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Reasonable Expectations: Oregon's Test for Attorney-Client Relationships

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Significant portions of the Rules of Professional Conduct address the attorney-client relationship. In fact, the first 18 RPCs focus on the attorney-client relationship and it is reflected in many of the other rules as well. At the same time, the attorney-client relationship is nowhere defined in Oregon's RPCs. This anomaly is neither new nor novel. The Oregon Supreme Court in *In re Weidner*, 310 Or 757, 768, 801 P2d 828 (1990), for example, observed regarding the former Oregon DRs: "The Code of Professional Responsibility did not and does not define the point at which a lawyer-client relationship comes into existence." Similarly, the ABA Model Rules of Professional Conduct on which Oregon's current RPCs are based note in paragraph 17 of the "scope" section: "[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." Instead, Oregon looks to caselaw to provide this key definition—with *Weidner* supplying the principal test.

In this column, we'll first look at *Weidner*'s standard, which is sometimes referred to as the "reasonable expectations of the client" test. We'll then briefly survey applications of the test across a variety of settings. We'll conclude with its implications for law firm risk management.

The Test

The Supreme Court in *Weidner* (310 Or at 770) created a two-part test—both elements of which must be met for an attorney-client relationship to be found. The first is subjective: does the client subjectively believe that the lawyer is representing the client? The second is objective: is the client's subjective belief objectively reasonable under the circumstances? Importantly, the test is not dependent on either a written fee agreement or the lawyer even being compensated. Instead, "[t]he evidence must show that the lawyer understood or should have understood that the relationship existed, or acted as though the lawyer was providing professional assistance or advice on behalf of the putative client[.]" The U.S. District Court for Oregon also uses the *Weidner* test when applying Oregon law, with *Westerlund Log Handlers, LLC v. Esler*, 2018 WL 614706 at *8-*11 (D Or Jan 29, 2018) (unpublished), and *DG Cogen Partners, LLC v. Lane Powell PC*, 917 F Supp2d 1123, 1137 (D Or 2013), offering illustrations.

Oregon's approach is not unique. Washington uses a similar test under (among others) *Bohn v. Cody*, 119 Wn2d 357, 363, 832 P2d 71 (1992). Section 14 of Restatement (Third) of the Law Governing Lawyers (2000), also uses a relatively similar formulation.

Applications

The *Weidner* "reasonable expectations of the client" test has been used across of broad spectrum of situations in which lawyer liability is predicated on the existence of an attorney-client relationship. The applications include: lawyer discipline (*see, e.g., In re Hassenstab*, 325 Or 166, 172-73, 934 P2d 1110 (1997); *In re Wittemyer*, 328 Or 448, 458, 980 P2d 148 (1999)); law firm disqualification (*see, e.g., Admiral Ins. Co. v. Mason, Bruce & Girard, Inc.*, 2002 WL 31972159 at *1 (D Or Dec 5, 2002) (unpublished); *Tinn v. EMM Labs, Inc.*, 556 F Supp2d 1191,1192-93 (D Or 2008)); legal malpractice (*see, e.g., Jensen v. Hillsboro Law Group, PC*, 287 Or App 697, 707, 403 P3d 455 (2017); *O'Kain v. Landress*, 299 Or App 417, 429-430, 450 P3d 508 (2019)); and lawyer breach of fiduciary duty (*see, e.g., Kidney Association of Oregon, Inc. v. Ferguson*, 315 Or 135, 145-46, 843 P2d 442 (1992); *Huntington Bank, Inc. v. Gilchrist Timber Co.*, 70 F3d 1278, 1278 (9th Cir 1995)).

Implications

The *Weidner* test has important implications at both the beginning and the end of an attorney-client relationship.

At the beginning, it is critical to document who you do—and don't—represent. In *Evraz, Inc. v. Continental Ins. Co.*, 2013 WL 6174839 (D Or Nov

21, 2013), for example, a law firm handling an environmental matter for a corporate client confirmed both that the corporation was the sole client and that it did not represent the corporation's carrier that was reimbursing part of the corporation's legal expenses. Later, the same law firm represented the corporate client in a coverage case against the carrier over the environmental matter. The carrier moved to disqualify the law firm—arguing that it was also the law firm's client. The court denied the motion. In doing so, the court pointed to the *Weidner* test and noted that the carrier could not meet the objective prong because the law firm had told the carrier that it was representing the corporate client only and not the carrier.

At the end, it can be equally critical to document that the work involved has been completed and the attorney-client relationship has come to an end. This can usually be accomplished with a polite communication letting the client know that the firm "has closed its file." The significance of ending the relationship is that our duties to former clients under RPC 1.9 are much narrower than those owed to current clients and center on the particular matters we handled for them. The Oregon State Bar in Formal Opinion 2005-146 (rev 2016) also looked to the *Weidner* test for determining when an attorney-client relationship has come to an

end by focusing on a client's subjective belief on whether a relationship has continued and whether that belief is reasonable under the circumstances.

ABOUT THE AUTHOR

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