Oregon’s Code of Professional Responsibility is framed in terms of a lawyer’s duties to clients. Sometimes though, we deal with people who may become our clients but ultimately never do. What are a lawyer’s duties to these prospective clients? Until recently, the Oregon Supreme Court had never spoken to that issue.

The Court journeyed into these new waters in In re Spencer, 335 Or 71, 58 P3d 228 (2002). In Spencer, a prospective client in a bankruptcy matter gave a lawyer a background letter and supporting material for his review—including, apparently, some of the prospective client’s original documents. The lawyer read the cover letter and decided not to take the case. The lawyer then gave the material to his legal assistant and asked her to let the prospective client know that he wasn’t taking on the case. The legal assistant did so and shredded most of the documents that the prospective client had provided.

When the prospective client learned that her documents had been destroyed, she filed a Bar complaint. The Bar charged the lawyer with violating DR 9-101(C)(4)—which requires a lawyer to “[p]romptly pay or deliver to a client as requested by the client the funds, securities or other properties in the possession of the lawyer which the client is entitled to receive.” The case went before a disciplinary trial panel and the panel dismissed the DR 9-101(C)(4)
charge because the rule is framed solely in terms of clients. The Bar appealed—contending that the rule should be read as also applying to prospective clients. The Supreme Court agreed, reversed the trial panel and sanctioned the lawyer.

In doing so, the Supreme Court expressly extended a lawyer’s duty to safeguard property entrusted to the lawyer to prospective clients. Because the rule is indeed written solely in terms of “clients,” the Court had to reason by analogy to reach this result. The Court used the Evidence Code to get there. The Court noted that under OEC 503(1)(a), a lawyer’s communications with a prospective client fall within the attorney-client privilege. The Court concluded that a prospective client’s property was entitled to that same kind of protection and held that DR 9-101(C)(4) does extend to prospective clients.

The Supreme Court’s decision in Spencer is notable because Oregon’s duties of lawyer confidentiality and conflicts of interest are also cast solely in terms of “clients.” Disqualification decisions elsewhere have on occasion extended the duty of confidentiality to information communicated to a lawyer by a prospective client and then barred the lawyers involved from representing other clients where doing so would conflict with the duty to preserve the prospective client’s confidences. The Supreme Court’s broad reading of the word “client” in Spencer suggests that the door may now be open to a broader reading of that term in other contexts involving prospective clients, too.
ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar’s Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB’s Ethical Oregon Lawyer and the WSBA’s Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar’s Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark’s telephone and email are 503.224.4895 and Mark@frllp.com.