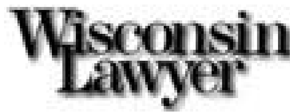

The Chevron Decision:
Unanswered Questions In Accounting Malpractice Law

Focusing almost exclusively on lawyer conduct in Chevron, the court left unanswered important questions about the practice of accounting

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Originally published May 1994

What began as an accounting malpractice action ended as an attorney misconduct case, as the Wisconsin Supreme Court affirmed judgment against defendant Deloitte & Touche (Deloitte) to punish misconduct of Deloitte's trial counsel in Chevron Chemical Company v. Deloitte & Touche.1

Focusing almost exclusively on lawyer conduct (see accompanying sidebar), the court left unanswered important questions about the practice of accounting: When an auditor withdraws a report on financial statements, to whom must he or she disclose the withdrawal? Is an auditor's compliance with the professional standards promulgated by the American Institute of Certified Public Accountants (AICPA) a defense against claims for failure to disclose? Are the sections of the Wisconsin Administrative Code that purport to codify those AICPA standards valid?

This article explores the origins of these questions in Wisconsin law, professional accounting standards and the opinion of the court of appeals in Chevron; it unearths the one piece of guidance to accountants from the supreme court's opinion; and finally it suggests how accountants might cope until these questions are answered authoritatively.

In 1986 Deloitte issued an unqualified audit report on the 1985 financial statements of American Fuel & Supply Co. Inc. (AFSCo). Then Deloitte discovered a material error or irregularity in those statements and withdrew its audit report. AFSCo refused to notify anyone of the withdrawal. Faced with AFSCo's threats to sue for breach of confidentiality, Deloitte nonetheless disclosed its retraction to AFSCo's one secured creditor. But Deloitte did not disclose the retraction to AFSCo's unsecured creditors, including Chevron.

To justify its nondisclosure to Chevron, Deloitte appealed to Standard AU section 561, one of the Statements on Auditing Standards promulgated by the AICPA.[2] Section 561 sets forth steps that an auditor should take when, "subsequent to the date of his report upon audited financial statements, [the auditor] becomes aware that facts may have existed at that date which might have affected his report had he then been aware of such facts."[3] The auditor's first step – which Deloitte took – is to "advise his client to make appropriate disclosure of the newly discovered facts and their impact on the financial statements to persons who are known to be currently relying or who are likely to rely on the financial statements and the related auditor's report."[4]

If, like AFSCo, the audit client refuses to make the disclosures, section 561 requires the auditor to take further steps. "The steps that can appropriately be taken will depend upon the degree of certainty of the auditor's knowledge that there are persons who are currently relying or who will rely on the financial statements and the auditor's report, and who would attach importance to the information, and the auditor's ability as a practical matter to communicate with them."

"Unless the auditor's attorney recommends a different course of action," section 561 requires the auditor to notify "each person *known* to the auditor to be relying on the financial statements that his report should no longer be relied upon."[5]

Deloitte concluded that it did not "know," in the sense required by section 561, that Chevron was relying on the 1985 financial statements and audit report. Deloitte knew that Chevron had been one of AFSCo's primary trade creditors for many years, including 1985. Deloitte knew that Chevron had received AFSCo's financial statements with Deloitte's audit reports for prior years, including 1984. But Deloitte did not know, and AFSCo would not tell Deloitte, whether AFSCo had given Chevron the 1985 report. Deloitte therefore took the position that section 561 did not require disclosure to Chevron.

Left in the dark, Chevron continued to extend credit to AFSCo until AFSCo filed for bankruptcy. Then Chevron sued Deloitte to make good its losses. Chevron contended that Deloitte had performed the audit of AFSCo's 1985 financial statements negligently. The jury found otherwise, the court upheld the verdict, and Chevron did not pursue the negligent audit issue on appeal. But Chevron did emerge from the turbulent and confusing trial with a judgment notwithstanding the verdict based on Deloitte's negligent failure to disclose to Chevron the retraction of the audit report. Deloitte's appeal thus focused upon Deloitte's post-audit conduct.

Citizens State Bank v. Timm, Schmidt & Co.

The *Chevron* litigation arose against the background of the leading Wisconsin accounting malpractice decision, *Citizens State Bank v. Timm, Schmidt & Co.*[6] In *Timm* the court addressed the issue: "May an accountant be held liable for the negligent preparation of an audit report to a third party, not in privity, who relies on the report?"[7] Holding that

“the absence of privity alone should not bar negligence actions by relying third parties against accountants,” the court then asked what is “the extent of an accountant’s liability to injured third parties.”[8] The court answered that accountants are liable to third parties “for the *foreseeable* injuries resulting from their negligent acts,” subject to certain public policy limitations.[9]

In adopting this rule, the court rejected *Restatement (Second), Torts,* section 552, relating to Information Negligently Supplied for the Guidance of Others. Under section 552, an auditor is liable to a third party who relies on a negligent audit report only if the third party is a “person or one of a limited group of persons for whose benefit and guidance” the auditor “intends to supply” the information, or knows the audit client intends to supply it.[10] The *Timm* court, however, found this limitation “too restrictive,” and made auditors liable to third parties who are in “the much larger class who might reasonably be expected sooner or later to have access to the [audit report] and *foreseeably* to take some action in reliance on it.”[11] Only this much larger class includes the bank in *Timm* – the unknown lender, whom the auditor has no specific reason to believe would rely on the audit report.[12]

Using *Timm* to answer the *Chevron* question

Timm used a broad foreseeability test to answer the question: To whom is an auditor liable for damages resulting from *a negligent audit report?* *Chevron* raises the question: To whom is an auditor liable for damages resulting from *the negligent failure to disclose the withdrawal of a non-negligent audit report?* It is tempting to apply the foreseeability test of *Timm* to answer the *Chevron* question and hold an auditor liable for negligent nondisclosure to precisely the same third parties to whom the auditor would be liable for a negligent audit. Under this rule, an auditor would have to disclose the retraction of an audit report to all third parties who would foreseeably (in the broad sense of *Timm*) rely on that audit report.

Is this rule workable? In a *Chevron* situation the auditor is faced with the practical problem of making a list of persons to whom to disclose retraction of the audit report. The auditor could readily list and notify specific persons for whose benefit and guidance the auditor supplied (or knew the audit client supplied) the audit report. The auditor could even arrange for notification to limited groups of persons for whose benefit and guidance the auditor supplied (or knew the audit client supplied) the audit report.[13] But that alone would not satisfy the *Timm* foreseeability rule. To satisfy that rule, the auditor would have to notify all persons, including persons the auditor had no reason to believe were relying on the audit report and even persons completely unknown to the auditor, who are in “the much larger class who might reasonably be expected sooner or later to have access to the [audit report] and foreseeably to take some action in reliance on it” – persons such as the unknown lender.

How could the auditor disclose anything to such persons? Only by public notice: publication in official newspapers or filing notice in a public registry. Such a notice

would be accessible to everyone foreseeable within the broad meaning of *Timm.* But it also would be accessible to everyone else, including all those persons who foreseeably never would have any legitimate interest in such a disclosure.

Is such overdisclosure a price worth paying to meet the *Timm* standard? Arguably not. Under common law, one person has an affirmative duty to disclose something to another only if the two stand in some special relationship.[14] It seems contrary to this rule to require an auditor to disclose retraction of an audit report to the public as a whole, or to all plaintiffs that are foreseeable within the meaning of *Timm.* The cost of abandoning this rule might be high: The auditor's public disclosure could harm the auditor-client relationship significantly, although perhaps no more than disclosure to, say, the SEC, which in this respect is a public registry. And the gain from abandoning the rule might be small: The wide net cast by public disclosure is not likely to catch many relying third parties who would not have been notified anyway by more limited disclosure.[15]

On the other hand, perhaps it is wrong to be solicitous of the client relationship in this case. The *Chevron* question arises because the audit client refuses to disclose the auditor's retraction of the misleading audit report, a refusal which arguably constitutes an intentional misrepresentation by the client. Moreover, often the (non-negligent) audit report is misleading precisely because of the client's temporarily successful fraud on the auditor. And any harm to the audit client from public disclosure, other than embarrassment, probably would result because the disclosure prevented some hitherto unknown third party from relying on the audit report – just what disclosure is meant to do.

Deloitte's appeal gave the court of appeals an opportunity to address these issues.

The court of appeals opinion in *Chevron*

The court of appeals affirmed judgment for Chevron, with Judge Fine dissenting.[16] The court concluded that Deloitte had a duty to disclose to Chevron the retraction of the audit report, despite AFSCo's objection.[17] The court based this conclusion on the premise that Deloitte owed such a duty to all persons who foreseeably relied upon the audit report.[18] The court never said whether it meant the word "foreseeable" in the broad sense of *Timm.* But the court did explain that Chevron's reliance was reasonably foreseeable because Deloitte knew that Chevron was a major creditor of AFSCo and knew that Chevron had received Deloitte's audit report in prior years.[19] This sensible explanation suggests that the court's concept of foreseeability might be more limited than that in *Timm.*[20] For purposes of *Chevron,* one might suppose, a third party's reliance is foreseeable if the auditor, with the information he or she has or should reasonably be expected to have, should be able specifically to identify the third party and conclude (foresee) that the third party probably is relying upon the withdrawn audit report.

But there is more to the majority opinion than this. In his dissenting opinion Judge Fine says the majority has extended the foreseeability test of *Timm* to *Chevron*

situations,[21] and the majority opinion does not disown that interpretation. Moreover, the majority's discussion of AU section 561 suggests that Judge Fine is right.

The problem of AU section 561 and section Accy 1.301(4)(a)

In reaching its conclusion, the court of appeals necessarily rejected Deloitte's contention that it had complied with AU section 56 and that such compliance precluded liability. But this issue gave the court considerable difficulty. Without considering whether Deloitte *had* complied with section 561,[22] or asking what might count as compliance, the court held that compliance with section 561 could not possibly be a defense to Chevron's claim because section 561 is inconsistent with section Accy 1.301(4)(a) of the Wisconsin Administrative Code.[23]

Section Accy 1.301(4)(a) expressly states that disclosure of confidential information is permissible if required by AU section 561. Far from suggesting that section 561 is inconsistent with Accy 1.301(4)(a), this implies that the administrative code incorporates section 561 into Wisconsin law. The court, however, concluded that Wis. Admin. Code Accy 1.301(4)(a) did not incorporate section 561 into Wisconsin law because the procedural prerequisites for such incorporation had not been met.[24] Having excised section 561 (and by implication all references to other AICPA standards) from Accy 1.301(4)(a), the court then reasoned that the two were inconsistent, because unlike section 561, Accy 1.301(4)(a):

"...does not differentiate between situations of client cooperation or non-cooperation, and thus substantially and intentionally departs from the provisions of AU sect. 561. This court holds that Accy 1.301(4)(a) is dispositive: *regardless* of the attitudes or actions of their clients, Wisconsin accountants may not use 'disclosure of confidential information' as an excuse for their own failure to correct audit reports generated prior to discovery of facts existing at the date of the subject report. ...The Wisconsin Administrative Code states that the confidentiality normally required of professionals does not prohibit disclosure of subsequently discovered facts."[25]

This reasoning is hard to understand. The point of Accy 1.301(4)(a) is to incorporate AU section 561 and other applicable AICPA standards into Accy 1.301. It is doubtful that anything is left of Accy 1.301(4)(a) to be "dispositive" after all references to section 561 and other AICPA standards are excised. Indeed, it is precisely by pruning section 561 from Accy 1.301(4)(a) that the court of appeals creates the supposed inconsistency between the two provisions. As long as section 561 remains incorporated in Accy 1.301(4)(a), both provisions "differentiate between situations of client cooperation or non-cooperation."

However obscure the court's reasoning, the court's conclusion seems clear. When the court says, without any limitation or qualification, that "Wisconsin accountants may not use 'disclosure of confidential information' as an excuse for their own failure to correct

audit reports,"[26] and that "[t]he Wisconsin Administrative Code states that the confidentiality normally required of professionals does not prohibit disclosure of subsequently discovered facts,"[27] the court means that client confidentiality counts for nothing in a *Chevron* situation. And if confidentiality is irrelevant, what is left to bar disclosure to anyone and everyone? As Judge Fine said, the majority opinion seems to mean that Wisconsin law permitted and required Deloitte to notify "the world at large,"[28] exactly the public notice that extension of *Timm*'s foreseeability standard to *Chevron* situations entails.

The court of appeals decision in *Chevron* is the first reported decision nationwide (and only reported decision to date) to decide whether compliance with the procedure set forth in AU section 561 is a bar to liability.[29] Because that procedure is incorporated in other AICPA Professional Standards, including those for review and compilation engagements,[30] this issue is of practical importance to CPAs. Moreover, the majority opinion seems to imply that much of Wis. Admin. Code Accy 1 has not been properly promulgated, a conclusion with clear implications for the practicing CPA. The novelty and importance of these issues, and the questions that can be raised regarding the reasoning of the court, make further clarification and guidance imperative.

The supreme court decision in *Chevron*

When the Wisconsin Supreme Court granted Deloitte's petition to review the case, there was reason to hope that such guidance might be forthcoming. But Chevron's cross-appeal turned out to be the tail that wagged the dog. Chevron argued that judgment should be imposed on Deloitte as a sanction for the conduct of Deloitte's trial counsel (an argument that the court of appeals had not addressed), and the supreme court affirmed judgment against Deloitte on that basis (see accompanying sidebar). The court gave no direct, reasoned answers to the questions the case presented about the post-audit conduct of Deloitte itself,[31] or the status of AU section 561 and other AICPA standards under Wisconsin law, or the validity of Wis. Admin. Code Accy 1.

Nonetheless, there is more to the supreme court's opinion than first meets the eye. Deloitte argued that even if Deloitte's counsel had engaged in misconduct, the misconduct had not caused Chevron harm.[32] The supreme court rejected this causation defense for the reason first stated by the circuit court:

"Defendant concedes there was misconduct, but denies the impact on the jury. But the evidence of the impact is the verdict itself. That verdict is not sustained by the evidence in this case and is only explained as a result of misconduct."[33]

In other words, the supreme court held that on the evidence presented, a reasonable person must conclude that Deloitte's nondisclosure constituted negligent misrepresentation under Wisconsin law.

On this very specific issue, then, there is near-unanimity among all the judges who addressed it: Under Wisconsin law, Deloitte owed Chevron a duty to disclose Deloitte's retraction of the audit report.[34] But why did Deloitte owe Chevron that duty? Was it because Deloitte knew that Chevron had been one of AFSCo's primary trade creditors and had received Deloitte's audit reports in prior years, and that should have alerted Deloitte that Chevron probably was relying on the 1985 report? Or was it because Chevron's reliance, whether or not Deloitte had reason to know of it, was foreseeable in the sense of *Timm*? The court did not say.

Conclusion

The supreme court's decision in *Chevron* provides little guidance to accountants. It leaves standing, as citable authority, the decision of the court of appeals.[35] It leaves uncertain whether the foreseeability test for *Chevron* situations is the same as that set forth in *Timm.* It leaves uncertain the status of AICPA professional standards under Wisconsin law. It leaves uncertain the validity and meaning of Wis. Admin. Code Accy 1. It leaves uncertain whether courts may *sua sponte* invalidate administrative rules without complying with section 227.40 of the Wisconsin Statutes. Accountants, their liability insurers, and the lawyers who counsel them must hope that the supreme court will take the next available opportunity to resolve these issues.

In the meantime, what can auditors do to protect themselves? Follow AU section 561. Despite the court of appeals decision, section 561 remains a sensible and useful guide to disclosure, if read liberally enough to require disclosure under the circumstances of *Chevron.* When section 561 requires disclosure, it is unlikely that an audit client will have a successful claim for breach of confidentiality. And one can hope that the plaintiffs to whom section 561 does not require disclosure but Wisconsin law does – a possibility suggested by *Chevron* – are few.

Endnotes

[1]*Chevron Chem. Co. v. Deloitte & Touche,* 176 Wis. 2d 935, 501 N.W.2d 15 (1993).

[2]Rule 202 of the AICPA's Code of Professional Conduct requires members to comply with all Statements on Auditing Standards.

[3]AU § 561.01.

[4]AU §§ 561.05-06.

[5]AU § 561.08 (emphasis added).

[6]*Citizens State Bank v. Timm, Schmidt & Co.,* 113 Wis. 2d 376, 335 N.W.2d 361 (1983).

[7]*Id.* at 377, 382.

[8]*Id.* at 385.

[9]*Id.* at 386-87 (emphasis added). Only New Jersey, Mississippi and Wisconsin currently have some form of this foreseeability test for audit liability. *See generally Bily v. Arthur Young & Co.,* 834 P.2d 745, 3 Cal. 4th 370, 11 Cal. Rptr. 2d 51 (1992), overruling adoption of the foreseeability test by a lower California appellate court, and adopting instead a variant of the test of *Restatement (Second), Torts,* section 552.

[10]*Restatement (Second), Torts,* § 552(2)(a).

[11]*Timm,* 113 Wis. 2d at 385-86 (emphasis added). It is arguable that this understates the scope of the auditor's liability and that, under Wisconsin law, the negligent auditor also should be liable for *unforeseeable* injuries or consequences to *unforeseeable* persons. See the comment in *Hap's Aerial Enter. v. Gen. Aviation,* 173 Wis. 2d 459, 466-67 n. 6, 496 N.W.2d 680 (Ct. App. 1992).

[12]As portrayed by the auditor's affidavits, 113 Wis. 2d at 379 and 388, the facts in *Timm* are virtually identical to the facts in illustration 10 to section 552, in which the *Restatement* concludes the auditor is *not* liable to the unknown lender bank:

"A, independent public accountant, is retained by B Company to conduct an annual audit of the customary scope for the corporation and to furnish his opinion on the corporation's financial statements. A is not informed of any intended use of the financial statements; but A knows that the financial statements, accompanied by an auditor's opinion, are customarily [translation: foreseeably] used in a wide variety of financial transactions by the corporation and that they may be relied upon by lenders, investors, shareholders, creditors, purchasers and the like, in numerous possible kinds of transactions. In fact B Company uses the financial statements and accompanying auditor's opinion to obtain a loan from X Bank. Because of A's negligence, he issues an unqualifiedly favorable opinion upon a balance sheet that materially misstates the financial position of B Company, and through reliance upon it X Bank suffers pecuniary loss. A is not liable to X Bank." (Bracketed phrase inserted.)

Similarly, the auditor in *Timm* said he had no specific knowledge that the audit client intended to use the audit report to obtain a loan from the bank or any other lender, 113 Wis. 2d at 379, and admitted that he knew that it is *common* [foreseeable] for clients to give audit reports to lenders, *id.* at 388. To accept the auditor's affidavits and (by contrast to illustration 10) still hold the auditor liable, the court had to hold that section 552 is "too restrictive."

[13]AU section 561.08.c suggests that disclosures may be made to certain third parties whose identities are unknown to the auditor, such as unknown investors, by "notification to a regulatory agency having jurisdiction over the client," including the SEC and stock

exchanges. But this would be ineffective with a client like AFSCo, which was not a publicly traded corporation.

[14]*See Restatement (Second), Torts,* section 551, especially subsection (2)(c); *Ollerman v. O'Rourke,* 94 Wis. 2d 17, 26-52, 288 N.W.2d 95 (1980). *But see Schuster v. Altenberg,* 144 Wis. 2d 223, 238 n. 3, 424 N.W.2d 159 (1988) (reliance on special relationships to determine a duty of affirmative action, such as warning a third party, is "analytical gymnastics" unnecessary under Wisconsin's broad definition of duty).

[15]In other words, there might be few unknown lenders or creditors. An important consideration here is that an unknown lender or creditor can easily become known and thus entitled to disclosure by the auditor under AU 561 or similar limited disclosure requirements. All the unknown lender need do is write the auditor: "We are considering entering into a business transaction or relationship with your audit client A, in reliance upon your unqualified audit report for the year 19XX. Are you currently aware of any reason for qualifying or withdrawing your audit report for that year?" Instead of requiring an auditor to make public disclosure, why not require unknown lenders to make such an inquiry and become known?

[16]*Chevron Chem. v. Deloitte & Touche,* 168 Wis. 2d 323, 483 N.W.2d 314 (1992).

[17]*Id.* at 334-40.

[18]*Id.* at 334-35.

[19]*Id.* at 335.

[20]The *Chevron* court of appeals cited *Timm* only for the general proposition that accountants' liability to third parties should be determined under accepted principles of Wisconsin negligence law, 168 Wis. 2d at 334 n. 17. Moreover, the court did not need to decide whether to extend the broad foreseeability test of *Timm* to *Chevron* situations in order to decide the appeal in *Chevron:* a narrower foreseeability test was sufficient to hold Deloitte liable.

[21]168 Wis. 2d at 347.

[22]The reasoning on which the court relied to show that Chevron's reliance was foreseeable – that Chevron was a major creditor that had received the audit report in past years – arguably shows equally well that section 561 required disclosure to Chevron.

[23]Wis. Admin. Code section Accy 1.301 provides, in pertinent part:

"(1) No person licensed to practice as a certified public accountant, or public accountant, as defined in the statutes, shall disclose any confidential information

obtained in the course of a professional engagement except with the consent of the client or through the due process of law....

"(4) Interpretations of s. Accy 1.301, not intended to be all-inclusive, are as follows:

"(a) Confidential information and technical standards. The prohibition against disclosure of confidential information obtained in the course of a professional engagement does not apply to disclosure of such information when required to properly discharge the certified public accountant's responsibility according to the profession's standards. The prohibition would not apply for instance, to disclosure, as required by section 561 of Statements on Auditing Standards No. 1, of subsequent discovery of facts existing at the date of the auditor's report which would have affected the auditor's report had the auditor been aware of such facts."

The language of section Accy 1.301(4)(a) is virtually identical to AICPA Professional Standard ET section 301.02; the only differences are those required when one transforms a professional standard into an administrative regulation. Chapter Accy 1 as a whole is saturated with language taken from, and references to, AICPA Professional Standards.

[24]168 Wis. 2d at 338 n. 28. This seems tantamount to a determination that some or all of Accy 1.301(4)(a) is "invalid," as defined in section 227.40(4)(a) of the Wisconsin Statutes. *See also LeClair v. Natural Resources Bd.,* 168 Wis. 2d 227, 233, 483 N.W.2d 278 (Ct. App. 1992). Yet it is doubtful that the proceedings in *Chevron* met the requirements of section 227.40, which provides the exclusive means for judicial review of administrative rules. Neither the Accounting Examining Board, nor the joint committee for review of administrative rules nor any other state agency was a party at any point during the proceedings, and there is no indication that any agency ever received notice of the challenge to the validity of the rule or was offered any opportunity to defend the rule (although possibly someone from the court of appeals searched the records of the board, 168 Wis. 2d at 339, n. 28). *See* Wis. Stats. §§ 227.40(1), (5). Indeed, not even the parties appear to have raised or argued the issue of the rule's validity. It appears that the court of appeals raised, investigated and resolved this issue entirely on its own, without giving anyone notice or opportunity to be heard.

[25]168 Wis. 2d at 339, 335 (emphasis in original).

[26]*Id.* at 339.

[27]*Id.* at 335.

[28]*Id.* at 347.

[29]Other decisions have referred to AU section 561, but none has squarely decided whether an auditor's noncompliance with section 561 may give rise to legal liability, or whether compliance may bar legal liability to third parties. *See Robin v. Arthur Young & Co.,* 915 F.2d 1120, 1126 n. 8 (7th Cir. 1990) (court cites sections 561 and 711, but

expressly declines to decide whether "failure to comply with the Accounting Standards constitutes a violation of state [Illinois] common law," or to decide whether "a lack of compliance with the Auditing Standards will expose an accounting firm to liability for aiding and abetting" in an action for securities fraud); *Reingold v. Deloitte Haskins & Sells,* 599 F. Supp. 1241, 1259 (S.D.N.Y. 1984) ("Section 561 concerns only changed facts, not changed reporting requirements," and thus did not apply); *Jenson v. Touche Ross & Co.,* 335 N.W.2d 720, 726 (Minn. 1983) (subsequent decisions by Michigan and Wisconsin securities commissions that contract sales were securities "were not facts in existence at the time of the audit report" and thus section 561 did not apply). *See also Fischer v. Kletz,* 266 F. Supp. 180 (S.D.N.Y. 1967), decided before the promulgation of section AU 561 in 1972, but addressing the problem of subsequent discovery of facts in existence at the time of the audit report.

[30]*See* AU section 315.10, relating to subsequent discovery of facts by successor auditor; AU sections 711.12-.13, relating to subsequent discovery of facts in the context of federal securities filings; and AR [Accounting and Review Services] sections 100.42 and 9100.13-.15, relating to subsequent discovery of facts in the context of review and compilation engagements. *See also* AU sections 317.22-.23, relating to auditor's disclosure of client's illegal act to parties other than client.

[31]Justice Abrahamson notes this in her concurring opinion, 176 Wis. 2d at 951-52.

[32]*Id.* at 947.

[33]*Id.* at 944, quoting Judge McMahon; *see also* 947-48.

[34]Justice Abrahamson reached the same conclusion, *id.* at 951-52, as did Judge McMahon and the majority of the court of appeals. Judge Fine stated that there was evidence to support a verdict against Deloitte on this issue, although he also said contrary evidence sufficed to support a contrary verdict. 168 Wis. 2d at 348.

[35]*But see Kocinski v. Home Ins. Co.,* 154 Wis. 2d 56, 72-73, 452 N.W.2d 360 (1990) (Abrahamson, J., concurring) ("I write to remind attorneys to take care in relying on language in opinions of the court of appeals when the [supreme] court has affirmed, reversed, or modified the decision of the court of appeals and failed to comment on the court of appeals language. This court has never decided the effect of a court of appeals opinion when this court affirms, reverses, or modifies the decision of the court of appeals.")