding the attorney-client relationship and (2) whether the adjudicating court favors inquiries into the merits of the attorney's conduct or a clear rule that attaches liability on the basis of relationships alone. Further, this section addresses a decision to be made if the qualified immunity standard is chosen: whether the standard should be applied broadly, ruling out attorney liability for any conduct within the direct representation of a client, or narrowly, ruling out liability only for conduct within the initial scope of the counsel that the client requested from the attorney in question.

1. Evidentiary Knowledge Versus Relationships as a Basis of a Claim

The doctrine surrounding the choice between qualified immunity and actual knowledge standards is clear: if a court prefers a policy making an inquiry into a lawyer's knowledge as a basis for liability, then actual knowledge is the appropriate standard. Conversely, if a court prefers to dictate attorney liability along preexisting relationship standards, then qualified immunity is preferable.

2. Clarity of Law Versus Meritorious Conduct Inquiry

The second fault line of analysis is whether a court wants to engage in an inquiry into the merits of attorney conduct or prefers a bright-line rule demarcating attorney liability to third parties around the attorney-client relationship alone. If an adjudicating court prefers the former method of analyzing the attorney's conduct in the context of evidence (or lack thereof) of overt fiduciary knowledge, then actual knowledge is the appropriate standard. Implicit within any inquiry into knowledge is an analysis of the attorney's reaction to any fiduciary knowledge she has.[218] Thus, actual knowledge still provides an avenue for judicial review of the merits of attorney conduct with knowledge as a defining backdrop. Qualified immunity, conversely, makes no such inquiry. The sole inquiry, at least initially,[219] under this standard is whether the attorney conduct at issue falls within the attorney-client relationship.[220] As a result, this standard provides

218. For example, if an attorney has overt knowledge that her client has a fiduciary obligation to a nonclient third party and fails to act in response to that knowledge, this interplay between knowledge and failure to respond would be key to an adjudicating court's analysis under the aiding and abetting fiduciary breach doctrine.

219. *See infra* Part III.F.3 (concerning further decisions as to the breadth of liability's applicability).

220. *See generally* Alpert v. Crain, Caton & James, P.C., 178 S.W.3d 398 (Tex. App. 2005).

the bright-line rule that will advance the policy of clear application of law favored by many adjudicating courts.

3. Within Qualified Immunity: Broad Versus Narrow Application

Once a court has made the decision to adopt a qualified immunity standard, a secondary decision needs to be made: should the standard be applied broadly (providing greater limitation of attorney liability) or narrowly (providing less protection to attorneys facing nonclient liability)? This difference was highlighted in the dissenting opinion of *Cantey Hanger*.[221] While the majority accepted a broad interpretation of qualified immunity,[222] the dissenting opinion disagreed: it argued that the standard should be applied narrowly, conferring protection only to conduct within the subject matter of the attorney's initial employment rather than to all attorney-client conduct.[223]

As a result, qualified immunity jurisdictions have the option to make a further policy decision: whether to broadly apply protection to the attorney-client relationship or further qualify the immunity by requiring the protected conduct to fall within the specific subject matter of the attorney's initial employment. Broad immunity provides far-reaching protections of the practice of law, advancing the policies above. While narrow immunity decreases this protection somewhat, this could provide an option to courts that wish to apply bright-line relationship rules yet harbor concerns about the overrestriction of attorney liability. All in all, the *Cantey Hanger* dissent opens a door to further policy tools at the disposal of qualified immunity jurisdictions.

CONCLUSION

The constructive knowledge standard must be rejected in favor of the actual knowledge or qualified immunity alternatives when aiding and abetting fiduciary breach claims are made against attorneys by nonclients. The civil aiding and abetting fiduciary breach claim originated out of the body of twentieth-century jurisprudence surrounding fiduciary liability. When leveled against attorneys by nonclients, the four key elements that compose the claim lead to multiple concerns when placed against the backdrop of the legal profession and the surrounding attorney-client relationship. One of those elements in particular, the element examining the attorney's fiduciary knowledge, presents such concerns. The two current standards of interpreting attorney fiduciary knowledge, constructive knowledge and actual knowledge, in conjunction with the qualified immunity

221. *See* Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 486 (Tex. 2015) (Green, J., dissenting).

222. Articulating that the protection from liability extends to any conduct within the attorney-client relationship. *See id.* at 481 (majority opinion).

223. In the case of *Cantey Hanger*, this was divorce litigation and settlement. *See id.* at 479.

standard (rejecting any such knowledge inquiry), compose the current range of approaches to the knowledge element.

Constructive knowledge provides a problematic choice for five central reasons. First, the constructive knowledge standard is incomplete and relies on either actual knowledge or other elements of the claim as a doctrinal fallback. Second, the well-established use of existing pleading standards as guidelines for evidentiary requirements is disrupted by the lower standards of constructive knowledge. Third, attorney liability emanating from constructive knowledge triggers professional responsibility concerns surrounding the viability of the attorney-client relationship. Fourth, constructive knowledge liability triggers economic efficiency concerns applying both directly to attorney-managed transactions and disputes, as well as indirectly to wider economic structures. Fifth, and finally, constructive knowledge would render the doctrine of civil liability inconsistent as a whole.

To mitigate these concerns as well as provide a sound doctrine of tort liability for the twenty-first century, courts should look to the alternatives of actual knowledge and qualified immunity, which provide more objective, clear, judicially sound, and economically efficient results. Within these alternatives, this Note has outlined remaining options for courts to tailor the knowledge element to fit their individualized policy goals. The rejection of constructive knowledge in favor of either actual knowledge or qualified immunity allows for a doctrinally sound approach while maintaining the necessary protection of the professional and economic frameworks surrounding the attorney-client relationship.