

A New Twist on Aiding and Abetting Liability Involving Lawyers

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A lawyer's standard risk for liability exposure comes from a lawsuit brought by a client alleging that the lawyer has breached some duty to the client causing damages, typically seen as a legal malpractice claim. However, we sometimes see lawsuits brought by non-clients against opposing counsel. These actions are usually grounded in a claim that the lawyer (opposing counsel) caused or aided in some alleged misconduct of the lawyer's client, which caused the claimant to suffer damages. We often see these claims brought as the aiding and abetting of a breach of some fiduciary duty on the part of the claimant's opponent (the lawyer's client), with the lawyer and the client as named defendants.

We also see these claims in other contexts (i.e., bankruptcy proceedings), such as when a client's creditors accuse a lawyer of helping the client hide assets and, more recently, in a claim alleging a lawyer aided a debt collector in violating the Fair Debt Collection Practices Act (FDCPA). The general theory behind these claims is that while providing legal services, the lawyer helped a client perform some act that violated the law or the client's duties to another party.

A recent case out of Nevada highlights a new twist on aiding and abetting liability involving a lawyer. In that case, the lawyer, who was in-house counsel for a corporation, was accused of helping her client remove confidential information from a former client/corporation in a misappropriation of trade secrets dispute between two companies. The lawyer had previously worked in-house at the claimant corporation. The claimant corporation accused the lawyer of taking confidential information to her new job. To broaden the claim beyond the lawyer, the corporate claimant brought an aiding and abetting breach of fiduciary duty claim against certain officers of the defendant corporation, alleging the named individuals encouraged or aided the lawyer in taking the confidential information from her prior employer.

The court found that such a claim was cognizable under Nevada law. It determined that because the lawyer owes a fiduciary duty to the prior client, should the facts show that the officers aided the lawyer in breaching that fiduciary duty to her former client, they too could be liable, along with the lawyer, under this common law aiding and abetting tort claim.

From a practice standpoint, lawyers should remain cognizant of liability exposure based upon claims that their activities could lead to aiding and abetting liability, if those activities cause a client to breach

some duty or violate some statute that impacts a third party. Lawyers should be equally mindful that this liability can flow both ways. If the lawyer's activities expose the lawyer to liability and could be perceived as having been aided by a client, that client also may face potential exposure through an aiding and abetting a common law tort claim.

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