

FORMAL OPINION NO 2005-146
Conflicts of Interest, Current Clients:
Long-Term Docket Obligations

Facts:

Lawyer maintains a long-term docket and sends periodic reminders to past clients regarding the possible need for further action with respect to otherwise completed matters. Examples of such notices are reminders to pay maintenance fees for patents and trademarks at regular time intervals or reminders to exercise options to renew leases or other contracts.

Question:

Are the clients to whom the notices are sent current clients?

Conclusion:

Yes.

Discussion:

For purposes of analyzing possible conflict situations, the distinction between current and former clients is crucial. *Compare* Oregon RPC 1.7 (current-client conflicts) *with* Oregon RPC 1.9 (former-client conflicts). *See also* OSB Formal Ethics Op No 2005-120 (rev 2015); OSB Formal Ethics Op No 2005-86; OSB Formal Ethics Op No 2005-17; OSB Formal Ethics Op No 2005-11. The existence of the relationship is fact-specific. *In re Robertson*, 290 Or 639, 648, 624 P2d 603 (1981) (“Inception, existence and termination of the relationship are often implied only from all of the facts.”). *See Bohn v. Cody*, 119 Wash 2d 357, 832 P2d 71 (1992), *amended on denial of reconsideration* (June 22, 1992), *modified by Trask v. Butler*, 123 Wash 2d 835, 872 P2d 1080 (1994).

Oregon courts have found a lawyer-client relationship when “(1) the services performed were of the kind traditionally done professionally by lawyers, *i.e.*, legal work, and (2) the putative client intended that the

relationship be created.” *In re Weidner*, 310 Or 757, 768, 801 P2d 828 (1990). The court further said:

We hold that, to establish that the lawyer-client relationship exists based on reasonable expectation, a putative client’s subjective, uncommunicated intention or expectation must be accompanied by evidence of objective facts on which a reasonable person would rely as supporting existence of that intent; by evidence placing the lawyer on notice that the putative client had that intent; by evidence that the lawyer shared the client’s subjective intention to form the relationship; or by evidence that the lawyer acted in a way that would induce a reasonable person in the client’s position to rely on the lawyer’s professional advice. The 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, as the lawyer did in *In re Bristow*, [301 Or 194, 721 P2d 437 (1986)].

In re Weidner, 310 Or at 770.

A formal agreement to pay fees is not necessary. *In re O’Byrne*, 298 Or 535, 544–45, 694 P2d 955 (1985).

The recipients of the periodic notices, absent any other facts, may or may not have a subjective and sufficiently reasonable belief that the lawyer-client relationship is a continuing one. If, for example, Lawyer has clearly stated in writing that no such continuing relationship exists, none would exist. In the absence of such a clear statement, however, the clients may reasonably believe that there is a continuing relationship with Lawyer, making them current clients.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 5.2 (determining whether a lawyer-client relationship exists) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 114, 116 (2000) (supplemented periodically); and ABA Model RPC 1.10.