

2007 Levit Essay Contest Hypothetical

You are the law clerk to the chief judge of a state appellate court, reviewing a trial court's ruling on a motion to dismiss for failure to state a claim for which relief can be granted. The matter will be decided by a three-judge court. You have been asked to write the opinion for the two-judge majority in this case of first impression. You may decide the case any way you want. You should anticipate, however, a strong dissent from the other judge, so you should address the arguments that will be asserted against your position.

The issue before the court is whether a claim may lie in tort against a lawyer for aiding and abetting a client's breach of fiduciary duty to a third party (non-client). The following alleged facts are taken as true:

Paul and Dean were college friends, who entered into a partnership to develop *Universe*, a new video game with huge commercial potential, even greater than that of *Humanity*, the worldwide market leader. Paul and Dean worked on *Universe* for years. As the project neared completion, trade journals reported *Humanity* was being updated with features that sounded identical to the hottest new features of *Universe*. Dean suspected Paul was leaking trade secrets for his own gain, and consulted his lawyer, Lana, about what to do. Lana advised Dean to tap Paul's phones to gather evidence of Paul's breach. The taps produced no evidence of a leak. Dean still suspected Paul, and told Lana that he wanted to get out of the project fast and get as much for *Universe* as he could. Lana advised him to sell *Universe* to a willing buyer and split the proceeds with Paul. Dean sold *Universe* for less than full value.

In fact, Paul had not leaked trade secrets and had not breached his partnership agreement with Dean in any respect. He had planned to stay with the *Universe* project until it was finished. Paul is horrified to discover Dean tapped his phones and sold *Universe* out from under him, and even more upset to learn that Lana, a lawyer, actually advised Dean to do both. Paul sued Dean for invasion of privacy and breach of fiduciary duty and sued Lana for aiding and abetting Dean in the commission of those torts. Lana moved for dismissal, for failure to state a claim, on the grounds that the state does not recognize a claim for a lawyer's aiding and abetting a breach of fiduciary duty to a third party. The trial court granted the motion.

You must decide: (i) whether this tort should be recognized in your stateⁱ, and (ii) if so, (a) what the legal standard should be, and (b) whether the facts alleged (and assumed to be true) adequately state such a claim, and if so, which of Lana's alleged actions constituted aiding and abetting breach of fiduciary duty.

Your judge tells you she would like you to read the Oregon Supreme Court's opinion in *Reynolds v. Schrock* 341 Or. 338 (2006), and consider that court's discussion of the "substantial assistance" standard as opposed to the "scope of representation" standard. You may adopt either of those standards, a different standard, or (if your state will not recognize the cause of action) no standard.

ⁱ Your state is a fictional state with no law on point. Look to other jurisdictions for instructive authority.