

December 2006 *Multnomah Lawyer Ethics Focus*

**Hazardous Duty Revisited:  
*Reynolds v. Schrock***

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In my May 2005 column called “Hazardous Duty”, I wrote about a significant lawyer liability decision then newly issued by the Oregon Court of Appeals: *Reynolds v. Schrock*, 197 Or App 564, 107 P3d 52 (2005). In *Reynolds*, the Court of Appeals held that a lawyer could be held liable to a nonclient for knowingly assisting a client in breaching a fiduciary duty to the nonclient. The startling element of *Reynolds* was that the assistance could come in the form of lawful legal advice to the client that the client then used to breach the fiduciary duty to the nonclient. Even the Court of Appeals acknowledged that its decision had “serious implications for attorneys.” The Supreme Court took review of *Reynolds* late last year and on September 8 reversed (341 Or 338, 142 P3d 1062).

The Supreme Court’s decision in *Reynolds* is itself a significant lawyer liability case in two respects. *First*, it created a shield from liability for assisting in the breach of a fiduciary duty when, like the facts before it, the “assistance” comes in the form of providing a client with lawful advice within the scope of a lawyer-client relationship. *Second*, the Supreme Court reaffirmed its own earlier decision in *Granewich v. Harding*, 329 Or 47, 985 P2d 788 (1999), where it announced the more general proposition that a lawyer could be held liable for

assisting in breaching a fiduciary duty to a third party if the lawyer was acting outside the scope of advising the lawyer's client. In this column, we'll look at both facets of the Supreme Court's *Reynolds* decision.

*Liability Shield.* In reversing the Court of Appeals, the Supreme Court in *Reynolds* recognized a privilege against liability for a lawyer assisting in a client's breach of fiduciary duty. The Supreme Court found that both Section 890 of the Restatement (Second) of Torts and prior Oregon case law suggested that in some narrow circumstances a shield from liability should be recognized to protect important public policy goals. It then found that protection of the lawyer-client relationship was one such goal. In particular, the Supreme Court stressed the importance of having a lawyer's advice unhindered by the prospect that the lawyer might be sued by a nonclient for rendering the advice involved to the lawyer's client. As the Supreme Court put it: "We extend those well-recognized principles to a context that we have not previously considered and hold that a lawyer acting on behalf of a client and within the scope of the lawyer-client relationship is protected by such a privilege and is not liable for assisting the client in conduct that breaches the client's fiduciary duty to a third party." 341 Or at 350. The Supreme Court then listed several factors necessary for the shield to apply, including: (a) the lawyer's advice must be given in the context of a lawyer-client relationship; (b) the lawyer must be acting consistent with the client's

interest and not simply for the lawyer's self-interest; and (c) the lawyer must be advising the client on lawful conduct.

*Continuing Risk.* The Supreme Court's decision in *Reynolds* left open an important area of continuing risk for lawyers. In reversing *Reynolds*, the Supreme Court both distinguished and adhered to its own earlier decision in *Granewich*. The lawyers in *Granewich* were retained to represent a closely held corporation. Later, the lawyers were alleged to have also begun offering advice to the corporation's two majority shareholders on how to "squeeze out" a third shareholder. The minority shareholder sued the two majority shareholders for breach of fiduciary duty and sued the lawyers for assisting in that breach. The Supreme Court held in *Granewich* that lawyers could be held liable for assisting in a breach of fiduciary duty—at least when, as was the case there, the advice was given to nonclients like the majority shareholders. Although the Supreme Court's decision in *Reynolds* creates a shield when advising fiduciaries, the Supreme Court's reliance on *Granewich* underscores that the risks identified in that more common situation remain. Lawyers advising closely held corporations, family groups, partnerships and other joint ventures are often put in situations which invite them to step beyond their role as lawyers for the entities involved and to give advice to individual shareholders, family members or partners as was the case in *Granewich*. Under *Reynolds*, lawyers in that situation would not have the protective shield of privilege for advice beyond their clients.

*Reynolds* and *Granewich* reinforce what was already good advice: clearly spelling out in an engagement letter who the lawyer represents and then acting consistent with that agreement.

#### **ABOUT THE AUTHOR**

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