

You have presented a hypothetical situation in which a sole practitioner was working as an independent contractor with a [law] firm. The attorney's office was within the firm's suite. While the attorney was representing one of the firm's clients, the client inquired as to the attorney's background and, upon learning that the attorney had significant experience in the environmental field, the client stated that his brother was active in the environmental consulting field. The client asked if his brother could call the attorney, and the attorney responded affirmatively.

You indicate that the client's brother ("CB") called, and met with, the attorney. CB subsequently asked the attorney to participate with him in his venture, which was not ongoing at that time, and was neither active nor generating any funds. CB's venture was twofold: (1) the provision of training for transportation of hazardous materials; and (2) the development of a software program for shippers of hazardous materials.

You further indicate that a decision was made to incorporate under the name of SM, Inc., with CB, a 51% shareholder, serving as President and the attorney, a 49% shareholder, serving as Vice President. You advise that the attorney contributed \$2,000.00 towards this venture: \$1,000.00 was a loan to CB to contribute to SM, Inc. to pay GM, a software development company; and the other \$1,000.00 went from the attorney to SM, Inc. to pay GM. GM had been working previously with CB on the hazardous material software program but had terminated the working relationship due to nonpayment by CB.

At the time GM received the monies, GM and SM, Inc. entered into a joint venture ("JV") agreement which stated that GM would have the copyright protection, and SM, Inc. would have the marketing rights.

Shortly thereafter, the attorney moved his office to another location where he shared a two-office suite with SM, Inc. and also shared the expenses. The attorney divided his time between the law practice and SM, Inc.

In addition, you advise that the JV agreement called for SM to provide data and documentation to complete the program. The original date for SM, Inc. to deliver this data and documentation was the end of July 1993, but SM failed to deliver on time. The delivery date was then set back to September 1993, but SM, Inc. again failed to deliver the date and documentation, The delivery date was set back a third time to November 1993. Again, SM, Inc. failed to deliver the data and documentation. Ultimately, SM, Inc. did not deliver in November, and GM notified SM, Inc. that the JV agreement was void due to SM, Inc.'s breach for failure to deliver the data and documentation.

Later, the attorney resigned from SM, Inc. as an officer, director, and registered agent, leaving CB as the only officer and director. You indicate that the attorney is not active and does not participate in any of SM, Inc.'s affairs, but is still a shareholder and is reluctant to abandon his shares because both CB and SM, Inc. owe him money: CB owes the attorney for the loan, and SM, Inc. owes him for the initial and subsequent contributions to SM, Inc. directly. The attorney had SM, Inc.'s telephone disconnected and its mail forwarded to another address, as directed by CB. In addition, all the property

of SM, Inc. remaining in the shared office was removed by a representative of CB. The lease is now in the name of the attorney only.

You state that GM has now requested a proposal from both SM, Inc. and the attorney to assist it in the marketing of software programs for shippers of hazardous materials. The attorney's proposal to GM could be a competing proposal against SM, Inc.'s proposal. Thus, you indicate that, if the attorney's proposal is accepted by GM, the attorney would be working with GM on projects similar to those projects on which the attorney worked for SM, Inc. The attorney is concerned that this could pose a possible conflict.

Furthermore, you advise that the attorney will shortly be filing a warrant in debt against CB for failure to pay the \$1,000.00 loan. In March 1993, CB executed a promissory note in favor of the attorney with a promise to pay the full amount by November 1, 1993. You state that after a number of oral representations that the \$1,000.00 was forthcoming, no payments have been made and CB has refused to return telephone calls.

Finally, you indicate that CB was never a client of the attorney and during the attorney's tenure with SM, Inc., he never received the benefit of any proprietary information concerning hazardous materials, their transportation, or any computer software and/or codes from either SM, Inc. or CB.

You have asked the committee to opine whether, under the facts of the inquiry, it would be unethical for the attorney to form a new corporation and then initiate a new agreement with GM to market the software program.

The committee is of the opinion that the provisions of the Code of Professional Responsibility are inapplicable to the question presented since, in the facts presented, there is no attorney-client relationship, either express or implied, between the attorney and either CB or SM, Inc. Therefore, since no conflict arises, it would not be unethical for the attorney to form a new corporation and then initiate a new agreement with GM to market the software program.

Committee Opinion
April 11, 1994