

COLORADO LAWYERS BEWARE: ANSTINE V. ALEXANDER AND THE ATTORNEY'S NEW DUTY TO NON- CLIENTS

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In Anstine v. Alexander, the Colorado Court of Appeals addressed the issue of whether an attorney can be found liable for aiding and abetting his client's breach of fiduciary duty to a non-client. Although the attorneys in question were absolved of legal malpractice liability to the corporation they represented, the defendant-attorneys were found liable for aiding and abetting the president's breach of fiduciary duty to the corporation's creditors. Interestingly, the same piece of advice that was given by the attorneys to the president of the corporation was at the heart of both the malpractice claim and the aiding and abetting claim. Though the Colorado Supreme Court recently overturned Anstine on other grounds, the Court specifically noted that the question of whether an attorney can be liable for aiding and abetting a breach of fiduciary duty to a non-client remains open for review.

Given the likelihood that the Colorado Supreme Court will revisit the question in the future, this Casenote critiques the reasoning behind the appellate court's decision, instead arguing for a rule that a claim of aiding and abetting a client's breach of fiduciary duty to a non-client should only be available where it is found that the attorney acted either fraudulently or maliciously in dispensing advice to his client. Following the Court of Appeals' reasoning would open a back door for third party adversaries of an attorney's client to impose a constructive duty upon attorneys who would otherwise owe the third parties no fiduciary duty. Holding attorneys liable on such a claim fatally undermines the foundations of the attorney-client relationship, potentially preventing attor-

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neys from zealously representing the interests of their clients where those interests conflict with those of the potential adversary.

INTRODUCTION

Traditionally, with few exceptions, attorneys have owed duties only to their clients. The attorney-client relationship, one of the cornerstones of America's adversarial legal system, demands that lawyers feel free to ethically advise their clients without fear that their advice will be used against them by third parties. Otherwise, a lawyer might not act in the best interests of his client; rather, the lawyer could act in the interest of his client's adversaries, perhaps to the detriment of his own client.

In *Anstine v. Alexander*, the defendant-attorneys were accused of providing advice to their client's president that was used to defraud the corporation's creditors.¹ A bankruptcy trustee, "standing in the shoes" of both the corporation and the corporation's creditors, brought legal action against the attorneys.² Although they were absolved of legal malpractice liability to the corporation they represented, the defendant-attorneys were found liable for aiding and abetting the president's breach of fiduciary duty to the corporation's creditors.³ The same piece of advice that was given by the defendant-attorneys to the president of the corporation was at the heart of both the malpractice claim and the aiding and abetting a breach of fiduciary duty claim. While this advice did not constitute malpractice, the advice nonetheless constituted the aiding and abetting of a breach of fiduciary duty owed by the president to the corporation's creditors.

Though the Colorado Supreme Court recently overturned *Anstine*, the "question of whether an attorney can ever be liable for aiding and abetting a breach of fiduciary duty to a non-client" remains open for review.⁴ Therefore, given the importance of this issue and the likelihood that the Colorado Supreme Court will revisit the question in the future, this Casenote critiques the reasoning behind the appellate court's

1. See *Anstine v. Alexander*, 128 P.3d 249, 253 (Colo. Ct. App. 2005), *cert. granted*, No. 05SC367, 2006 Colo. LEXIS 148 (Colo. Feb. 21, 2006).

2. *Id.* at 254.

3. *Id.* at 255.

4. *Alexander v. Anstine*, 152 P.3d 497, 503 (Colo. 2007).

decision. This Casenote argues for a rule that would generally prevent attorneys from being held liable as aiders and abettors to a client's breach of fiduciary duty to a third party. Holding attorneys liable on such a claim fatally undermines the foundations of the attorney-client relationship and will prevent attorneys from zealously representing the interests of their clients. Hopefully, the following analysis will dissuade future courts from ruling similarly to the Colorado Court of Appeals.

The court of appeals' decision in *Anstine* is even more disconcerting given that the attorneys were found liable under an aiding and abetting theory while the accompanying legal malpractice claim was simultaneously dismissed. This holding opens a back door for third parties in a fiduciary relationship with an attorney's client to tacitly impose a constructive duty upon attorneys who would otherwise owe the third parties no fiduciary duty. In other words, under such a system, attorneys must give advice to their clients while also considering the needs of any and all of their client's potential fiduciaries. Thus, attorneys would indirectly owe a duty of care to third parties—even though such a duty might conflict with the interests of their clients, to whom attorneys typically owe an undivided loyalty.⁵ Such a rule turns the adversarial system on its head, leaving lawyers open to litigation from any number of third party entities that are able to construct a duty between themselves and the attorney's client—regardless of whether the lawyer acted properly in advising his client.

Part I of this Casenote discusses the facts of *Anstine* and the appellate court's reasoning behind holding attorneys liable for aiding and abetting a breach of fiduciary duty to a third party by their corporate client's president, despite finding that the lawyers had not committed malpractice. Part II of this Casenote reviews the traditional duties attorneys owe to third parties. Part III critiques the Colorado Court of Appeals' analysis, concluding that when the issue arises again, the Colorado Supreme Court should reject the Colorado Court of Appeals' theory of attorney liability found in *Anstine*. Part IV proposes a different rule, allowing an attorney to be found liable of aiding and abetting a client's breach of fiduciary duty to third parties only where the attorney acted fraudulently or maliciously.

5. *People v. Driscoll*, 716 P.2d 1086, 1088 (Colo. 1986).

I. *ANSTINE V. ALEXANDER*

In 2005, the Colorado Court of Appeals addressed the issue of whether, absent a finding of malpractice, an attorney can be found liable for aiding and abetting his client's breach of fiduciary duty to a third party.⁶ In *Anstine v. Alexander*, the appellate court upheld such a claim, explaining that aiding and abetting is a separate claim from malpractice. Therefore, a finding of no liability for malpractice is not necessarily a bar to a claim from a third party that the attorney aided and abetted his client in breaching a fiduciary duty owed to that third party.⁷

A. *Facts*

Anstine arose following the bankruptcy of Builders Home Warranty ("BHW"), a company that sold warranties for new homes.⁸ Between 1993 and 1998, BHW acquired the insurance to back their warranties from two salespeople who held themselves out as representatives of a major insurance company.⁹ In 1998, after learning of a criminal investigation and subsequent prosecution of one of the "representatives," BHW discovered that the salespeople actually perpetrated a fraud and had no connection to the insurance company they claimed to represent.¹⁰ BHW tried to bind the insurance company to the fraudulent conduct of the salespeople by asserting the salespeople were agents of the company and acted with apparent authority.¹¹ This tactic failed, leaving BHW in a precarious position—the company had sold new home warranties, yet possessed no insurance to cover their customers' potential claims.¹²

The defendants, attorneys Hugh Alexander and Kevin Kuznicki, and the law firm to which they belonged, acted as

6. In Colorado, third parties cannot maintain a malpractice claim against an attorney absent an attorney-client relationship. See Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A., 892 P.2d 230, 239 (Colo. 1995). However, an exception arises if there is "a finding of fraud or malicious conduct by the attorney." *Id.* at 235.

7. *Anstine*, 128 P.3d at 255.

8. *Id.* at 252–53.

9. *Id.* at 252.

10. *Id.*

11. *Id.*

12. See *id.*

BHW's insurance counsel.¹³ The attorneys posed two options to company president Andrew Jelonkiewicz: "BHW could 'warehouse' the premium payments [the company] had received from warranty purchasers by placing them in escrow and using the account to purchase replacement coverage, or BHW could file bankruptcy."¹⁴ The president opted to "warehouse" the premiums and immediately sought to acquire replacement coverage.¹⁵

Shortly thereafter, before BHW secured replacement coverage, a competitor of BHW filed a lawsuit in federal court.¹⁶ The competitor alleged the "warehousing" option "was a deceptive and unfair practice which harmed the competitor and gave BHW an unlawful advantage"; they sought to enjoin BHW from selling warranties before acquiring insurance coverage.¹⁷ In response to the filing, the attorneys advised BHW's president to file for bankruptcy, but the president determined that the company would continue the warehousing option and the search for replacement coverage.¹⁸ The president's search yielded a bid from a Swiss company, Swiss Standard Trust Co. ("SST"), which established an insurance company, Equitable Insurance Group ("EIG"), to provide coverage for a limited number of the existing uninsured warranties and any future warranties that would be sold.¹⁹ Despite not securing coverage for all the older warranties, and against the advice of the defendant-attorneys, the president wired the warehoused premium funds to an off-shore escrow account operated by SST.²⁰

A short time later, the United States District Court for the District of Colorado ruled on the unfair practices suit, enjoining BHW from selling any new warranties until it could adequately demonstrate that EIG's policies complied with state insurance regulations.²¹ Furthermore, the court ordered BHW to fully disclose to its clients that the older warranties remained uninsured and that new warranties could not be insured unless ap-

13. *Id.* at 252–53.

14. *Id.* at 253.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*; Petition for Certiorari at 5, *Alexander v. Anstine* (Colo. 2005) (No. 05-SC-367) [hereinafter *Petition for Certiorari*].

21. *Anstine*, 128 P.3d at 253.

proved by the insurance commission.²² Soon thereafter, pursuant to the advice of its attorneys, BHW declared bankruptcy under Chapter 7.²³

Under Chapter 7 bankruptcy, a trustee is named to liquidate all the assets of the declaring entity and to distribute the proceeds to the entity's creditors.²⁴ The trustee is able to bring claims as a hypothetical judgment lien creditor pursuant to state laws.²⁵ The *Anstine* appellate court determined that in Colorado, "any hypothetical judgment lien creditor . . . [has] standing to sue the attorneys for malpractice causing injury to BHW and to sue BHW's president for breach of his fiduciary duty to BHW and, if BHW was insolvent, for breach of his fiduciary duty to BHW's creditors."²⁶ Thus, in *Anstine*, the bankruptcy trustee brought a claim against BHW's president and attorneys, alleging that "the attorneys committed legal malpractice and aided and abetted the president's breach of fiduciary duty to BHW and to its creditors by advising the president to warehouse the warranty premiums and . . . to use those premiums to purchase unacceptable off-shore policies."²⁷ At trial, the jury absolved the attorneys of any malpractice, but held the attorneys liable for aiding and abetting the breach of fiduciary duty owed to creditors.²⁸ While the jury only apportioned one percent of the total liability to the attorneys, the trial court amended the verdict, holding the attorneys and the president jointly liable, and also awarded attorneys' fees to the trustee.²⁹

The attorneys appealed the verdict to the Colorado Court of Appeals.³⁰ The appellate court "vacate[d] the judgment as to the imposition of joint liability, affirm[ed] it in all other re-

22. *Id.*

23. Petition for Certiorari, *supra* note 20.

24. See 11 U.S.C.A. § 726 (West 2004 & Supp. 2006).

25. 11 U.S.C. § 544(a)(1) (2000). The trustee may bring claims as a "creditor that extends credit to the debtor . . . and that obtains . . . a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists." *Id.*

26. *Anstine*, 128 P.3d at 254. While this assertion was overturned by the Colorado Supreme Court in *Alexander v. Anstine*, 152 P.3d 497 (Colo. 2007), the issue of whether the attorneys could be held liable as aiders and abettors to a non-client was saved "for another day." *Id.* at 503.

27. *Anstine*, 128 P.3d at 253.

28. *Id.*

29. *Id.*

30. *Id.* at 252.

spects, reverse[d] the order awarding attorney fees, and remand[ed] for further proceedings.”³¹ The attorneys appealed this decision to the Colorado Supreme Court, which later ruled in their favor on other grounds.³²

B. The Colorado Court of Appeals’ Decision

The court of appeals faced a difficult issue—could the attorneys “be liable to BHW’s creditors for aiding and abetting the president’s breach of fiduciary duty” even if the attorneys owed no duty to the creditors in the first place?³³ The court answered the question in the affirmative, disregarding the trial court’s conclusions that the attorneys owed no duty to their client’s creditors and that the attorneys had not committed malpractice.³⁴ Instead, the appellate court reasoned that liability for aiding and abetting is based solely on the duty the attorney’s client owes to its creditors.³⁵ Therefore, a finding absolving the attorneys of liability for legal malpractice does not necessarily preclude a finding against the attorneys for aiding and abetting, even though the same piece of advice is at the center of both claims.³⁶

The Colorado Court of Appeals opened its analysis by distinguishing between legal malpractice and aiding and abetting a breach of fiduciary duty.³⁷ Whereas legal malpractice involves a duty owed to a client by his attorney, aiding and abetting a breach of fiduciary duty deals with a defendant’s “knowing participation” in a breach of fiduciary duty owed by another to the plaintiff.³⁸ In the end, “the jury found that BHW’s president breached the fiduciary duty he owed [to] . . . [BHW’s creditors] by warehousing premiums and transferring escrowed premiums offshore.”³⁹ Additionally, the jury found that “the

31. *Id.*

32. *Alexander v. Anstine*, 152 P.3d 497, 503 (Colo. 2007) (holding that the bankruptcy trustee did not have standing to sue the president and thus lacked standing to sue the attorneys; the Court therefore did not reach the issue of whether attorneys can be held liable for aiding and abetting a breach of fiduciary duty to a non-client).

33. *Anstine*, 128 P.3d at 255.

34. *Id.*

35. *Id.* at 255–56.

36. *Id.*

37. *Id.* at 255.

38. *Id.*

39. *Id.*

attorneys . . . aided and abetted the breach" because the attorneys advised the president about the warehousing option.⁴⁰

The defendant-attorneys argued "that liability cannot be imposed upon a lawyer for aiding and abetting a breach of fiduciary duty owed by a client to a third person who is not the lawyer's client."⁴¹ The appellate court noted that "absent a showing of malice, fraud, willful and wanton conduct, or any other circumstances giving rise to a duty of care, lawyers [do] not owe [a] fiduciary duty to" third parties.⁴² However, the court distinguished this concept from an aiding and abetting claim, and stated that "there is no requirement that an aider and abettor owe a fiduciary duty, or any other duty of care, to a party injured by the principal's breach."⁴³ Thus, the Colorado Court of Appeals upheld the trial court's determination that by advising BHW's president to warehouse the premiums, the appellants aided and abetted their client's breach of fiduciary duty to BHW's creditors even though the defendant-attorneys were not negligent in providing this advice.

C. *A Constructive Duty Imposed*

By allowing the aiding and abetting claim, the *Anstine* court placed a constructive duty upon the defendant-attorneys. While attorneys certainly owe a duty of care to their clients, the court now required them to also consider the interests of their clients' fiduciaries, who may be indirectly impacted by the advice the attorneys provide their clients. In this case, a particular piece of advice constituted aiding and abetting, but did not constitute malpractice. The attorneys were thus placed in a compromised position—apparently, there was nothing wrong with providing the advice to the president until the president used this information to the detriment of third parties. The important question thus becomes, if an attorney's advice constitutes aiding and abetting a breach of fiduciary duty between his client and his client's creditors, how can such advice not also constitute malpractice? If providing the advice is not

40. *Id.*

41. *Id.* at 255–56.

42. *Id.* at 256 (citing *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306 (Colo. Ct. App. 1998)).

43. *Id.* The court further noted that "[t]o be liable as an aider and abettor requires only a knowing participation in the breach." *Id.* (citing *Holmes v. Young*, 885 P.2d 305 (Colo. Ct. App. 1994)).

deemed to be malpractice, how can that advice be said to constitute aiding and abetting a breach of fiduciary duty?

Consider the opinion of the Colorado Supreme Court in *Bebo Construction Co. v. Mattox & O'Brien, P.C.*, where the court held that to establish a legal malpractice claim, one must prove that the attorney "proximately caused damage" to his client.⁴⁴ Holding that the advice an attorney provided aided and abetted a client's breach of fiduciary duty to the client's creditors would seem to demonstrate that the attorney proximately caused damage to his client. With regard to *Anstine*, assuming the aiding and abetting liability was appropriately established, it would be undeniable that BHW was proximately damaged by the advice given by the attorneys to BHW's president. However, the attorneys in *Anstine* were absolved of malpractice liability. Thus, the court's holdings are seemingly in contradiction—either the attorneys were negligent in serving their client by aiding and abetting a breach of fiduciary duty, or the attorneys were neither negligent nor did they aid and abet the president's breach.

Put more simply—to avoid all liability, the attorneys had to look beyond their duty to the client—they also needed to consider the impact such advice would have on third parties, regardless of whether the advice constituted malpractice. Thus, a constructive fiduciary duty ran from the *Anstine* attorneys to their client's creditors, placing similar burdens on the attorneys as if there was a direct fiduciary duty owed by the attorneys to their client's creditors. This is a problematic situation for attorneys, who presumably rely on the malpractice standard as a proxy for "proper" conduct.

II. DUTIES TRADITIONALLY OWED TO THIRD PARTIES BY ATTORNEYS

It has long been held that absent specific exceptions, "the obligation of the attorney is to his client and not to a third party."⁴⁵ In Colorado, attorneys owe a fiduciary duty to act in the best interests of their clients; this duty only extends to third parties where fraud or malice is involved.⁴⁶ The Colorado Court of Appeals stated that the general reasons behind such

44. 990 P.2d 78, 83 (Colo. 1999).

45. *Sav. Bank v. Ward*, 100 U.S. 195, 200 (1879).

46. *See Weigel v. Hardesty*, 549 P.2d 1335, 1337 (Colo. Ct. App. 1976).

limitations on the liability of attorneys to third parties include: "(1) the attorney's duty of loyalty and effective advocacy for his client; (2) the nature of the adversarial relationship between an attorney and other parties; and (3) the potential liability to an unlimited number of third parties if attorney liability to third parties is extended."⁴⁷ These reasons are essentially public policy arguments for limiting the duty of attorneys to third parties. These concerns reflect the traditional view that lawyers owe undivided loyalty solely to their clients.

While the *Anstine* court was only bound by Colorado state law and federal constitutional opinions, the decisions of courts in other states serve as persuasive authority and can offer additional insight in addressing the issue at hand. A full description of these approaches follow.

A. *Fraud Exception*

Fraudulent conduct by an attorney against a third party can negate the general rule that the attorney owes no duty to the third party.⁴⁸ Fraud is defined as a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."⁴⁹ A Texas case, *Querner v. Rindfuss*, provides an example of the fraud exception.⁵⁰ In this will-contest case, the plaintiff-beneficiaries alleged that the defendant-attorney had aided the executor in a fraudulent misappropriation of funds from the deceased's estate.⁵¹ The court held that, if proven, the fraud would "vitiate[] all privileges," allowing the plaintiffs' claims against the attorney.⁵² In essence, this fraud exception constructively places a duty upon attorneys to third parties where the attorney has engaged in fraudulent activity. Such an exception runs counter to a purely adversarial system where lawyers owe a duty of loyalty only to their clients.

47. *Montano v. Land Title Guarantee Co.*, 778 P.2d 328, 330-31 (Colo. Ct. App. 1989). See generally Joan Teshima, Annotation, *Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R.4th 615 (1988).

48. See *Weigel*, 549 P.2d at 1337.

49. BLACK'S LAW DICTIONARY 685 (8th ed. 2004).

50. 966 S.W.2d 661, 670 (Tex. App. 1998).

51. See *id.* at 665-66.

52. *Id.* at 670.

Regardless, the public policy implications of such an exception are clear. Clients, who typically have very little knowledge of the law, rely upon attorneys for their expertise. The work attorneys perform affects not only their clients, but also innumerable third parties. A fraud exception thus protects third parties who otherwise could be defrauded by a malevolent attorney. Incidentally, the exception also protects the attorney's clients, who have unwittingly placed their attorney in a position to defraud a third party. Considering the elevated position attorneys hold within the legal system, there is a great potential for abuse of power. Discouraging attorneys from acting fraudulently toward third parties is necessary to maintain an equitable adversarial system of justice upon which the general public can depend.

B. Malice Exception

Malicious conduct by an attorney can also invite litigation from a third party to whom the attorney would not otherwise owe a duty.⁵³ Malice is defined as the "intent, without justification or excuse, to commit a wrongful act."⁵⁴ Such a definition would seem to build upon the notion of fraud, which focuses singularly on deceit.⁵⁵ However, malice is a broader concept, encompassing other wrongful acts.⁵⁶ In *Kennedy v. Kennedy*, the plaintiffs acquired a piece of land at a foreclosure sale and offered the land in a proposed exchange with the United States Forest Service.⁵⁷ However, the defendant-attorney intentionally misinformed the Forest Service that the plaintiffs did not hold legal title.⁵⁸ The Forest Service subsequently revoked their offer for the parcel.⁵⁹ In fact, the defendant-attorney represented the previous owners of the plaintiff's property, who had unsuccessfully brought suit to prevent the foreclosure.⁶⁰ Consequently, the plaintiffs argued that the defendant-attorney should have known that the foreclosure went

53. See *Weigel v. Hardesty*, 549 P.2d 1335, 1337 (Colo. Ct. App. 1976).

54. BLACK'S LAW DICTIONARY, *supra* note 49, at 976.

55. *Id.* at 685.

56. *Id.* at 976. Presumably, under this definition, fraud would be a subset of malice.

57. *Id.* at 408.

58. *Id.*

59. *Id.* at 409.

60. *Id.* at 408-09.

through.⁶¹ The court held that the plaintiff's allegations raised a cause of action against the defendant-attorney because his actions could be considered "malicious."⁶²

Indeed, if the defendant-attorney had known the plaintiffs had proper title, his misrepresentation could very well be construed as an attempt to maliciously frustrate the plaintiffs' attempt to sell the property. The defendant-attorney likely offered the misrepresentation as a sort of retaliation against those who took possession of the property he failed to keep from foreclosure. It is easy to see how such retaliation falls within the scope of a "wrongful act" "without justification or excuse."⁶³

In short, an attorney's intentional misrepresentation to a third party could form the basis for a malicious conduct exception, thereby allowing a third party to bring suit against him. Again, as with the fraud exception, the malice exception addresses the public policy concern that lawyers are in a position to abuse their authority, harming both their clients and those who interact with their clients. Such exceptions ensure an equitable justice system.

C. *Reliance Exception*

Where an attorney's representations induce a non-client into reliance, some states will allow the non-client third party to sue the attorney.⁶⁴ In *McCamish v. F.E. Appling Interests*, a recreational development company sued the attorneys of its lender.⁶⁵ The recreational company went bankrupt after the lender failed to extend a line of credit that it had previously promised.⁶⁶ Following the recreational company's lawsuit against the lender, settlement negotiations ensued, resulting in an agreement between the parties.⁶⁷ Fearing the agreement would not be enforceable, the parent of the recreational company demanded that the attorneys for the lender verify the le-

61. *Id.* at 409.

62. *Id.* at 410-11.

63. BLACK'S LAW DICTIONARY, *supra* note 49, at 976.

64. See *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794-95 (Tex. 1998) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 73(2) (Tentative Draft No. 8, 1997)).

65. *Id.* at 788-89.

66. *Id.*

67. *Id.* at 789.

gitimacy of the settlement, which the attorneys did.⁶⁸ However, the settlement agreement was never ratified; the attorneys did not have the authority to represent the lender in settlement negotiations.⁶⁹ Subsequently, the Federal Savings & Loan Insurance Corporation was appointed receiver of the insolvent company; this would not have happened if the settlement had been valid.⁷⁰ The court ruled that the plaintiff had a cause of action against the attorneys of the lender if the plaintiff could prove that the attorneys invited the plaintiff's reliance on the settlement's validity. The court noted that the general rule in Texas that a third party cannot rely upon an attorney's statement absent privity of contract did not apply in this situation.⁷¹

A reliance exception recognizes that lawyers may act outside their traditional scope of interacting solely with their clients. In serving clients, attorneys may very well represent their clients' intentions to others, especially in business transactions. Given the attorney's position of authority in legal matters, it is quite feasible that a third party would take the word of the attorney as the word of the client, especially in contract negotiations or initial public offerings. It is therefore desirable to keep attorneys from overstepping their bounds as their clients' representatives and to hold attorneys responsible when they go beyond the mandate of their clients. Again, this policy concern ensures an equitable, though adversarial, system of justice where attorneys are motivated to advocate with honesty and integrity.

D. Third Party Beneficiary Exception

Many states specifically hold that attorneys may owe duties to third party beneficiaries of a contract. A third party beneficiary is defined as "[a] person who, though not a party to a contract, stands to benefit from the contract's performance."⁷² In *Guy v. Liederbach*, a named beneficiary and the executrix of a will filed suit against the attorney-drafter; the attorney had directed the executrix to witness the signing of the will, but do-

68. *Id.*

69. *Id.* at 790.

70. *Id.*

71. *Id.* at 795.

72. BLACK'S LAW DICTIONARY, *supra* note 49, at 165.

ing so invalidated the deceased's legacy and the plaintiff's appointment as executrix.⁷³ The court determined that a named legatee was able to maintain a cause of action against the drafting attorney as a third party beneficiary, as he stood to personally gain from the transaction between the attorney and the testator.⁷⁴

This exception recognizes that in certain instances, an attorney must be cognizant of individuals who stand to gain from the attorney's work with a client. This is especially clear in the estate planning context, where the competency of an attorney has its greatest impact on the heirs of the client. Here, the intent of the attorney-client relationship is to benefit a non-client third party, thus creating a duty of care between the attorney and the third party. This responsibility outweighs the policy goal of sustaining the absolute duty of an attorney to his client in favor of promoting an ethical profession that instills confidence in the general public.

E. Multi-Factor Balancing Test

A multi-factor balancing test has been used by courts to determine whether a duty between an attorney and a third party exists given relevant policy considerations. Different states utilize different factors, though for the most part, the balancing tests encompass similar concepts. Under one example of the multi-factor balancing test, a duty from an attorney to a third party is established upon consideration of six factors: (1) the extent to which the transaction in question was intended to harm the plaintiff; (2) the attorney's ability to foresee the harm to the plaintiff; (3) the level of certainty that injury was suffered by the plaintiff; (4) the nexus between the attorney's conduct and the plaintiff's injury; (5) public policy interests in preventing future harm; and (6) whether the profession would be unduly burdened by a finding of liability.⁷⁵ In short, "[t]he inquiry under this multi-factor test has generally focused on whether the attorney's services were intended to affect the plaintiff."⁷⁶

73. 459 A.2d 744, 746 (Pa. 1983).

74. *Id.*

75. *Bohn v. Cody*, 832 P.2d 71, 76 (Wash. 1992).

76. *Id.* (quoting *Strangland v. Brock*, 747 P.2d 464, 467 (Wash. 1987)) (internal quotation marks omitted).

Bohn v. Cody offers a prime example of the multifactor analysis. In *Bohn*, the plaintiff-parents loaned their daughter money and then sued the attorney who proposed the loan after the daughter failed to repay her debt.⁷⁷ The daughter sought the loan to cover her default on a \$15,000 balloon mortgage payment.⁷⁸ It was significant that the attorney who represented the daughter in foreclosure proceedings was the same attorney who proposed the loan.⁷⁹ The loan was conditioned on the parents receiving a contract deed for the daughter's property.⁸⁰ However, the deed was never transferred to the parents, despite the attorney's assertions to the contrary; IRS liens encumbered the property as a result of the daughter's failure to pay taxes and eventually the house was sold to another couple.⁸¹ Applying the six factors, the court sustained the action, concluding that a duty could exist between the attorney and the parents.⁸² As with the previous exceptions, the balancing test demonstrates a general concern for maintaining the ethical practice of law, while also respecting the importance of the adversarial system.

Unlike all the distinct exceptions discussed above, whereby only limited duties are typically implied between third parties and attorneys, the *Anstine* court greatly expanded the standard of care an attorney must observe when interacting with a third party. Furthermore, the court complicated matters by imposing this new duty indirectly; the liability for aiding and abetting was imposed upon attorneys even when the action in question was found to be ethical for the purposes of a legal malpractice claim.

III. CRITIQUE OF THE COLORADO APPELLATE COURT'S DECISION IN *ANSTINE V. ALEXANDER*

Regardless of the legal reasoning behind the Colorado Court of Appeals' verdict in *Anstine*, public policy concerns demand the opposite outcome; that is, where an attorney's advice to his client's corporate officer does not constitute malpractice,

77. *Id.* at 72.

78. *Id.* at 73.

79. *Id.*

80. *Id.*

81. *Id.* at 74.

82. *Id.* at 77.

that same advice cannot serve as the foundation for aiding and abetting that officer's breach of fiduciary duty to the client's creditors. While the court explains that the attorney owes no direct duty to third parties, its ruling establishes a "constructive duty" that, if ever adopted by the Colorado Supreme Court, could have a devastating impact on the adversarial system in Colorado and will set a dangerous precedent for other states to follow.

A. *The New Constructive Duty*

In Colorado, attorneys owe duties to third parties only where there is a finding of fraud or malice on behalf of the attorney.⁸³ While the *Anstine* court determined that aiding and abetting a breach of fiduciary duty does not necessitate finding a duty running from the lawyer to the third party, a constructive duty nonetheless results if liability for aiding and abetting is upheld in this context. Essentially, by providing the president of BHW with the warehousing idea, the lawyers acted as "the brains" behind the president's actions that were later determined to constitute a breach of fiduciary duty. Thus, to avoid this situation, the attorneys should not have provided the advice. The only reason the attorneys would have withheld such advice is if they had fully considered what was in the best interest of the (then unknown) bankruptcy trustee. Here is the fundamental breakdown in the adversarial justice system caused by this decision. Not only must the attorney consider the effects his advice will have on his client—he must also consider the effect such advice will have on the client's adversary. Essentially, the lawyer is thrust into the position of serving two masters.

Thus, the result of imposing liability for aiding and abetting upon the attorneys is to implement a constructive duty that forces attorneys to respond to the needs of third parties, in addition to the needs of their own clients. These duties will most likely conflict where the client is a debtor and the plaintiff is a creditor. Consequently, an unjust verdict results where an attorney is found liable for aiding and abetting by providing advice that was determined not to constitute malpractice, and

83. Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A., 892 P.2d 230, 235 (Colo. 1995).

thus was deemed to be neither fraudulent nor malicious. Since this constructive duty has the same effects as an actual duty, the Colorado Supreme Court should treat it as such and reject the imposition of liability for aiding and abetting against an attorney to a non-client absent fraud or malice.⁸⁴

B. Limiting the Duties Between Attorneys and their Clients' Fiduciaries: Berg & Berg Enterprises v. Sherwood Partners, Inc.

The California Court of Appeals recently examined the issue of whether an attorney should owe duties to those in a fiduciary relationship with the attorney's clients. In *Berg & Berg Enterprises v. Sherwood Partners, Inc.*, plaintiff Berg sued the defendant law firm for a breach of fiduciary duty relating to Sherwood's performance as an assignee for the benefit of creditors in the bankruptcy proceeding of Pluris, Inc., the assignor.⁸⁵ In the bankruptcy context, the "assignor" is the entity that has become bankrupt, and the "assignee" takes control of the assignor's assets, managing them and distributing them among the assignor's creditors.⁸⁶ A fiduciary duty is "[a] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary . . . to the beneficiary."⁸⁷ Berg argued that the defendant was the fiduciary and that Berg was the beneficiary. Berg was the largest creditor of Pluris, and alleged that defendant Sherwood had intentionally depleted Pluris' assets, leaving Berg without its fair share.⁸⁸ Later, Berg amended its complaint to include the law firm SulmeyerKupetz ("Sulmeyer"), which represented Sherwood.⁸⁹ Berg alleged Sulmeyer acted in concert with Sherwood, though no allegations of fraud were raised against the law firm, nor was any independent duty alleged to exist between Sulmeyer and Berg.⁹⁰ Berg correctly asserted that Sherwood had a fiduciary duty to Berg and the other creditors because Sherwood was the assignee for the benefit of

84. Under Colorado law, absent fraud or malice, an attorney can only owe a duty to his client. See *Weigel v. Hardesty*, 549 P.2d 1335, 1337 (Colo. Ct. App. 1976).

85. 32 Cal. Rptr. 3d 325, 328 (Ct. App. 2005).

86. BLACK'S LAW DICTIONARY, *supra* note 49, at 127, 129.

87. *Id.* at 545.

88. *Berg*, 32 Cal. Rptr. 3d at 328.

89. *Id.*

90. *Id.*

Pluris' creditors.⁹¹ Berg then contended that this fiduciary duty extended from Sherwood to Sherwood's attorney, Sulmeyer.⁹²

The California Court of Appeals specifically tackled the issue of whether the law firm, Sulmeyer, owed a fiduciary duty to its client's fiduciary, Berg, absent any allegation of fraud or attorney misconduct.⁹³ The court established that no authority in California directly addressed the issue as it applied to the attorney of a creditor's assignee; as a result, the court used a balancing test in order to determine whether a duty of care existed in the given situation.⁹⁴ The balancing test included eight factors: (1) the degree to which the transaction was intended to affect the plaintiff (in this situation, the creditor); (2) the foreseeability of injury to the plaintiff; (3) whether the plaintiff actually suffered injury; (4) the nexus between the conduct of the defendant (i.e., the attorney of the assignee) and the injury suffered; (5) the moral blame associated with the conduct of the defendant; (6) the public policy interest in preventing future harm; (7) the probability that the obligation of liability would obstruct the attorney's ethical duties to his client; and (8) the probability that such liability would inflict an undue burden on the legal profession as a whole.⁹⁵ Given these considerations, the California Court of Appeals determined that upholding a duty running from the attorneys to the creditors was overcome by the concerns articulated in factors seven and eight, which "far outweigh any of the other factors that might favor a duty."⁹⁶ Thus, the court determined that no duty existed. In fact, the court concluded that the

existence of such a duty here would simply put Sulmeyer in an untenable and conflicted ethical position vis-à-vis its own client, to whom Sulmeyer owes its undivided loyalty, and would impose too great a burden and a disincentive on a lawyer contemplating the representation of an assignee for the benefit of creditors.⁹⁷

91. *Id.* at 341.

92. *Id.* at 342.

93. *Id.* at 344.

94. *Id.* at 346-47.

95. *Id.*

96. *Id.* at 347.

97. *Id.*

Because the Colorado Court of Appeals has placed upon attorneys a constructive duty to third parties to whom their clients owe a fiduciary duty, the reasoning of the California Court of Appeals in *Berg* is entirely applicable to the situation in *Anstine*. In fact, the similarity between the two cases only highlights how *Anstine* provides an end run around sound public policy. Both cases involved attorneys who represented debtors who owed a fiduciary duty to creditor plaintiffs.⁹⁸ In *Anstine*, the defendants were the attorneys of BHW, whose president, as BHW's agent, owed a fiduciary duty to BHW's creditors—the plaintiffs—under the court's interpretation of Colorado law.⁹⁹ In *Berg*, the defendants were the attorneys of the assignee, who owed a fiduciary duty to the assignor's creditors, which included the plaintiff.¹⁰⁰ Furthermore, in both cases, the plaintiff creditor alleged the debtor had breached its fiduciary duty.¹⁰¹ The plaintiffs then brought the debtors' attorneys into litigation by connecting them to that breach of duty.¹⁰² The methods by which the plaintiffs attempted this feat differed, though. In *Anstine*, the plaintiffs claimed the attorneys aided and abetted the debtor's breach of fiduciary duty, though the plaintiffs never claimed the attorneys owed them a direct duty.¹⁰³ In *Berg*, however, the plaintiffs claimed the attorneys, as fiduciaries of the debtor, owed a duty to the debtor's creditor.¹⁰⁴ In other words, the plaintiffs used different means toward the same end: bringing the attorneys, along with their deep pockets, into litigation.

The *Berg* court concluded that imposing a fiduciary duty between the attorneys and the creditors would be fatal to the attorney-client relationship because the lawyer would have had

98. See *Anstine v. Alexander*, 128 P.3d 249, 252 (Colo. Ct. App. 2005); *Berg*, 32 Cal. Rptr. 3d at 326.

99. *Anstine*, 128 P.3d at 254–55. In breaching his fiduciary duty to BHW, former president Jelonekiewicz exposed himself to liability from BHW's creditors. *Id.* Because of this breach of duty and the fact that BHW was insolvent, Colorado law treats Jelonekiewicz as having breached a fiduciary duty to BHW's creditors. *Id.* Note also that the defendant, *Anstine*, is the bankruptcy trustee and as such, steps into the shoes of BHW's creditors. *Id.*

100. *Berg*, 32 Cal. Rptr. 3d at 341. In *Berg*, the assignee defendant stepped in the shoes of the debtor corporation, Pluris, owing a duty to the corporation's creditors, the plaintiffs. *Id.*

101. See *Anstine*, 128 P.3d at 252; *Berg*, 32 Cal. Rptr. 3d at 326.

102. See *Anstine*, 128 P.3d at 252; *Berg*, 32 Cal. Rptr. 3d at 326.

103. *Anstine*, 128 P.3d at 252.

104. *Berg*, 32 Cal. Rptr. 3d at 326.

to answer to two masters: his client and his client's legal adversary.¹⁰⁵ The same argument can be made in the context of *Anstine*. Allowing the claim of aiding and abetting a breach of fiduciary duty would be devastating to the attorney-client relationship because the lawyer must similarly answer to two masters of opposing interests. Of course, the *Berg* ruling carries only intellectual weight in Colorado—mere persuasive authority. However, the opinion is on point regarding the policy issues involved in *Anstine*, and the Colorado Supreme Court would be well advised to give its reasoning serious consideration in the future.

C. The Legal Connection Between Malpractice and Aiding and Abetting

Moving beyond the issue of whether the Colorado Court of Appeals could have instituted a constructive duty upon all attorneys, serious consideration must be given to whether it is logically possible for an attorney to avoid malpractice, yet still incur liability for aiding and abetting a breach of fiduciary duty. To be liable for aiding and abetting a breach of fiduciary duty, a defendant must knowingly participate in the breach.¹⁰⁶ Such an act would seem to fit within the common definition of malice, which is "[t]he intent, without justification or excuse, to commit a wrongful act."¹⁰⁷ Yet, by absolving the lawyers of malpractice liability, the *Anstine* trial court's verdict also seemed to implicitly absolve the lawyers of engaging in malicious or fraudulent conduct, a necessity if the court was to find any duty between the attorneys and the third party creditors.¹⁰⁸

Thus, from a legal perspective, the jury's findings conflict, and the Court of Appeals reasoning is faulty. In other words—how can an attorney fulfill his duty to his client and participate in a wrong perpetrated by the client at the same time? The *Anstine* court would simply respond that both actions can be committed simultaneously because they are independent of

105. *Id.* at 347.

106. *Holmes v. Young*, 885 P.2d 305, 305 (Colo. Ct. App. 1994).

107. BLACK'S LAW DICTIONARY, *supra* note 49, at 976.

108. See *supra* note 28 and accompanying text. An attorney typically can only be liable to a third party where there is a finding of fraud or malicious conduct. Therefore, if a jury absolves an attorney from a malpractice claim brought by a third party, the attorney necessarily is liable of neither fraud nor malice.

each other—the standard for attorney malpractice has nothing to do with whether the attorney's advice aided the client in perpetrating a wrong.¹⁰⁹ The court arrived at the paradoxical conclusion that properly serving a client includes helping the client perpetrate a wrong against a third party. One possible way of rationalizing the court's logic would be if the attorney owed separate duties to both the client-debtor and the plaintiff-creditor. However, the court specifically denied the existence of any such duty to the plaintiff-creditor.¹¹⁰ Regardless, this is a dangerous line of reasoning, as discussed above in relation to the *Berg* case. Given all these questions and inconsistencies, it is understandable that the Supreme Court of Colorado reserved the issue of when attorneys can owe duties to non-clients for another day.

D. Public Policy Concerns

Overall, the decision in *Anstine v. Alexander* does not properly address the policy concerns it raises. Certainly, there are circumstances in which an attorney must be held responsible to a third party for his actions. As addressed earlier, the court in *Koehler v. Pulvers* held that an attorney serving a securities partnership owed a duty to investors because of public policy concerns, even though no such duty had ever been found to exist previously.¹¹¹ The court reasoned that investors required added protection such that the imposition of a duty upon the attorneys was appropriate.¹¹²

Similarly, the Colorado Court of Appeals, by allowing the aiding and abetting claim to go forth in *Anstine*, established a rule that rests on an attorney's obligations to a third party.¹¹³ However, unlike *Koehler*, there was no discussion regarding deterrence or any other public policy concerns. Though the *Anstine* court claimed that no duty existed between attorneys and non-clients, the careful attorney must act as if there is one; hence a constructive duty is imposed.¹¹⁴ In order to shield him-

109. See *Anstine v. Alexander*, 128 P.3d 249, 255 (Colo. Ct. App. 2005).

110. *Id.* at 256.

111. *Koehler v. Pulvers*, 614 F. Supp. 829, 849 (S.D. Cal. 1985).

112. *Id.*

113. Brief for Colorado Bar Association as Amicus Curiae Supporting the Petition for Writ of Certiorari, at 5, *Alexander v. Anstine*, No. 05SC367, 2006 WL 390192 (Colo. Feb. 21, 2006) (No. 05-SC-367).

114. See *Anstine*, 128 P.3d at 255.

self from liability, the wary attorney must consider what is in the best interest of potential third parties—the same would be true if the attorneys specifically owed a duty to third parties. As a result, the *Anstine* court's decision has a substantially similar effect to imposing a direct duty on lawyers to non-clients; such a holding should stand only if supported by relevant policy concerns.

The Colorado Court of Appeals, in simply holding that an aiding and abetting claim is separate and distinct from a malpractice claim (where the attorney owes a duty to his client), never addressed the public policy concerns of allowing the aiding and abetting claim to proceed.¹¹⁵ Of course, it could be argued that there is a need to deter attorneys from providing the sort of advice the defendants offered in *Anstine*. However, absent a discussion of such concerns, the ruling in *Anstine* has a broad applicability that is truly dangerous to the legal profession. At the very least, the court should have attempted to justify its ruling instead of merely relying on a strict interpretation of the law. This could have provided a limited interpretation whereby the duty is only owed to a trustee in the bankruptcy context, echoing the limited duty owed to shareholders under *Koehler*. Instead, should the Colorado Court of Appeals' reasoning be implemented in the future, third parties will be able to bring aiding and abetting actions against attorneys of their adversaries when those adversaries breached their fiduciary duty by acting on the legally ethical advice of counsel.

E. Finding an Exception to the Rule that Attorneys Owe No Duty to Third Parties

In order to address the public policy issues at play, it is beneficial to again address the exceptions to the traditional rule that attorneys do not owe fiduciary duties to third parties. Under any of these exceptions, representative of the collective body of state and federal law, it is very difficult to justify the Colorado Court of Appeals' holding in *Anstine*.

115. *Id.*

1. Fraud and Malice Exceptions

Under the fraud and malice exceptions, an attorney's fraudulent or malicious conduct can create a duty between the attorney and whoever was injured by the fraudulent or malicious conduct.¹¹⁶ In *Anstine*, it is possible that the attorneys committed a fraud or acted maliciously in advising their client that warehousing the warranties while new coverage was obtained was an appropriate solution to BHW's problems. However, as discussed above, the attorneys were found to have acted reasonably and were not held to have engaged in malpractice.¹¹⁷ Therefore, the fraud and malice exceptions do not seem to justify the imposition of liability for aiding and abetting upon the attorneys, whereby a constructive duty is established.

2. Reliance Exception

Where an attorney's representations induce a non-client into reliance, some states will allow the non-client third party to sue the attorney, imposing a duty from the attorney to the third party.¹¹⁸ In *Anstine*, however, there was no evidence that the attorneys had any contact whatsoever with the creditors represented by the bankruptcy trustee, much less induced the creditors to rely upon the attorneys' advice. Certainly, had that been the case, there are many strong policy arguments for allowing liability based on the reliance exception. By interacting directly with the creditors, the attorneys would have acted outside their role as advisors to BHW, becoming active participants in the business. However, this was not the case in *Anstine* and thus the reliance exception offers no support for the enforcement of a constructive duty.

3. Third Party Beneficiary Exception

As described above, many states specifically hold that attorneys may owe duties to third party beneficiaries of a con-

116. See *supra* notes 50 & 57 and accompanying text.

117. See *Anstine*, 128 P.3d at 253, 255.

118. See *McCamish v. F.E. Appling Interests*, 991 S.W.2d 787, 794-95 (Tex. 1998) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, *supra* note 64, § 73(2)).

tract.¹¹⁹ Such an exception makes sense in the context of a will contest, where the third party is a beneficiary of the will drafted by the attorney. However, in *Anstine*, the relevant contract was between BHW and its creditors—there was no contract or other instrument linking the attorney to the creditor. Moreover, the attorneys in *Anstine* acted as fiduciaries to BHW; the creditors did not expect a direct benefit from the attorneys' work, as would be the case in the will contest. To the creditors, the attorneys were merely employees of the debtor, BHW. Therefore, the third party beneficiary exception is also inappropriate in the *Anstine* context.

4. Multi-Factor Balancing Test

Under the multi-factor balancing test, a duty from an attorney to a third party is established upon consideration of six factors: (1) the extent to which the transaction in question was intended to harm the plaintiff; (2) the attorney's ability to foresee the harm to the plaintiff; (3) the level of certainty that injury was suffered by the plaintiff; (4) the nexus between the attorney's conduct and the plaintiff's injury; (5) public policy interests in preventing future harm; and (6) whether the profession would be unduly burdened by finding an attorney liable.¹²⁰ This exception seems to be the only method that could be applied to the facts in *Anstine*. As discussed above, the California Court of Appeals has applied a substantially similar balancing test.¹²¹

Had the *Anstine* court considered the above factors, a different result might have been reached. First, was the transaction intended to harm the plaintiff? This factor could be read differently as asking whether malice was involved. As discussed earlier, absent a successful claim of malpractice, it seems unlikely that malice was involved. Second, could the attorneys have foreseen the damage their advice would cause the plaintiff? This point is certainly arguable, but it is logical to presume that the foreseeability of harm to others would be encompassed within a claim of malpractice, which again would make it a non-issue in *Anstine*. Third, was there a high level of

119. See *Guy v. Liederbach*, 459 A.2d 744, 746 (Pa. 1983).

120. *Bohn v. Cody*, 832 P.2d 71, 76 (Wash. 1992) (quoting *Strangland v. Brock*, 747 P.2d 464, 467 (Wash. 1987)).

121. See *supra* note 82 and accompanying text.

certainty that injury was suffered by the plaintiff? There is little doubt that the trustee plaintiff in *Anstine*, standing in the shoes of the creditors, suffered an injury because the debtor went into bankruptcy, leaving the homeowners without warranties. Certainly, this factor weighs in favor of enforcing a fiduciary duty where normally there is none. Fourth, what was the connection between the injury and the attorneys' conduct? This factor seems to cut in favor of enforcing a duty, as the advice likely led to the plaintiff's injury.¹²² However, in finding that the attorneys were not negligent in dispensing advice to their client, it is unclear whether the attorneys truly injured the creditors. Fifth, what are the public policy interests in preventing public harm? It can easily be argued that there is a strong public policy in favor of preventing attorneys from giving advice that wrongfully sends companies into bankruptcy, an outcome that undeniably harms consumers. Such an argument is especially persuasive where that advice is found not to constitute malpractice. In other words, there is conceivably attorney conduct that might not be challenged as malpractice, but nonetheless is deserving of liability; it is tacitly unfair for a lawyer to be absolved of any responsibility for the content of his advice where that advice had a detrimental impact on third parties. Sixth, what impact would imposing a duty have on the profession? There is little doubt that imposing such a duty to third parties would have an enormous impact on the profession. The California Court of Appeals characterized the duty as placing attorneys in an "untenable and conflicted position," where the attorney must serve both his client, who is entitled to his "undivided loyalty," and the third party, whose interests conflict with those of the client.¹²³

The multi-factor balancing test does not provide an easy answer to the problem posited in *Anstine v. Alexander*. Finding such a duty to third parties would be detrimental to the legal profession despite the interest of preventing harm to creditors. In order to protect the adversarial system, clients deserve the "undivided loyalty" of their legal counsel. True, to limit the duties owed by attorneys to only their clients would reduce the

122. At least the injury was arguably worsened. Had BHW's president chosen to declare bankruptcy and not to warehouse the warranties, the number of creditors would have been limited.

123. *Berg & Berg Enters. v. Sherwood Partners, Inc.*, 32 Cal. Rptr. 3d 325, 347 (Ct. App. 2005).

cash settlements due to creditors, but to rule otherwise would affect every person that needs an attorney, including creditors. Thus, even under a balancing test, a strong argument can and should be made in opposition to the Colorado Court of Appeals' decision. If a court should determine that no actual duty exists between the attorney-defendants and the fiduciary of the attorney's clients, then the court should also strike down any ruling that imposes a constructive duty upon attorneys to a fiduciary of the attorney's client.¹²⁴

IV. A BETTER RULE

In the future, the Colorado Supreme Court and Court of Appeals will likely have the opportunity to review the key question in this Casenote: can an attorney be found liable under a theory of aiding and abetting a client's breach of a fiduciary duty to a non-client? Answering the question requires the Court to perform a balancing act that potentially pits the adversarial system of justice against those that system is designed to protect—aggrieved petitioners seeking just recovery.

A. Attorney Duties to Non-Clients Must Be Limited

In order to accommodate the tension between aiding and abetting a breach of fiduciary duty and malpractice, a claim of aiding and abetting a client's breach of fiduciary duty to a third party should only be available where it is found that the attorney acted either fraudulently or maliciously in dispensing advice to its client.¹²⁵ Such a rule respects the constructive duty that third party aiding and abetting liability places upon an at-

124. It is worth repeating that under Colorado law, there is no balancing test to determine whether a duty should be enforced against the defendant attorneys. Instead, the relevant question under the law is whether fraud or malice was involved. See *Weigel v. Hardesty*, 549 P.2d 1335, 1337 (Colo. Ct. App. 1976). As discussed throughout this Casenote, neither fraud nor malice was involved as the attorneys were relieved of any malpractice liability. See *Anstine v. Alexander*, 128 P.3d 249, 253 (Colo. Ct. App. 2005). Thus, applying other exceptions merely highlights the fact that there is virtually no support, in any American jurisdiction, that any duty should be placed upon the defendant attorneys in the *Anstine* context.

125. Therefore, if a court specifically finds an attorney not liable under a theory of malpractice with regard to a certain action or piece of advice, that court would be precluded from sustaining a claim of aiding and abetting a breach of fiduciary duty where that same action or advice was at the heart of the breach.

torney. At the same time, this rule would follow the precedent established in Colorado under *Weigel v. Hardesty*, which extended the obligation of an attorney to third parties where the attorney acted with fraud or malice.¹²⁶ Even if the Colorado Court of Appeals correctly held that aiding and abetting is a separate claim from malpractice, the fact that the court did not address the policy concerns surrounding its decision is cause for concern. The rule advocated for in this Casenote encourages courts to address a claim against an attorney for aiding and abetting a breach of fiduciary duty to a third party as if the claim was for a direct breach of fiduciary duty to the third party. Such a rule would do a much better job of maintaining the adversarial system that underlies American jurisprudence.

While the California Court of Appeals' decision in *Berg* provides valuable insight into the dangers of applying a constructive duty between lawyers and third parties, the multi-factor balancing approach utilized by the court should not be adopted in Colorado. Under a balancing approach, there is always the possibility that a jury could find policy reasons to overturn the general precept that no duty exists between attorneys and third parties. Maintaining the adversarial system of justice is simply too important to be ignored on the whim of a jury, which possibly does not grasp the importance of the tested judicial structure. By requiring fraud or malice to be present, the jury is appropriately removed from the policy debate. Appellate review will allow enforcement of a duty, should policy considerations warrant.

B. Lingering Concerns

It is also worth addressing the concern that third parties, situated similarly to the creditors in *Anstine*, might truly have suffered injury where attorneys for the insurance provider offered advice that was merely careless, though neither fraudulent nor malicious. In such a situation, the creditors might be unable to collect reasonable damages from the bankrupt corporation; the only remaining deep pockets would be those of the careless attorneys. The rule proposed in this Casenote would seemingly leave such creditors without meaningful recourse, which might prove to be an unsatisfactory result to some.

126. See *Weigel*, 549 P.2d at 1337.

One possible way to address this concern would be to expand the proposed rule and allow an aiding and abetting claim by a non-client against an attorney where *any* type of malpractice was demonstrated. Unfortunately, such a rule is too expansive in a litigious society, where attorneys would become the straw men in a majority of legal disputes. Such would be a natural result where plaintiffs are always seeking another source of judgment funds. Also, such a rule would encourage attorneys to be overly cautious in advising their clients. Attorneys need to feel free to advise their clients of all their legal options. To do otherwise, offering limited advice to protect the attorney from liability, could in and of itself constitute malpractice.

Make no mistake, the proposed rule is designed to protect not only the adversarial system of justice, but also attorneys. One need not worry that without the rule created by the appellate court, attorneys would be free to harm non-clients. Certainly, careless attorneys are subject to a plethora of penalties, including malpractice liability and ethical discipline, that encourage attorneys to make well reasoned decisions. Unfortunately, there will always be the outlying cases where the rule will deny plaintiffs just recovery. This is the price of a functioning American justice system.

CONCLUSION

In holding attorneys responsible to third parties for aiding and abetting a breach of fiduciary duty, the Colorado Court of Appeals has imposed a constructive duty upon attorneys. Should the court's reasoning in *Anstine v. Alexander* stand, Colorado attorneys will be forced to consider the needs of both their clients and their clients' adversaries, turning the adversarial system of justice on its head. Public policy concerns demand that attorneys be focused solely on the interests of their clients. Only when a lawyer acts with fraud or malice should he owe a duty of care to a third party, constructive or otherwise. Such a rule addresses both sides of the public policy debate—the adversarial justice system is protected and attorneys are dissuaded from unethical conduct. The Colorado Supreme Court should be responsive to these policy concerns when confronted with a similar issue in the future.