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THE DESCENDANTS OF *FASSIHI*: A COMPARATIVE ANALYSIS OF RECENT CASES ADDRESSING THE FIDUCIARY CLAIMS OF DISGRUNTLED STAKEHOLDERS AGAINST ATTORNEYS REPRESENTING CLOSELY-HELD ENTITIES

MATTHEW J. ROSSMAN*

INTRODUCTION

It has been over twenty years since the Michigan Court of Appeals considered and decided *Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*[1] This case involved a suit by one fifty percent shareholder (Fassihi) of a closely held corporation against the corporation's attorney after Fassihi was forced out of the business by the other fifty percent shareholder, allegedly with the attorney's help. *Fassihi* has since come to stand for the general proposition that an attorney who represents a closely-held business entity may owe a fiduciary duty, akin to that owed to a client, to each of the entity's individual stakeholders[2] even when she does not represent them individually.[3] This duty is especially likely to exist when the entity has a small number of stakeholders and is particularly likely to be implicated when the entity, or those who control it, asks for the assistance or advice of the attorney in taking action adverse to a stakeholder. Although by no means the only case of its time to address an attorney's duties to constituents of a "closely-held" client,[4] *Fassihi* is the

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1. 309 N.W.2d 645 (Mich. Ct. App. 1981).

2. "Stakeholder," for purposes of this Article, essentially means "constituent," as that term is defined in the Comment to Rule 1.13 of the American Bar Association's Model Rules of Professional Conduct ("MRPC"), but of a "closely held entity," rather than a large publicly traded corporation. "Constituent" is defined in the Comment to mean "[o]fficers, directors, employees and shareholders . . . of the corporate organizational client" and "the positions equivalent to [those] held by persons acting for organizational clients that are not corporations" and applies to all organizations, no matter the size or complexity. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 1 (2003). Because the cases discussed in this Article specifically address closely held entities, it is important to distinguish the use of the term "constituents" in this context. The term "stakeholder," with its connotation of equity ownership, is appropriate considering that in most closely held entities most or all of the constituents are equity owners.

3. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 56 cmt. h (2000).

4. The terms "close," "closed," and "closely-held" are often used interchangeably as adjectives before "corporation" to mean corporations with a relatively limited number of shareholders, the shares of which are not publicly traded. 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS: LAW AND PRACTICE § 1.02 (rev. 3d ed. 2002 (1971). Certain states further refine this general concept by providing that close corporations are those in which there is "substantial majority stockholder participation in the management, direction and

preeminent case recognizing a stakeholder's claim of breach of fiduciary duty against an attorney who represents only the business.

Twenty years after *Fassihi*, its central proposition has certainly not gained universal acceptance in the nation's courts. Some jurisdictions have flat out rejected it, while others have confused or combined the question of whether a fiduciary relationship exists between an attorney and individual stakeholder with the question of whether they have established a separate attorney-client relationship.[5] Furthermore, disgruntled stakeholders routinely assert other theories of fiduciary-type liability, which have also received uneven treatment in the courts, against business attorneys in circumstances factually similar to *Fassihi*.

The resulting lack of certainty is disconcerting for attorneys who represent closely-held entities. What is disconcerting is not that courts are developing or expanding theories of liability to hold accountable attorneys who clearly behave improperly, but rather that it is difficult to gauge where courts stand on these theories. Perhaps even more perplexing, the theories are not always consistent in their application with guidelines governing attorney behavior—in particular, the guidelines established by the American Bar Association's ("ABA") Model Rules of Professional Conduct ("MRPC").[6]

This state of affairs could adversely impact both lawyers for closely-held businesses and the clients they serve. Uncertainty regarding to whom within a business a lawyer owes duties could cause risk averse lawyers to avoid serving closely-held businesses, impose "self-protective reservations"[7] in the attorney-client relationship, or overcompensate by considering the interests of an entity and each of its individual constituents whenever a significant decision needs to be made, even when this would not otherwise be appropriate. Less cautious attorneys could be subject to overbroad liability and the risk of lawsuits

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operations of the corporation" and/or where restrictions are placed on the transfer of its shares. *Id.* (citing Donahue v. Rodd Electrotype Co. of New England, Inc., 328 N.E.2d 505, 511 (Mass. 1975)); *see also* BROOKE WUNNICKE, ETHICS COMPLIANCE FOR BUSINESS LAWYERS 231 (1987) (citing *Donahue*, 328 N.E.2d at 511).

Considering that almost all jurisdictions and the MRPC use the same or similar analysis for most business entities, e.g., corporation, partnership, LLC, etc., when determining an attorney's representational obligations, the author of this Article will use the more universal terms "closely-held business" or "closely-held entity" rather than "closely-held corporation." *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003); *see also id.* at R. 1.13 cmt. 1; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361, at 2 (1991) ("There is no logical reason to distinguish partnerships from corporations or other legal entities in determining the client a lawyer represents.")

5. *See infra* Part I.B.

6. *See generally* MODEL RULES OF PROF'L CONDUCT (2003).

7. This phrase appears in *Goodman v. Kennedy*, 556 P.2d 737, 743 (Cal. 1976), to describe one consequence associated with overbroad liability in this context. The contention is that the lawyer will modify and/or withhold advice to an entity client to avoid any negative impact on the interests of individual stakeholders and thus minimize the threat of claims by disgruntled stakeholders.

whenever a stakeholder feels he or she has gotten the short end of the stick in a dispute relating to the business. In fact, the author's interest in this subject grew out of his own experiences representing small businesses and repeatedly encountering the ethical and professional dilemmas caused when formerly rosy relationships among business partners began to wither.

In recent years, several courts have addressed claims resulting from what might be referred to as the "Fassihi Scenario," i.e., when a stakeholder in a closely-held business contends that the actions of one or more other stakeholders or the entity have adversely affected him or her and that the attorney is partially to blame for her participation in, or even mere facilitation of, whatever took place. These cases are worth examining closely for several reasons. First, they underscore how jurisdictions continue to differ on whether and to what degree attorneys must heed the interests of individual stakeholders while counseling a business on a decision or course of action that directly affects stakeholders' interests. At the same time, the cases do indicate some uniform trends in the courts on the viability of particular fiduciary-based theories of attorney liability frequently asserted by disgruntled stakeholders and provide a good sense of where the law is headed. Finally, considering these cases in combination with *Fassihi*, other related caselaw, and the MRPC, provides valuable lessons for how attorneys can frame and conduct their representation of closely-held entities to reduce their potential for liability if these inherently thorny situations arise.

Accordingly, this Article will examine three of these recent cases closely and then make observations about what these "descendants of *Fassihi*" say about the state of the law and how they should impact attorney behavior. To provide proper context for this discussion, a short summary of *Fassihi* and other contemporary responses to the issues raised in *Fassihi* follows.

I. *FASSIHI* AND OTHER RESPONSES

A. Fassihi v. Sommers, Schwartz, Silver, Schwartz & Taylor, P.C.

The facts of *Fassihi* are fairly straightforward. Fassihi, a radiologist, was one of two fifty percent shareholders of a closely-held professional corporation.[8] The corporation formed after Lopez, another radiologist, asked Fassihi to join him in a medical practice at the hospital with which Lopez was affiliated. After practicing together for a short time, Lopez decided to cut ties with Fassihi and asked the corporation's lawyer to determine how Fassihi could be ousted. The lawyer complied and a meeting of the Board of Directors of the corporation was purportedly held (without Fassihi present) at which the Board voted to terminate Fassihi's interest.[9] The *Fassihi* court noted some skepticism as to whether the Board could have taken this action, both because Lopez and Fassihi disagreed as to whether or not the Board had a third director in addition to them, and because

8. Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 309 N.W.2d 645, 647 (Mich. Ct. App. 1981).

9. *Id.*

it seemed unusual to the court that a board could simply terminate a stockholder's interest.[10] At the very least, however, the action resulted in hospital officials notifying Fassihi that he was no longer eligible to practice at the hospital.[11] Unbeknownst to Fassihi, but known to Lopez and the corporation's lawyer, membership in the corporation was required for retention of medical staff privileges at the hospital.[12]

Fassihi subsequently sued the corporation's lawyer alleging legal malpractice, breach of "fiduciary, legal and ethical" duties, and fraud stemming from the lawyer's participation in Fassihi's ouster.[13] On appeal from the trial court's denial of Fassihi's motion for summary judgment, the Michigan Court of Appeals addressed the question of whether Fassihi had standing to bring any individual claims against the law firm, which claimed to represent only the corporation. The fraud issue aside, the court noted that the case presented it with a difficult question, "what duties, if any, an attorney representing a closely held corporation has to a 50% owner of the entity, individually . . . a problem of first impression in Michigan."[14]

Although it agreed with the defendant that an attorney for a corporation represents the corporation and not its shareholders, the court held that the absence of an attorney-client relationship between a corporation's lawyer and one of its stakeholders does not preclude the existence of a fiduciary relationship between them.[15] Instead, a fiduciary relationship arises whenever

> [O]ne reposes faith, confidence, and trust in another's judgment and advice. Where a confidence has been betrayed by the party in the position of influence, this betrayal is actionable and the origin of the confidence is immaterial. . . . [W]hether there exists a confidential relationship . . . is a question of fact.[16]

Not only might a fiduciary relationship be found, the court noted that such relationships between lawyers and stakeholders are likely to occur in closely held corporations "where the number of shareholders is small."[17] In these instances, "corporate attorneys, because of their close interaction with a shareholder or shareholders, simply stand in confidential relationships in respect to both the corporation and individual shareholders."[18] Fassihi's simple assertion that he "*believed that*, as a 50% shareholder . . . , defendant would treat him with the same degree of loyalty and impartiality extended to the other shareholder,"[19]

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10. *Id.* at 647 n.2.
11. *Id.* at 647.
12. *Id.*
13. *Id.* at 646.
14. *Id.* at 647-48.
15. *Id.* at 648.
16. *Id.* (internal citations omitted).
17. *Id.* at 649.
18. *Id.*
19. *Id.* at 648 (emphasis added).

along with the other facts, was sufficient to "tend[ ] to show some legal duty on the part of the attorney to him personally."[20]

Moreover, Fassihi's allegations regarding the lawyer's behavior—in particular, his active and covert participation in a plan with one shareholder to deprive Fassihi of the economic benefit associated with his fifty percent interest in the corporation—seemed to the court to be the type of behavior that would constitute a breach of duty if a fiduciary relationship existed. Accordingly, the court of appeals found that it could not dismiss this claim simply as a matter of law and remanded the case to the trial court.[21]

Fassihi is significant for at least two reasons. First, its approach was distinguishable from a contemporary line of cases in which the central issue in upholding the claims of the stakeholders of a closely-held corporation against the entity's attorney was whether the attorney represented the stakeholders as individuals.[22] Both *Fassihi* and its contemporaries acknowledged the same reality, namely, that "treating a closely held corporation with few shareholders as an entity distinct from the shareholders"[23] potentially disregards a stakeholder's sometimes reasonable perception that the lawyer for the business is representing his or her interests. But rather than tying up this issue solely in the question of who the attorney represents, *Fassihi* recognized the possibility of a separate fiduciary duty owed to a non-client stakeholder and therefore potentially created an obligation on the attorney's part in many more representations.

Fassihi is also significant for the standard it used to determine whether a fiduciary duty actually existed. Lawyers are considered to owe clients two primary duties—a duty of care (essentially a duty of competent representation) and a fiduciary duty (composed of various obligations of confidentiality and loyalty).[24] A separate line of cases had already established the circumstances under which non-client stakeholders could assert a breach of the duty of care against an attorney—by meeting the very narrowly applied "intended beneficiary" test.[25] Rather than apply this standard, the *Fassihi* court posited that a fiduciary relationship existed in this context whenever someone "repose[d] faith, confidence and trust in another's judgment and advice."[26] Although the court did not go into extensive detail about how this standard might be met, it did connect the standard to the stakeholder's belief of what the relationship entailed and, simply as stated, the "reposed faith, confidence and trust" standard would almost certainly be easier for a stakeholder to meet than the "intended beneficiary" test. Furthermore, it suggested that this type of relationship is

20. *Id.* at 649 n.6.

21. *Id.* at 648-50.

22. *See, e.g.*, *In re* Conduct of Kinsey, 660 P.2d 660 (Or. 1983); *In re* Banks, 584 P.2d 284 (Or. 1978).

23. *Fassihi*, 309 N.W.2d at 649.

24. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 48,49 (2000).

25. See *infra* notes 85-88 and accompanying text for discussion of this test.

26. *Fassihi*, 309 N.W.2d at 648.

typical in a lawyer's representation of a closely-held entity. Again, the practical effect of *Fassihi* appeared to be the broadening of circumstances under which a non-client, disgruntled stakeholder could successfully assert a claim against the entity's attorney.

B. Other Responses to the Fassihi *Scenario*

Since *Fassihi*, several courts have recognized the potential for a fiduciary relationship between the attorney for a closely-held entity and its individual stakeholders in the absence of an attorney-client relationship.[27] This is true not only in cases addressing the Fassihi Scenario, but also in attorney disqualification cases where a stakeholder of a business entity has successfully objected to an adverse party's use of the entity's attorney in litigation involving the stakeholder.[28] It is fair to say that it is now commonplace for a stakeholder involved in either type of proceeding to attempt to claim the existence of a fiduciary relationship with the entity's attorney. Moreover, the circumstances under which courts have acknowledged that this fiduciary relationship potentially applies have gone beyond the inherently adverse stakeholder squeeze-out to include the execution of more routine corporate tasks.[29]

At the same time, *Fassihi*'s central proposition has certainly not been universally accepted. One example is *Egan v. McNamara*,[30] decided shortly after *Fassihi*. In *Egan*, the D.C. Court of Appeals considered a claim of the estate of a majority shareholder of a close corporation against the corporation's attorney alleging that the attorney breached a fiduciary duty by not warning the shareholder about certain aspects of a shareholder's agreement that adversely affected his interests.[31] The court replied resoundingly that the attorney only had obligations to the corporation, despite the fact that the attorney had previously represented the majority shareholder on personal matters: "[T]here was no fiduciary duty. [The lawyer] represented the corporation, an entity legally distinct from its directors, and officers, and shareholders. As [the corporation's]

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27. *See, e.g.*, Johnson v. Superior Court, 45 Cal. Rptr. 2d 312 (App. Ct. 1995) (holding that lawyer for limited partnership had fiduciary obligations to each of the partners whether or not he represented them individually); Brennan v. Ruffner, 640 So. 2d 143 (Fla. Dist. Ct. App. 1994) (considering claim of fiduciary duty by shareholder of closely-held corporation against corporation's attorney); Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings, & Berg, P.C., 541 N.E.2d 997 (Mass. 1989) (noting, in dicta, that there is logic in proposition that lawyer for closely-held corporation owes nonclient shareholders fiduciary duty); Collins v. Telcoa Int'l Corp., 283 A.D.2d 128 (N.Y. App. Div. 2001) (reinstating claim of breach of fiduciary duty by minority shareholder against corporation's attorney); Arpadi v. First MSP Corp., 628 N.E.2d 1335 (Ohio 1994) (finding lawyer for limited partnership owed duties to limited partners).

28. *E.g.*, Marguiles v. Upchurch, 696 P.2d 1195 (Utah 1985) (holding that law firm's representation of limited partnership gave rise to fiduciary duty with respect to individual partners).

29. *See, e.g.*, *Brennan*, 640 So. 2d at 143 (negotiation of shareholders' agreement).

30. 467 A.2d 733 (D.C. 1983).

31. *Id.* at 738.

counsel, his obligation was to ensure that the agreement was in the best interest of the company, regardless of its impact on individual shareholders."[32] Several other courts have found likewise, citing the inevitability of conflicts arising between the interests of an entity and those of its stakeholders, the impracticality of an attorney having to consider the interests of a potentially unlimited number of parties with every entity decision, and the inconsistency of such a duty with applicable rules of professional conduct.[33]

Other courts have appeared willing to consider the claim, but reluctant to find in favor of the stakeholder notwithstanding compelling facts. A prime example is *Skarbrevik v. Cohen, England & Whitfield*.[34] In this case, a California appeals court overturned a trial court's decision in favor of a twenty-five percent shareholder (Skarbrevik) of a closely-held corporation who was forced out of the corporation by the other three shareholders and the corporation's attorney. The court of appeals found that the facts did not support the existence of a fiduciary duty owed by the attorney to Skarbrevik, even though the attorney's actions were at least as detrimental to the ousted shareholder as in *Fassihi*.[35] The attorney assisted the other shareholders in reneging on a previous offer to buy out Skarbrevik and then facilitated the amendment of the corporation's Articles of Incorporation to eliminate Skarbrevik's preemptive right to proportional participation in stock issuances so that the others could ultimately dilute his interest. In finding that the corporation's attorney owed duties only to the corporation and not to individual shareholders, the court specifically distinguished the facts at hand from *Fassihi* stating, "the evidence at trial established no such relationship of trust and confidence between plaintiff and defendant attorneys which would give rise to a fiduciary duty."[36]

Generally speaking, rules governing attorney behavior do not directly address the Fassihi Scenario and, in fact, could very well be construed as inconsistent with *Fassihi*. Rule 1.13(a) of the MRPC, which has been adopted in most U.S. jurisdictions, states that an attorney retained by an organizational client "represents the organization acting through its duly authorized constituents."[37] Section (e) of Rule 1.13 states that the "lawyer may also represent any of [the

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32. *Id.* at 739.

33. *See, e.g.*, Rose v. Summers, Compton, Wells & Hamburg, P.C., 887 S.W.2d 683 (Mo. Ct. App. 1994) (citing similar litany of reasons for not recognizing fiduciary relationship in this context).

34. 282 Cal. Rptr. 627 (Ct. App. 1991).

35. *Id.* at 639.

36. *Id.* at 636.

37. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (2003); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 5-18 (1981), which provides that:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder . . . or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

organization's] directors, officers, employees, members, shareholders or other constituents" subject to the Rules governing conflicts of interest, but in no way implies that the lawyer automatically does represent any of these constituents nor specifies any circumstances under which the lawyer might be deemed to owe duties to any individual constituents.[38] In fact, section (d) of Rule 1.13 explicitly directs the lawyer to clarify to constituents that he or she represents only the organization when it is apparent that the "organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[39] Read literally, Rule 1.13 seems to say that the lawyer for a closely-held entity must follow the direction of those constituents authorized to make decisions for the entity, without concern for whether a particular decision adversely affects the interests of one or more stakeholders.

In a 1991 formal opinion, the ABA's Standing Committee on Ethics and Professional Guidance, which is charged with interpreting the MRPC, provided some additional guidance on these particular aspects of Rule 1.13.[40] Among other things, Formal Opinion 91-361 clarified that "[a]n attorney-client relationship does not automatically come into existence between a partnership lawyer and one or more of its partners," or, by extension, the lawyer and individual stakeholders of any type of entity.[41] It also provided, however, that such a relationship could arise in ways other than just an express agreement between the lawyer and stakeholder, including where there is evidence of reliance by the individual stakeholder on the lawyer or of the stakeholder's expectation of personal representation. Interestingly, the Opinion itself made no mention of any duties owed by a lawyer to those constituents the lawyer does not separately represent, however, *Fassihi* is cited in a footnote for the proposition that "[i]n small partnerships, as with closely held corporations, . . . the likelihood that the attorney representing the entity will be held to stand in a confidential, or fiduciary, relationship with the individual shareholders, or partners, is much greater."[42] It must be stressed, however, that the Opinion did not specifically discuss or endorse the position of the *Fassihi* court, nor did it take a position on exactly when an attorney representing such an entity owes fiduciary duties to its stakeholders. In summary, the position of the ABA appears to be that a lawyer facing a Fassihi Scenario must act in accordance with the wishes of an entity's duly authorized constituents and owes no duties of any kind to individual stakeholders unless he or she has expressly or impliedly agreed to represent them.

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38. MODEL RULES OF PROF'L CONDUCT R. 1.13(e).

39. *Id.* R. 1.13(d).

40. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991).

41. *Id.*

42. *Id.* at n.5.

II. THE RECENT CASES

A. *Cacciola v. Nellhaus*[43]

1. Facts.—This recent Massachusetts case involved a family business—four brothers who owned equal twenty-five percent interests in a real estate partnership.[44] Although two of the brothers—Edward and Anthony—handled the day-to-day operations of the business, a written partnership agreement gave all four equal authority in its management and in partnership decisionmaking. After Anthony's death, his estate became successor in interest to his partnership share. Pursuant to the partnership agreement, the partnership had the option to purchase the share.[45] Although some discussions took place among the remaining brothers about purchasing the share (including one between Edward and his brother Salvatore in which they agreed the partnership should buy it), the partnership did not proceed further with the matter.

A year and a half had passed when Salvatore, to his surprise, "received a financial statement from the partnership's accountant showing Edward with a fifty percent interest in the partnership."[46] Edward had purchased Anthony's interest from his estate, allegedly at below market value and without notifying the other partners. To convince the estate to sell to him, Edward allegedly told its representatives that Salvatore (and presumably his other brother, David) was not interested in the share. Edward closed the transaction with the assistance of the partnership's longtime lawyer, Howard Nellhaus. Not only did Nellhaus serve as lawyer for the transaction, but he advised Edward that Edward had the right and authority to purchase the share without notice to Salvatore, despite the fact that the partnership had the first option to buy Anthony's share.[47] When Salvatore asked Nellhaus for information about the transaction, Nellhaus refused, claiming the information was confidential.

Salvatore sued Edward. Soon after, Salvatore died and the executrix of his estate filed a separate action against Nellhaus asserting what the complaint termed "malpractice," but which the plaintiff initially described as a violation, "while purportedly acting as counsel for the partnership, [of] the obligations [Nellhaus] had as counsel to Salvatore, a partner in the partnership."[48] Nellhaus successfully moved to dismiss the malpractice claim on the ground that "as attorney for the partnership, he owed no enforceable duty to Salvatore."[49] The executrix appealed, and the appellate court reversed the trial court's dismissal of the malpractice claim by reinstating the claim and restating it as a breach of

43. 733 N.E.2d 133 (Mass. App. Ct. 2000).

44. *Id.* at 135.

45. *Id.* at 141.

46. *Id.* at 136.

47. *Id.*

48. *Id.*

49. *Id.*

fiduciary duty claim.[50]

2. *Analysis*.—Of the three cases considered by this Article, *Cacciola* is most similar to *Fassihi*. The cases are factually different in that *Fassihi* involved the ouster of one fifty percent stockholder by another, while *Cacciola* involved a somewhat more benign, "secret" acquisition by one partner of an interest that should have first been made available to the partnership. As to the issue of the lawyer's role, however, the cases have conceptual similarities. In both cases, a disgruntled stakeholder alleged that the lawyer actively assisted another stakeholder in increasing his ownership of the business at the disgruntled stakeholder's expense.

Cacciola, like *Fassihi*, began with the question of whether or not the lawyer and disgruntled stakeholder had an attorney-client relationship in order to determine whether or not the stakeholder's estate had a valid claim for legal malpractice against Nellhaus.[51] Based on the allegations of Salvatore's estate, the court found neither an express relationship between Salvatore and Nellhaus nor an instance of Salvatore's having relied upon Nellhaus's advice which might give rise to an implied attorney-client relationship.[52] The *Cacciola* court also specifically distinguished Massachusetts law from cases in other jurisdictions in which courts have recognized attorney-client relationships between lawyers and individual stakeholders of small, closely held entities simply by virtue of the lawyer's representation of the entity.[53]

After finding the malpractice claim inapplicable, the court could have simply affirmed the lower court's decision to grant summary judgment. Instead, drawing upon *Fassihi* and dicta from a prior Massachusetts Supreme Judicial Court case, *Schaeffer v. Cohen, Rosenthal, Price, Mirkin, Jennings, & Berg, P.C.*,[54] the court implied an additional claim for breach of fiduciary duty against Nellhaus from the estate's complaint.[55] This judicial activism might be read as a determined effort by the appellate court to address and define a duty alluded to but not formally upheld in *Schaeffer*, or as the court's concern that Nellhaus's allegedly reprehensible behavior might otherwise go unpunished due to poor pleading, or both. In any event, the court found in *Fassihi* abundant guidance for determining both whether a fiduciary relationship existed between Salvatore and Nellhaus and how the accompanying duty might have been breached.

In making the first determination, the *Cacciola* court quoted directly from *Fassihi*:

> [i]nstances in which the corporation attorneys stand in a fiduciary relationship to individual shareholders are obviously more likely to

50. *Id.* at 141.

51. "In order to prove a claim of legal malpractice, the plaintiff must show that the defendant owed him a duty of care arising from an attorney-client relationship." *Id.* at 137.

52. *Id.*

53. *Id.*

54. 541 N.E.2d 997 (Mass. 1989).

55. *Cacciola*, 783 N.E.2d at 137.

> arise where the number of shareholders is small. In such [circumstances] . . . the corporate attorneys, because of their close interaction with a shareholder or shareholders, simply stand in confidential relationships in respect to both the corporation and individual shareholders.[56]

Then, noting simply that partnerships are similar to close corporations and that Salvatore was an equal twenty-five percent partner in the partnership, the court concluded that Nellhaus may indeed have owed Salvatore a fiduciary duty.[57] In doing so, the court suggested this duty may exist whenever an entity has a small number of stakeholders. To support this proposition, the court cited dicta in *Schaeffer* as standing for the even broader proposition that "an attorney for a partnership owes a fiduciary duty to each partner."[58]

As for the nature and breach of the duty, the *Cacciola* court looked first to the assertions of the plaintiff in *Fassihi* who claimed that as a fifty percent shareholder, he trusted that his corporation's lawyer would treat him with "the same degree of loyalty and impartiality extended to the other shareholder" and that the lawyer violated this trust by failing to disclose his dual representation of both the corporation and the other shareholder and by helping to terminate the plaintiff shareholder's association with the corporation.[59] Linking the facts in *Fassihi* to the case at hand, the court then stated:

> The allegations set forth in the plaintiff's complaint resemble those at issue in *Fassihi*. Salvatore, as an equal twenty-five percent partner, alleged that "although the defendant . . . , as counsel to the partnership, had obligations to Salvatore, as one of the partners . . . to keep Salvatore informed as to significant transactions affecting the partnership, nevertheless, [the] defendant . . . did not inform Salvatore about Edward's negotiations and his subsequent purchase of Anthony's former interest . . ." Moreover, the defendant "refused to provide Salvatore with any details of the purchase by Edward," . . . .[60]

In *Cacciola*, the fiduciary duty of "loyalty and impartiality" owed by the lawyer seemed to consist of, at the very least, a duty of disclosure of significant transactions affecting the entity. Given the size of the *Cacciola* partnership and the nature of the estate's allegations regarding the behavior of Nellhaus, the court found that a claim for breach of fiduciary duty should withstand dismissal.[61]

Again, the court could have stopped here. The *Fassihi* court found a breach of fiduciary duty claim applicable to both the lawyer's alleged failure to disclose information that affected the plaintiff/disgruntled stakeholder and his alleged

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56. *Id.* at 138 (quoting Fassihi v. Sommers, Schwartz, Silver, Schwartz, & Tyler, P.C., 309 N.W.2d 645, 649 (Mich. Ct. App. 1981) (alterations in original)).

57. *Id.*

58. *Id.* at 137 (quoting *Schaeffer*, 541 N.E.2d at 1002).

59. *Id.* at 138 (quoting *Fassihi*, 309 N.W.2d at 648).

60. *Id.*

61. *Id.*

active participation "in terminating plaintiff's association with the corporation" and using a contract to the plaintiff's detriment.[62] The *Cacciola* court used the lawyer's breach of fiduciary duty to encompass only Nellhaus's failure to disclose, but suggested a separate theory of liability—"aiding and abetting Edward's breach of his fiduciary duty to Salvatore"—that Salvatore's estate could have asserted to cover Nellhaus's participation in Edward's purchase of Anthony's share.[63]

In explaining the basis for such a claim, the court pointed out that partners owe to each other a duty of "utmost good faith and loyalty" and even more so in this case "because of their familial relationship."[64] Accordingly, Edward owed Salvatore a fiduciary duty that he breached when he secretly purchased Anthony's interest. In linking Nellhaus to Edward's improper behavior, the court cited *Spinner v. Nutt*,[65] a Massachusetts Supreme Judicial Court case, for the circumstances under which a person may be liable for participating in a fiduciary's breach. Liability arises when a person "knew of the breach and actively participated in it such that he or she could not reasonably be held to have acted in good-faith."[66] Nellhaus then could be liable not only for the breach of his own duty to Salvatore, but also for his involvement in Edward's breach of duty so long as, presumably, he would be unable to demonstrate that he reasonably believed his advice to Edward and his work on the transaction was appropriate.

Although *Cacciola* borrowed heavily from *Fassihi*, it appears that Massachusetts courts have a significantly more expansive view of attorney liability in the Fassihi Scenario. According to *Cacciola*, a lawyer automatically owes a fiduciary duty to each stakeholder of a client that is a close corporation, partnership or other similar entity. Furthermore, an attorney encountering a Fassihi Scenario might also face liability for aiding and abetting one individual stakeholder's breach of fiduciary duty to another stakeholder, even in the absence of a relationship with the disgruntled stakeholder.

B. Chem-Age Industries, Inc. v. Glover[67]

1. Facts.—The most recent of the three cases discussed in this Article is a South Dakota Supreme Court case which involved a shady business venture initiated by an entrepreneur named Dahl. Dahl convinced two businessmen, Pederson and Shepard, to invest in a business he was starting called Chem-Age Industries.[68] According to their agreement, the investors would contribute cash,

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62. *Fassihi*, 309 N.W.2d at 648.
63. *Cacciola*, 733 N.E.2d at 139.
64. *Id.*
65. 631 N.E.2d 542 (Mass. 1994).
66. *Id.* at 546.
67. 652 N.W.2d 756 (S.D. 2002).
68. *Id.* at 761.

arrange loans for the business, and serve as its Board of Directors.[69] Dahl would act as its chief executive officer responsible for day-to-day operations.[70]

The investors gave Dahl some money up front in exchange for a promise of shares, but insisted that Dahl get an attorney to formally set up a corporation before going any further.[71] Dahl engaged Glover, an attorney with whom he had worked on various transactions and lawsuits during the previous twenty years, to do the work.[72] Glover prepared the necessary paperwork, which listed Pederson and Shepard as incorporators and Glover as registered agent of the corporation, and in November 1997, the business was incorporated as Chem-Age Industries, Inc. ("Chem-Age").[73] After this, Pederson obtained a large loan for Chem-Age and the business began purchasing equipment.[74] After handling the incorporation, Glover acted as Chem-Age's attorney on at least one other matter—a lawsuit filed against it—and occasionally held himself out as its attorney in conversations with outside parties.[75]

By early fall of 1998, Pederson and Shepard began to notice that Dahl was accumulating large balances on company credit cards for what appeared to be personal expenses and became suspicious that he was swindling them.[76] They set up a meeting with Dahl and Glover at which they were surprised to learn not only that Dahl and Glover believed Dahl alone owned Chem-Age, but also that the two were in the process of negotiating the sale of all of the assets of Chem-Age to another company.[77] Dahl told Pederson and Shepard that they would be repaid for their investments out of the proceeds from the sale of Chem-Age's assets.[78]

Needless to say, litigation ensued against both Dahl and Glover. The suit against Glover, brought by Chem-Age as an entity and Pederson and Shepard individually, asserted several different claims including legal malpractice and breach of fiduciary duty.[79] Glover moved successfully for summary judgment on these two claims on the ground that he had only represented Dahl and, therefore, owed no duties to Pederson, Shepard or Chem-Age.[80] Glover maintained that shortly after incorporation Dahl had told him that Pederson and Shepard were no longer interested in the business and that Dahl would run Chem-Age as a sole proprietorship.[81] The plaintiffs appealed raising several questions relating to the nature of the duties Glover owed to them and whether Glover had breached any

69. *Id.* at 761-62.
70. *Id.*
71. *Id.* at 761.
72. *Id.*
73. *Id.* at 762.
74. *Id.*
75. *Id.* at 767.
76. *Id.* at 762.
77. *Id.*
78. *Id.*
79. *Id.* at 761.
80. *Id.* at 763, 767.
81. *Id.* at 776.

of the duties owed.[82]

2. *Analysis*.—The *Chem-Age* court's first task in addressing what duties Glover owed, and to whom, was to attempt to sort out exactly who Glover represented. After considering Glover's role in setting up the corporation and the fact that he continued to perform work and occasionally held himself out as working on behalf of Chem-Age after its incorporation, the court was persuaded that Glover may have represented the corporation and that the trial court erred in granting summary judgment to the contrary.[83] The court was unpersuaded, however, by Pederson and Shepard's assertion that Glover represented each of them individually because Glover simply had too little direct contact with them for either to have reasonably believed he was represented by Glover. Accordingly, the court found that Glover may have owed duties arising from an attorney-client relationship to Chem-Age, but not to the investors.[84]

While more could be written just on these findings, what makes *Chem-Age* important for purposes of this Article is the considerable time the court spent discussing three "nonclient," fiduciary-based claims Pederson and Shepard might have had against Glover as Chem-Age's attorney. The first, which the court termed a Nonclient Third-Party Beneficiary claim, was technically a claim for negligence (i.e. a breach of duty of care), and not breach of a fiduciary duty.[85] However, it is worth considering here, given the context in which it was brought—Pederson and Shepard were not really questioning Glover's competence in incorporating Chem-Age, but rather his failure to protect them as constituents of the entity. In this way, this claim is very similar to the fiduciary claims brought in other cases considered herein.[86] In fact, it is not uncommon for stakeholders suing entity attorneys to use negligence claims to encompass breach of fiduciary duty claims and vice-versa.[87]

In essence, the Nonclient Third Party Beneficiary theory provides that in certain circumstances a lawyer owes a duty of care to a nonclient when the nonclient is either invited or intended to benefit from the lawyer's services to his or her client.[88] In the case at hand, Pederson and Shepard might claim that they were invited to rely individually on Glover's services to the corporation or that Dahl intended that Glover's representation benefit them primarily and could then assert a valid legal malpractice claim against Glover.

While the *Chem-Age* court was intrigued enough by this theory of liability to spill considerable ink discussing it, the court ultimately found that Pederson and Shepard had not presented sufficient evidence to support it as a technical matter under the standards set forth for such a claim in section 51 of the

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82. *Id.* at 763.

83. *Id.* at 768.

84. *Id.*

85. *Id.* at 769.

86. Third party negligence claims were also asserted by the plaintiffs in *Cacciola*, *supra* Part II.A, and *Richter v. Van Amberg*, *supra* Part II.C.

87. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. c (2000).

88. *Id.* § 51.

Restatement (Third) of the Law Governing Lawyers.[89] Clearly, other concerns also influenced the court's decision. The court laid out several policy reasons to explain the court's reluctance to relax the rule of strict privity in attorney malpractice cases:

> First, the rule preserves an attorney's duty of loyalty to and effective advocacy for the client.... Second, adding responsibilities to nonclients creates the danger of conflicting duties.... Third, once the privity rule is relaxed, the number of persons a lawyer might be accountable to could be limitless .... Fourth, a relaxation of the strict privity rule would imperil attorney-client confidentiality.[90]

These policy reasons are nearly identical to the ones cited in cases rejecting the availability of a breach of fiduciary claim in the Fassihi Scenario. The court also looked at the nature of the services Glover provided—primarily setting up the corporation—and contrasted it with a scenario where instead of just preparing paperwork, he was called upon to advise and warn "individual constituents of all the consequences and dangers inherent in investing in a corporation."[91] Considering Glover's role and contact with Pederson and Shepard, the court did not see justification for providing them with a legal malpractice claim.[92]

Next, the court turned to whether Glover owed and breached a fiduciary duty to Pederson and Shepard even though he did not represent them. At the outset, it stated that no South Dakota court had previously recognized the claim of breach of fiduciary duty "involving lawyers and nonclients," although it acknowledged that other jurisdictions had, including some "in the corporate sphere."[93] As an example, the court cited *Fassihi*.[94] While not discrediting *Fassihi*, the test the *Chem-Age* court found in South Dakota caselaw for determining whether a fiduciary duty existed was significantly more extensive than *Fassihi*'s "reposed trust and confidence" standard:

> To ascertain a fiduciary duty, we must find three things: (1) plaintiffs reposed "faith, confidence and trust" in Glover, (2) plaintiffs were in a position of "inequality, dependence, weakness, or lack of knowledge" and, (3) Glover exercised "dominion, control or influence" over plaintiffs' affairs.[95]

Perhaps because of this, the court found no fiduciary relationship between Glover and the stakeholders. "Pederson and Shepard have submitted no evidence to show how they were in a confidential relationship with Glover, where they depended on him specifically to protect their investment interests, and where

89. *Chem-Age*, 565 N.W.2d at 771.
90. *Id.* at 769 (citations omitted).
91. *Id.* at 770-71.
92. *Id.* at 771.
93. *Id.* at 772.
94. *Id.* at 773.
95. *Id.* at 772 (citation omitted).

Glover exercised dominance and influence over their business affairs."[96] Further, "[a]side from simple avowals that they believed Glover was watching out for their interests, their claim that Glover was entrusted with explicit responsibility for their investments is 'factually unsupported.'"[97] In analyzing the stakeholders' claim in this way, *Chem-Age* differs sharply from *Cacciola*, which seemed to imply that a fiduciary duty extending from the lawyer to stakeholders exists whenever a lawyer represents a closely held entity. It differs from *Fassihi* as well not only by using a more exacting standard, but by requiring evidence of reliance beyond just simple avowals. *Fassihi*'s appeal might very well have been unsuccessful had it been judged by the *Chem-Age* court.

Glover, however, was not out of the woods yet. As in *Cacciola*, the *Chem-Age* court moved immediately on to consider whether Glover might be liable for "aiding and abetting" a breach of a fiduciary duty owed to the disgruntled stakeholders by Dahl, even though Pederson and Shepard apparently never alleged this themselves.[98] Once again, the *Chem-Age* court used a different and arguably more onerous standard. While the *Cacciola* court had prior state caselaw to rely upon, *Chem-Age* looked instead to the Restatement (Second) of Torts section 876(b), which provides generally that "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other,"[99] and to *Granewich v. Harding*,[100] a 1999 Oregon Supreme Court case which applied this Restatement provision to the *Fassihi* Scenario.[101] In *Granewich*, the attorney helped controlling shareholders squeeze out a minority shareholder by advising and assisting them to take certain steps specifically designed to dilute the minority shareholder's interest (for example, amending the corporation's bylaws to eliminate certain voting requirements that protected the minority shareholder's interest from dilution).[102] The *Granewich* court overturned a lower court's decision that the minority shareholder could not bring a claim for aiding and abetting the majority shareholders' breach of their fiduciary duty to him against the attorney in "the absence of any duty flowing directly from the lawyers to plaintiff."[103]

The *Chem-Age* court had no difficulty finding that Dahl's behavior, as alleged by the plaintiffs, clearly breached fiduciary obligations Dahl owed to the company and its investors.[104] Nor did the court have much doubt that material questions of fact existed as to whether Glover substantially assisted Dahl in

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96. *Id.* at 773.

97. *Id.*

98. *Id.*

99. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

100. 985 P.2d 788 (Or. 1999).

101. *Chem-Age*, 652 N.W.2d at 773-74.

102. *Granewich*, 985 P.2d at 791-92.

103. *Id.* at 790, 794 (citing Granewich v. Harding, 945 P.2d 1067 (Or. Ct. App. 1997)).

104. *Chem-Age*, 652 N.W.2d at 774.

breaching those obligations.[105] Its concern, again policy-driven, was whether it was wise to hold Glover partially responsible for Dahl's use of his services. Holding attorneys liable in this way, the court posited, "poses both a hazard and a quandary for the legal profession."[106] Echoing the concerns it expressed earlier when considering the Nonclient Third Party Beneficiary claim, the court cautioned that overbroad liability for attorneys could affect the quality of legal services in this context, as attorneys might modify, or refrain from providing, advice on matters that affect the rights of third parties.[107] These "self protective reservations" hurt the attorney's client by depriving it of competent, unfettered advice from its legal counsel.[108] At the same time, the court acknowledged that the right to unfettered advice is not an absolute one—"lawyers should not be free to substantially assist their clients in committing tortious acts."[109]

The court concluded that these competing concerns could be reconciled through the strict application of Restatement section 876. First, section 876 requires that the attorney "substantially" assist or encourage a breach of the fiduciary duty.[110] To be implicated, the attorney must provide "substantial assistance" to the actual breach of the duty—merely acting as a scrivener or providing routine legal services to someone who then uses them to breach a duty is insufficient.[111] As an example, the court noted that in *Granewich* the lawyer did more than just advise the controlling shareholders about their options but actually participated in the wrongful acts by making misrepresentations and amending the bylaws in a way that violated the law.[112] Second, the attorney must *know*—actually or constructively—of the fiduciary's role as fiduciary and that the fiduciary's conduct "contravenes a fiduciary duty."[113] Constructive knowledge might suffice especially when the aider and abettor have maintained a long-term or in-depth relationship with the fiduciary.[114] When applied correctly, the court believed that the standard would protect a lawyer from meritless claims by every stakeholder disadvantaged by the lawyer's advice.[115]

In the aiding and abetting claim, the *Chem-Age* court at last found a hook on which Pederson and Shepard could potentially hang their hats. Given the facts at hand, the court found that Glover's participation in the formation of the corporation, acquiescence in Dahl's treatment of the business as a one-man operation, and his long term relationship with Dahl, provided reason enough to proceed further on the questions of whether Glover knew or should have known

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105. *Id.* at 776.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

111. *Chem-Age*, 652 N.W.2d at 774-75.

112. *Id.* at 775.

113. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 874 cmt. c (1979)).

114. *Id.*

115. *Id.* at 774.

of Dahl's fiduciary duty to the duped investors and whether he substantially assisted in the breach of that duty.[116] This holding then suggests, as *Granewich* did, an alternative way to find an attorney liable to stakeholders she does not represent and to whom she does not owe a fiduciary duty. The *Chem-Age* court's measured and careful review of three separate nonclient, fiduciary-based claims makes it an important update to *Fassihi.*

C. Richter v. Van Amberg[117]

1. Facts.—At issue in this New Mexico federal district court case were the actions of a lawyer who represented a real estate development partnership called Santa Fe Partners II ("SFP"). SFP had two, clearly unequal, partners—Gibbens and Richter. Gibbens provided most of the capital for the venture and consequently was largely in control. SFP's partnership agreement designated Gibbens as the managing partner and provided that Richter was entitled to twenty percent of the partnership's profits only after Gibbens had recovered his initial investment.[118]

The opinion in this case does not set forth the rest of the facts very clearly. What is clear, however, is that the relationship between Gibbens and Richter ultimately began to fracture. Gibbens believed that Richter had deceived him in taking an undisclosed commission on certain property, presumably associated with the partnership and was also disappointed by Richter's general performance.[119] Gibbens approached the partnership's lawyer, Van Amberg, about representing him personally and, in the course of so doing, expressed his dissatisfaction with Richter and his desire to dissolve SFP to avoid paying Richter any profits.[120] Van Amberg declined to represent Gibbens, citing his obligations to SFP as an entity, but continued to represent the partnership and said nothing to Richter.[121]

Subsequent to this, Van Amberg facilitated a sale of some of the partnership's property (the "MAH Sale"). Gibbens insisted that it be done without Richter's knowledge or consent and technically, Richter's consent was not required under SFP's partnership agreement.[122] When Richter's consent to the MAH Sale later became necessary to complete its closing (and presumably Richter objected because he had not yet received any profits from the venture), Van Amberg brokered an accommodation between Richter and Gibbens which allowed the sale to go forward.[123] After the MAH Sale, Gibbens sued to dissolve

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116. *Id.* at 776.
117. 97 F. Supp. 2d 1255 (D.N.M. 2000).
118. *Id.* at 1259.
119. *Id.* at 1262.
120. *Id.*
121. *Id.*
122. *Id.* at 1259.
123. *Id.*

SFP.[124] Richter counterclaimed and the partners ultimately settled the dissolution of the partnership when Richter accepted payment of $110,000.[125]

The case at issue arose out of claims Richter later asserted against Van Amberg, after learning that Gibbens and Van Amberg had spoken about Gibbens's plans to dissolve SFP prior to the MAH Sale. Richter sued Van Amberg asserting a catalog of claims, including legal malpractice, breach of fiduciary duty and aiding and abetting a breach of fiduciary duty.[126] Underlying all of Richter's claims were his contentions that Van Amberg facilitated the MAH Sale while aware that Gibbens wanted to terminate the partnership without compensating Richter and failed to disclose this to Richter. Richter claimed he would not have agreed to the MAH Sale had he known Gibbens' intentions.[127]

Van Amberg countered that Richter's contentions did not amount to any wrongdoing on Van Amberg's part and moved for judgment as a matter of law.[128] Van Amberg claimed that Gibbens, as SFP's managing partner, had full authority under the partnership agreement over partnership matters, without any right of consent by Richter, and, therefore, Van Amberg only owed a duty of disclosure to Gibbens.[129] Moreover, Van Amberg claimed that ethical rules prohibited him from disclosing what he learned about Gibbens's desire to dissolve the partnership to Richter because it was a communication by a person "who consults a lawyer with a view to obtaining professional legal services."[130]

2. *Analysis.*—The *Richter* court granted Van Amberg's motion, agreeing that, even assuming Richter's version of the facts, there was no legally sufficient basis to support a finding for Richter on any of his claims.[131] What is distinctive about the *Richter* opinion, especially when compared with *Cacciola* and *Fassihi*, is its analytical approach to determining whether Van Amberg owed a fiduciary duty to Richter. In concluding he did not, the court never contemplated that a fiduciary relationship might exist between the two, separate and apart from an attorney-client relationship. In this way, *Richter* bears very little resemblance to *Fassihi*. The fact that the *Richter* court employed several different and contradictory tests for determining Van Amberg's obligations to Richter, however, prevents it from representing a clear alternative to the *Fassihi* approach.

It is significant that the *Richter* court began its analysis of Richter's breach of fiduciary duty claim by quoting from a treatise on legal malpractice—"[the] breach of fiduciary duty claim is also one for legal malpractice."[132] For in this

124. *Id.*

125. *Id.*

126. *Id.* at 1255-56.

127. *Id.* at 1259.

128. *Id.* at 1258.

129. *Id.* at 1259.

130. *Id.* at 1262.

131. *Id.* at 1258.

132. *Id.* at 1261 (citing 2 MALLEN & SMITH, LEGAL MALPRACTICE § 14.1.5 (4th ed. 1998 Supp.)).

court's opinion, such a claim was inextricably tied to an attorney-client relationship. For Richter, this meant the court would not recognize his claim for breach of fiduciary duty against Van Amberg unless Richter demonstrated an attorney-client relationship existed between them.

The court provided support for this approach, and distanced itself from *Fassihi*, by citing two recent New Mexico cases in which courts had held that the attorney for a closely-held entity owed no special duties to its constituents by virtue of that representation.[133] Most compelling was the decision in *Delta Automatic Systems, Inc. v. Bingham,*[134] a 1998 case, in which the court considered claims by the two sole shareholders of a corporation that the corporate attorney owed them a special duty because he represented them in matters apart from the corporation. The court stated unequivocally: "In representing Delta, Defendants did not owe the Quintanas, as shareholders, any special duty above and beyond their duties to the corporation. This is so even though the Quintanas were the sole shareholders of Delta and Defendants knew that the Quintanas' livelihood depended on Delta's success."[135] Had the *Richter* court stopped here, we could simply assume that New Mexico law on this issue is similar to other jurisdictions which have concluded that attorneys owe no fiduciary or other duties to the stakeholders of a closely-held entity absent evidence of a separate attorney-client relationship between them.

Instead, however, the *Richter* court also pointed to *Rice v. Strunk*,[136] a 1996 decision of the Indiana Supreme Court, which provided that partnerships should be treated differently than corporations for purposes of determining who the attorney represents, as guidance in reaching its decision. This approach, while contrary to Rule 1.13 of the MRPC and the law in the vast majority of U.S. jurisdictions, is still followed in a few states. It employs the aggregate, rather than entity, theory of representation when analyzing a lawyer's representation of a partnership and other unincorporated associations, holding that an attorney who represents a partnership actually represents each partner jointly rather than the partnership as an entity. As the court in *Rice* noted, however, pursuant to partnership law, partners may essentially contract away this fiduciary and legal relationship with the entity's attorney by entering into a partnership agreement that delegates their rights to the management of the partnership to a manager or managing partner.[137] Following this logic, the *Richter* court found that, indeed, Richter might have had individual claims against Van Amberg had he not entered into a partnership agreement with Gibbens delegating full governing authority on all partnership matters to Gibbens.[138] Because he did so, the court reasoned, Van Amberg's fiduciary obligations of confidentiality and undivided loyalty flowed directly to the partnership as represented by its managing partner and not to

133. *Id.* at 1263.

134. 974 P.2d 1174 (N.M. Ct. App. 1998).

135. *Id.* at 1178 (cited in *Richter*, 97 F. Supp. 2d at 1263-64).

136. 670 N.E.2d 1280 (Ind. 1996).

137. *Id.* at 1288-89.

138. *Richter*, 97 F. Supp. 2d at 1263.

either of the partners individually.[139]

This purely contractarian approach differs from *Fassihi* in which such obligations are not automatically bestowed upon stakeholders, but created through the relationship that the individual stakeholder has with the attorney. However, it also is clearly inconsistent with the *Richter* court's simultaneous use of *Delta* as controlling precedent.

In the absence of a fiduciary relationship with Richter, Van Amberg's behavior, which initially might have appeared problematic, is viewed in a different light. The law only imposed on him a duty to his client—the partnership. Citing New Mexico's version of Model Rule 1.13, the court stated, "As the partnership lawyer, Mr. Van Amberg's responsibility was to the entity, specifically the managing partner."[140] Therefore, Van Amberg's "secret" facilitation of the MAH Sale was not wrongful as Gibbens, pursuant to the partnership agreement, "had the authority to convey partnership real property . . . on behalf of the partnership without Plaintiff Richter's consent."[141] Van Amberg's non-disclosure of Gibbens's intent to dissolve the partnership without giving Richter any profits was also appropriate because Van Amberg only had a duty of disclosure to the partnership, not individual partners. Further, and perhaps more plausibly, because Gibbens disclosed it in the course of requesting Van Amberg to represent him personally, it was a confidential attorney-client communication.[142]

Clearly, the *Richter* court was convinced that the facts, as much as the law, justified its decision in this case. Even under Richter's version of the facts, the court believed that Van Amberg's behavior lined up with applicable professional standards. Richter and Gibbens were both sophisticated businessmen who retained separate counsel during their disputes.[143] When Gibbens approached Van Amberg about personal representation, Van Amberg declined and told Gibbens to retain separate counsel.[144] When Van Amberg participated in the negotiations between Richter and Gibbens it was at the request of Richter's counsel.[145] Towards the end of its opinion, the court revealed an unwillingness to drag Van Amberg into Richter's sour break-up with Gibbens. It noted that both Gibbens and Richter "had colorable claims against one another for breach of fiduciary duty" and "have strong personalities" and "it is highly unlikely that Mr. Van Amberg could have predicted what either would do regarding their ongoing partnership disputes."[146] Accordingly, the court quickly dispensed of Richter's final claim that the lawyer aided and abetted Gibbens's breach of fiduciary duty to Richter, noting again that Van Amberg's actions met

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139. *Id.*

140. *Id.* at 1263 (citing N.M. R. PROF. CONDUCT 16-113 (A)).

141. *Id.* at 1262-63.

142. *Id.* at 1262.

143. *Id.* at 1264.

144. *Id.* at 1266.

145. *Id.* at 1264.

146. *Id.* at 1266.

professional standards and that "no evidence suggests that Mr. Van Amberg's non-disclosure was the proximate cause of damages to Plaintiff Richter."[147]

At the end of the day, it is difficult for the reader to decipher on what principle the *Richter* decision rests. Was it that Van Amberg, as lawyer for the partnership, owed no duties to Richter, that Richter contracted away any duties Van Amberg owed to him, that Van Amberg's adherence to applicable professional standards absolved him of liability, or some combination of these three? The answer is unclear. Notwithstanding, this case is significant for its discussion of several approaches to the question of the existence of a fiduciary duty in the Fassihi Scenario not discussed in *Fassihi, Cacciola* or *Chem-Age*.

III. Lessons Learned

So what helpful guidance might be gleaned from these "descendants of Fassihi" for those who represent closely held businesses? Interests among business partners frequently diverge and most significant decisions a business makes have the potential to affect constituents differently. Must lawyers in this arena practice with an excess of caution, with one eye constantly on the stakeholder who is getting the short end of the stick?

A. *Where Does the Law Stand?*

The initial question posed by this Article was: Under what circumstances is a lawyer who represents a closely held entity potentially susceptible to fiduciary-type claims asserted by individual, nonclient stakeholders? The cases analyzed in Part II demonstrate that there still is no uniformity of opinion on this issue. This is especially true with the respect to the narrower question of how widely has *Fassihi*'s central proposition been accepted. At one end of the spectrum is a case like *Cacciola* in which the language of the court's opinion insinuates that a lawyer owes a fiduciary duty to non-client stakeholders whenever the lawyer represents a closely-held entity. At the other end of the spectrum is the *Richter* court which, apparently, would not recognize a claim for breach of fiduciary duty in the absence of an established attorney-client relationship. Somewhere in the middle is *Chem-Age* which, like *Fassihi*, requires the demonstration of a relationship of trust, not quite arising to the level of an attorney-client relationship. Even on the question of what constitutes a relationship of trust, courts apply varying standards as a comparison of *Chem-Age* and *Fassihi* indicates. The recent cases are representative of the diversity of viewpoints expressed by courts that have considered this claim during the twenty years since the *Fassihi* decision.[148]

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147. *Id.*

148. *E.g.*, Skarbrevik v. Cohen, England & Whitfield, 282 Cal. Rptr. 627 (Ct. App. 1991) (considering breach of fiduciary claim but finding absence of relationship of trust between lawyer and constituent); Rose v. Summers, Compton, Bells, & Hamberg, P.C., 887 S.W.2d 683 (Mo. Ct. App. 1994) (finding lawyer for limited partnership not liable and owed no fiduciary duty to limited partners); Arpadi v. MSP Corp., 628 N.E.2d 1335 (Ohio 1994) (finding lawyer for limited

An important corollary issue for those jurisdictions which acknowledge the existence of a fiduciary duty in this context is: what does the duty consist of? Is it identical to the fiduciary duty lawyers owe clients, less comprehensive or altogether different? The fiduciary duty resulting from an attorney-client relationship is really an amalgam of several separate obligations, including "safeguarding the client's confidences and property; avoiding impermissible, conflicting interests; dealing honestly with the client; adequately informing the client; following instructions of the client; and not employing adversely to the client powers arising from the client-lawyer relationship."[149] The limited treatment this issue has received suggests that the duty owed to a nonclient stakeholder closely resembles that owed to a client. In *Cacciola*, the duty encompassed Nellhaus's (the attorney) failure to deal honestly with Salvatore by not informing him "about Edward's negotiations and his subsequent purchase of Anthony's former interest."[150] In *Fassihi*, it was the lawyer's behavior in acting to deplete Fassihi's property (i.e. his economic interest in the corporation).[151] The *Chem-Age* court discussed the fiduciary duty to a nonclient as though it were the duty owed to a client.[152] Other cases and the Restatement have insinuated the same.

One way in which the three recent cases stand apart from *Fassihi*, which is also an indication of how the jurisprudence has developed, is that they each address a separate, additional claim: the attorney's 'aiding and abetting' of another stakeholder in breaching his fiduciary duty to the plaintiff. This is not because the facts in *Fassihi* are less compelling than the other cases for such a claim, but rather because it is only in the last twenty years that courts have begun to recognize the liability of an attorney for this tort.[153] In fact, it is only since *Granewich v. Harding*,[154] a 1999 decision of the Oregon Supreme Court, that this type of claim was upheld in a case involving the Fassihi Scenario. *Granewich* is partially distinguishable from *Fassihi*, because it involved an attorney who began representation of a corporation only after the majority shareholders had commenced the plan to oust the minority shareholder. The minority shareholder had no direct contact with the attorney and therefore could not reasonably claim that he had established a relationship of trust and confidence with the attorney. This distinction, however, certainly did not stop the *Cacciola*, *Chem-Age*, and *Richter* courts from considering an aiding and abetting claim, in two of the cases

partnership owed duties to limited partners).

149. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. b (2000) (internal references omitted).

150. Cacciola v. Nellhaus, 733 N.E.2d 133, 138 (Mass. App. Ct. 2000).

151. Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 309 N.W.2d 645, 646 (Mich. Ct. App. 1981).

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

153. Bryan C. Barksdale, Note, *Redefining Obligation in Close Corporation Fiduciary Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty in Squeeze-Outs*, 58 WASH & LEE L. REV. 551, 554 (2001).

154. 985 P.2d 788 (Or. 1999). *See supra* notes 100-03 and accompanying text.

even when the plaintiffs had not initially pleaded it.

The presence of the aiding and abetting claim in the above cases represents a clear, recent trend of courts towards treating it not only as complimentary to the more direct breach of fiduciary duty claim, but, perhaps in many instances, as a better way to determine an attorney's liability in the Fassihi Scenario. There are several possible reasons for this. First, caselaw is better developed as to what duties majority stakeholders owe to minority stakeholders than it is as to what duties an attorney for a closely-held entity owes to individual nonclient stakeholders. Because many Fassihi Scenario cases involve a concomitant breach of duty by a majority stakeholder, the court can move directly on to the more concrete inquiry of whether the attorney knowingly participated in the majority stakeholder's breach rather than having to address whether a fiduciary relationship existed between the attorney and the disgruntled stakeholder and whether the attorney's actions violated this relationship. Along these lines, and as has already been demonstrated above, jurisdictions differ significantly on whether or not, and when, attorneys owe fiduciary duties to nonclients. The aiding and abetting claim addresses the attorney's reprehensible behavior notwithstanding the court's position on these other issues. Finally, as one commentator recently pointed out, liability for breach of a fiduciary duty does not require a mental state and is therefore essentially a strict liability claim.[155] To be liable for aiding and abetting someone else's breach, one must have done so knowingly and therefore this claim may better fit scenarios like those in all three of the recent cases in which the plaintiff seeks redress against the attorney for affirmatively and intentionally acting against his interest.

In summary, whether or not, as well as when, an attorney is susceptible to fiduciary claims in this context continues to be largely dependant upon the jurisdiction in which the attorney practices. It appears, however, that in a growing number of jurisdictions, a lawyer embroiled in a Fassihi Scenario will be susceptible to liability if she knowingly and substantially assists one or more stakeholders in breaching their fiduciary duties to another stakeholder. Other attempts to extend fiduciary type liability, like the nonclient third party beneficiary claim alleged in all three of the recent cases, have generally failed.

B. Possible Responses by the Attorney

Given the judicial uncertainty, it is tempting to seek a straightforward, failsafe answer to this thorny representational dilemma. One particularly risk-averse approach would be for the lawyer to simply not involve herself in matters that adversely impact the interests of one or more stakeholders. This might involve declining to accept representation of closely held businesses where the interests of stakeholders appear to be even remotely at odds, refusing to advise an entity client (including its control group) on decisions that could negatively affect one or more stakeholders and recommending that all affected constituents seek separate counsel whenever any intracorporate dispute arises.

155. Barksdale, *supra* note 153, at 559.

Another possible approach would be for the lawyer to attempt to consider and reconcile the interests of an entity and each of its stakeholders on all decisions. This utilizes the "group" or "aggregate" theory of organizational representation, which some legal commentators and courts have asserted (as *Cacciola* implicitly does) is appropriate when lawyers represent closely held entities.[156] In essence, this approach requires that the lawyer treat each stakeholder as a co-client pursuant to Model Rule 1.7 and refrain from further representation if the interests of these co-clients are "fundamentally antagonistic." Because the lawyer would owe representational duties to each stakeholder, when faced with a potential Fassihi Scenario, she could not assist an entity or control group in taking action adverse to any one stakeholder.

While accomplishing the lawyer's objective of reducing fiduciary liability exposure, these approaches both raise legal and practical problems. The most fundamental of these is that neither approach comports with the "entity" theory of representation embodied in Model Rule 1.13, and its Model Code counterpart EC 5-18, which together are the basis for the standards for professional conduct adopted in every state pertaining to a lawyer's representation of an organization. The selection of the "entity" theory over the "aggregate" theory by the drafters of the MRPC followed from their conclusions that the former had supplanted the latter in jurisdictions throughout the United States and that treating stakeholders as co-agents of the entity rather than co-clients more accurately reflects basic principles of corporate law.[157] ABA Formal Opinion 91-361 clarified that these principles and the entity theory applies equally to partnerships, closely held entities and other types of associations as it does to corporations.[158] Inherent within Rule 1.13 is the notion that the lawyer, in following the will of the entity as expressed by its "duly authorized constituents," may assist in a course of action adverse to one or more of the entity's stakeholders.[159]

As a practical matter, following either of the two approaches discussed above as a general rule would hinder a lawyer's ability to meaningfully and effectively represent closely held business clients. Under either approach, the lawyer would have to tailor her advice to omit the discussion of options that could potentially negatively impact a stakeholder and thus would deprive an entity client of an opportunity to fully consider all options and make fully informed decisions. The "risk-averse" approach would require identifying all situations in which interests potentially diverge—ranging from inherently contentious ones, like the decision

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156. "Reality inhibits application of the entity representation rule of the closed corporation." WUNNICKE, *supra* note 4, at 232; *see also* Lawrence Mitchell, *Professional Responsibility and the Close Corporation: Toward A Realistic Ethic*, 74 CORNELL L. REV. 466 (1989).

157. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, LAW AND LAWYERING 17.6 to 17.13 (3d ed. 2001).

158. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991).

159. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003) (requiring lawyer to explain to constituent that entity is client when lawyer is "dealing with" constituent against whom entity's interests are adverse).

to involuntarily buy out a minority shareholder, to more apparently mundane tasks like the preparation of organizational documents that supposedly express the *agreement* of stakeholders—and then recusing herself.[160] It is hard to believe a lawyer could ever identify all such situations or that a client would find it valuable to retain a lawyer who did. In the same vein, while under certain circumstances it is either advisable or required that a lawyer for a business recommend that constituents at odds with one another consult separate counsel, in many cases, it is neither required nor helpful to do so, especially when considering the attendant costs, both financial and otherwise, of adding more lawyers to the fray.

Although assisting an entity client to reconcile the interests of its stakeholders is sometimes in the entity's best interests, a purely "aggregate" approach to corporate representation is often unfeasible. Because the lawyer owes duties to multiple clients rather than one, the potential for pervasive and numerous conflicting duties increases with each additional stakeholder. Ostensibly, the lawyer owes obligations of confidentiality to each stakeholder and to the entity itself, which could make communications with any one stakeholder a potential minefield. Additionally, as previously mentioned, the lawyer may feel compelled to impose self protective restrictions on her advice to avoid any chance of impairing one client's interests, which ultimately hinders the development of an open, trustworthy relationship between the lawyer and entity.

C. A Case-by-Case Strategy for Reducing Exposure to Fiduciary Liability

A more appropriate response for containing fiduciary liability should be firmly rooted in applicable caselaw and professional standards. To this end, the recent cases examined in this Article are quite instructive.

The recent cases suggest that the course of dealing that the attorney and client engage in is often a very important factor. For example, in *Chem-Age*, Pederson and Shepard's claim of a fiduciary relationship with Glover failed because there was "no evidence to show how they were in a confidential relationship with Glover, where they depended on him specifically to protect their investment interests, and where Glover exercised dominance and influence over their business affairs."[161] Simple avowals that they believed Glover was watching out for their interests were insufficient absent evidence "that Glover was entrusted with explicit responsibility for their investments."[162]

Similarly, in dismissing the notion that Van Amberg owed any duties to Richter individually, the *Richter* court looked to their interactions and found no specific evidence of Richter's reliance on Van Amberg in partnership matters;

160. *See* Brennan v. Ruffner, 640 So. 2d 143 (Fla. Dist. Ct. App. 1994) (considering claim that lawyer breached fiduciary duty to shareholder in preparation of shareholders agreement); *see also* Egan v. McNamara, 467 A.2d 733 (D.C. 1983) (same).

161. Chem-Age Indus., Inc. v. Glover, 652 N.W.2d 756, 773 (S.D. 2002).

162. *Id.*

in fact, Richter retained separate counsel to protect his interests during his negotiations with Gibbens.[163] The court found Van Amberg's response to Gibbens's request for personal representation telling of how he viewed his relationship with the stakeholders—he declined and referred Gibbens to outside counsel, stating that he could only represent the partnership.[164] Later, he urged Gibbens to disclose certain partnership matters to Richter.

Cacciola, with its insinuation that a fiduciary relationship between an attorney and stakeholder of a closely held entity might be inherent, did not explore how the partners of Cacciola Associates perceived Nellhaus nor point to this as a factor. In a few jurisdictions, course of dealing will not be a factor. One other case, however, is instructive. In *Brennan v. Rufner*, a Florida appeals court affirmed the dismissal of a claim of breach of fiduciary duty by a "disgruntled minority shareholder" against the attorney of a closely-held corporation, after the corporation's other two shareholders voted the minority shareholder out of the corporation using a procedure agreed upon in their shareholders agreement.[165] In concluding that the attorney did not have a fiduciary relationship with the disgruntled shareholder resulting from his preparation of the shareholders agreement, the court found persuasive the fact that the attorney had told the shareholders that he only represented the corporation in drafting the agreement.[166] Defining upfront the nature of the attorney's relationship with the constituents of an entity client is also consistent with several sections of the MRPC, including Rule 1.2 (c), Rule 1.7 and Rule 1.13 (d).

For the most part, the logic in these cases closely resembles the "reasonable expectations" approach adopted in most jurisdictions and by the ABA for dealing with the closely related issue of determining whether an attorney and an individual stakeholder have established a separate attorney-client relationship.[167] This approach looks at the facts of each particular case to determine whether an express or implied relationship has arisen based on the stakeholder's reasonable expectation of the role of the attorney, including whether "there was evidence of reliance by the individual [stakeholder] on the lawyer as his or her separate counsel, or of the [stakeholder's] expectation of personal representation."[168] Similarly then, an attorney who would like to proactively decrease the likelihood of creating a fiduciary relationship with individual stakeholders should address this issue at the beginning of a representation by clearly stating to each that the attorney will only represent the interests of the business entity and not those of any of the individual stakeholders. This would best be taken care of in writing,

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163. Richter v. Van Amberg, 97 F. Supp. 2d 1255, 1265 (D.N.M. 2000).

164. *Id.* at 1262.

165. *Brennan*, 640 So. 2d at 143.

166. *Id.* at 146-47; *see also* Buehler v. Sbardellati, 41 Cal. Rptr. 2d 104, 108 (1995) (upholding lawyer's limitation of role in formation of limited partnership to merely documenting transaction and not representation of each partner's individual interests).

167. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-361 (1991).

168. *Id.*

ideally in an engagement letter.[169] For the risk averse attorney, the letter could go even further and provide that undertaking the engagement in no way creates any type of a fiduciary relationship with any of the stakeholders.

Of course, putting this in writing is one thing and following it is quite another. As several commentators have noted, it is often difficult in the course of representing a closely held entity to separate the entity and its stakeholders.[170] But difficult does not mean impossible. The attorney who wishes to rebut a future contention that she has a fiduciary relationship with any of the entity's stakeholders would be well advised to adhere to "corporate"/"entity" formalities. These formalities include somewhat mundane, yet important, practices like ensuring that direction given by a constituent of the client is consistent with the constituent's authority and has been properly approved by the entity, insisting that constituents adhere to rules and procedures set fort in the entity's governance documents and applicable law and even reinforcing that the entity is the client when communicating with constituents (e.g., by addressing letters to constituents in their official capacities). They also include obeying requirements directly imposed by the MRPC such as explaining the identity of the attorney's client when it is apparent that the entity's interests are adverse to those of one or more of its stakeholders and keeping paramount the best interest of the entity in each and every facet of the representation. Each of the foregoing are examples of sometimes overlooked standards of good corporate legal practice.

Finally, it seems almost too obvious and a little circular to suggest that an attorney can better protect himself from liability associated with a Fassihi Scenario by obeying the law. And yet it should be of some comfort for attorneys to know that courts typically have only upheld the types of claims discussed throughout this Article when the attorney has transgressed or assisted someone to transgress a law either external or, more often, internal (i.e. constitutional law of the entity).

Cacciola is a good example of this point. The attorney for the partnership engineered a transaction that allowed one partner to acquire a deceased partner's interest. What made this otherwise innocuous action improper was that it was carried out in violation of a partnership agreement granting the partnership the first option to purchase the interest. Similarly, in *Chem-Age*, Glover's assisting Dahl in selling the assets of the business might otherwise not have been problematic. But the fact that Glover illegally notarized the signatures of Pederson and Shepard on the corporation's Articles of Incorporation and then facilitated the sale of Chem-Age's assets without observing any corporate formalities seemed to convince the court that the stakeholders might have a viable claim against Glover.

On the other hand, the *Richter* court dismissed all of the claims brought against Van Amberg even though the court believed that Richter had a colorable

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169. For an example of language to use in engagement letters in this context, see CHESTER ROHRLICH ET AL., ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES, at app. 2B (6th ed. 2001).

170. *See, e.g.*, sources cited in *supra* note 156.

claim against Gibbens for breach of fiduciary duty and Van Amberg assisted Gibbens on several matters that Richter alleged to be wrongful. The court noted that Van Amberg's behavior seemed consistent both with applicable ethical standards and SFP's partnership agreement, which designated Gibbens as the managing partner with decision-making authority on almost all partnership matters.

Although the results in these cases are in part a reflection of the jurisdiction in which they were brought, the matter is certainly not out of the attorney's hands. Adherence to those provisions of the MRPC that apply to organizational representation, corporate/entity formalities and applicable law will greatly reduce an attorney's exposure to fiduciary liability with respect to individual stakeholders of an entity client.