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Supreme Court Sets Duties to Prospective Clients

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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

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