

EXAMINERS' ANALYSIS OF QUESTION NO. 6

An understanding of these facts and questions requires applicants to understand how an attorney-client relationship is formed, how to treat communications with prospective clients, how the rules of professional conduct regarding conflicts and confidentiality apply to internet advertising, and the circumstances in which an attorney's conflict of interest is imputed to other members of the attorney's firm.

1. Yes.

For Jones' communication with the law firm to be confidential, there must either have been an attorney-client relationship, or the communication must have been made when the lawyer and Jones were considering whether to establish an attorney-client relationship. Determining whether an attorney-client relationship exists is a question of law, and the standard is whether the putative client reasonably believed that there was an attorney-client relationship. Neither an express representation agreement nor a written agreement is necessary; an attorney-client relationship can arise based on the parties' actions and the reasonable perceptions of the putative client. Cf., e.g., *Dalrymple v National Bank and Trust Co of Traverse City*, 615 F Supp 979, 982 (WD MI 1985) ("In determining whether an attorney-client relationship has been created, the focus is on the putative client's subjective belief that he is consulting a lawyer in his professional capacity, and on his intent to seek professional advice."); *Fletcher v Board of Education*, 323 Mich 343, 348 (1948) (in determining whether an attorney-client relationship exists, focus is on reasonableness of putative client's belief based on objective circumstances). See also *ABA/BNA Lawyers' Manual on Professional Conduct*, 31:101 ("A lawyer-client relationship ... arises when someone asks a lawyer

'If the individual had retained the firm on a contingent fee basis, a written fee agreement would have been ethically required because of the nature of the fee agreement, MRPC 1.5(c), but no written agreement is required in order to form an attorney-client relationship.

for legal help and the lawyer expressly or implicitly gives it or agrees to give it."); *Restatement of the Law (Third) Governing Lawyers*, §14: "A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services".

Where, as here, a law firm has invited members of the public to share, on its website, the details of their possible causes of action, an individual such as Jones would reasonably believe that information is transmitted to the firm for the purpose of obtaining legal advice *unless* the website contains adequate safeguards against such a belief. If, on the other hand, Jones had contacted the firm by sending an uninvited email, the information disclosed would not be confidential; uninvited communications from non-clients are not confidential.

Even if no attorney-client relationship is deemed to have been established, the communication was presumptively confidential because Jones reasonably understood that it was made when the lawyer and Jones were considering whether to establish an attorney-client relationship and in furtherance of that decision-making process. Cf. *Restatement of the Law (Third) Governing Lawyers* §15.

2. Presumptively yes. Applicants will gain points in answering this question by noting the application of the rules of professional conduct involving former clients and the imputation of conflicts.

If the information shared with your colleague was confidential, Jones is treated as a former client of your colleague for purposes of conflicts of interest analysis. Pursuant to MRPC 1.9(a), the colleague who reviewed Jones' submission is presumptively disqualified from representing Smith because the communication involved the same or a substantially related matter - in this case, the same matter - and Jones' interests are materially adverse to Smith's, and where one attorney in a law firm is disqualified from representing a client pursuant to Rule 1.9(a), the conflict is imputed to all other attorneys in the firm. MRPC 1.10(a).

Applicants can gain points by looking to Rule 1.18(c) of the ABA Model Rules of Professional Conduct (as to which there is no Michigan counterpart) and arguing by analogy that, based on the facts presented, there might not be a basis for disqualification if the information Jones provided was not information "that could be significantly harmful to that person in the matter." See also *Restatement of the Law (Third) Governing Lawyers* §15(2) (same). If, for example, the information Jones disclosed to the law firm merely identified the date and location of the accident and there is no dispute as to those facts, and his disclosure did not include details of Jones' version of what happened, the information would not be information "that could be significantly harmful" to Jones "in the matter", and there would be no disqualification if the standard of Rule 1.18(c) were applied.

3. Yes.

An attorney may continue to represent Smith if Jones, as a former client, gives informed consent to the representation. MRPC 1.9(a); MRPC 1.10(d). Although not expected, applicants may gain additional points if they note that, unlike under the ABA Model Rules, the Michigan rules do not require that Jones' consent be in writing. *Id.*

4. In setting up its website, a law firm has the opportunity to include a disclaimer advising prospective clients that information they share with the law firm will not be treated as confidential. Applicants can receive points for noting the significance of a disclaimer, and they can earn additional points for noting that the website can be set up to require a prospective client to click on an acknowledgment of having read the disclaimer and agreeing to its terms. A typical disclaimer will note that (1) sharing information with the law firm does not create an attorney-client relationship; (2) information being submitted is not confidential; and (3) providing information to the law firm will not prevent the law firm from representing a party adverse to the prospective client. If such a disclaimer (and possibly a click-through option) exists on the firm's website, and the prospective client nevertheless discloses otherwise confidential information after clicking the acknowledgment, the information disclosed is not confidential. In the absence of such safeguards, however, the information will be considered to be confidential. *Cf., e.g., New Hampshire*

Ethics Opinion 2009-2010/1; Massachusetts Ethics Opinion 07-01; Iowa Ethics Opinion 07-02.