sent would yet be effective. Further, while the lawyer continues to hold the shares in escrow, it would appear that the lawyer would be acting in an unprofessional manner if he were to proceed to levy an attachment thereon as Y's attorney. We interpret Rule 5 to encompass this matter since, in our opinion, the ownership of the shares by X is confidential information obtained by the lawyer while employed by X, his former client, regardless of the fact that the ownership of the shares and the escrow might be "a public record." Canon 37, American Bar Association, provides that the confidences of a client or former client may not be disclosed or used by a lawyer to the disadvantage of the client or former client, even though there are other available sources of such information. (See also Drinker, Legal Ethics, page 135.) Further, Canon 6, A.B.A., prohibits acceptance of subsequent employment "in matters adversely affecting any interest of the client with respect to which confidence has been reposed." While it may be that the exception in Canon 6 "by express consent of all concerned given after a full disclosure of the facts" applies to the clause therein immediately above quoted, we are of the opinion that the lawyer would violate Canon 6 if he were to accept the new employment wherein an attachment of the shares is contemplated or might occur, even if another were the escrow holder, unless in obtaining his consent the lawyer were to explain to X, his former client, that such an attachment was contemplated. Otherwise there would be no "full disclosure of the facts" under Canon 6.

In conclusion, the Committee is of the opinion that it would be unwise for a lawyer to accept employment to file such an action under the circumstances in question. Assuming the lawyer honestly believes, as we assume this lawyer does, that there are and will be no conflicting interests between the former and the new client as to any matter as to which the lawyer had obtained confidential information during the former employment, or, that if such be the case, the lawyer intends to rely on the former client's "consent," unforeseen circumstances might thereafter alter the picture. The lawyer might subsequently be put in a position where the purported "consent" of the former client would not cover some matter which was unforeseen or not contemplated by anyone when the consent was given, in which case the lawyer might well be required to withdraw from further participation in the action in order not to be guilty of unprofessional conduct.

EDITOR'S NOTE: See Opinion No. 31, supra, and note thereto, in connection with possible use by attorney of information he has obtained concerning assets of former client; see also ABA Supp. Opinions 297 (p. 70), Opinion 310 (p. 71); N.Y. City 88 (p. 40). Cf. Opinion No. 159, supra. See Opinion No. 109, supra, and note, for opinions on adverse and conflicting interests. See Drinker, Legal Ethics, p. 111, et seq. on taking cases against interest of client or former client.

Opinion No. 267 (January 26, 1960)

CONFIDENTIAL COMMUNICATIONS. Disclosure by guardian to attorney; disclosure of probable misuse of ward's funds by guardian to attorney; attorney's right and obligation to report to court and related problems.

The Committee has been asked to render an opinion on the following facts and question:

In 1952, G, the natural mother of W, was appointed the guardian of the person and estate of W. The ward's estate consisted principally of a personal injury recovery. The guardian's bonding company required all disbursements to be by check signed by G and approved by the bonding company. These procedures were properly followed and a proper account was filed and approved in 1953. Thereafter, disbursements were made in the same manner but no further accounting has been filed. Under the original order of court, G was entitled to withdraw a sum each month for the support and maintenance of W, whose custody G had. Several years after 1953, the custody of W was transferred from G to W's father, F, in another state and thereafter F wholly supported W. G, however, continued to make the monthly withdrawals, co-signed by the bonding company, but used the money for her own purposes and not to support W. No one knows of these facts except G.

In 1959, the bonding company demanded that an account be filed. G's original attorney withdrew from the case. G has now gone to attorney B, has made a full disclosure of the facts and has asked attorney B to render an account on her behalf and to protect her interests. Attorney B desires to know the following:

(1) May attorney B prepare an account for the guardian's signature and after signing, file the same, which account does not specifically mention or specify the defalcation on the guardian's part.

(2) Is attorney B under an obligation to call the situation to the court's attention in the absence of express consent on the part of G, the guardian.

(3) May attorney B call the situation to the court's attention in the absence of express consent on the part of the guardian.

(4) What steps can the lawyer ethically take to minimize the exposure of the guardian to criminal or other liability for her actions, if any.

The problem presented by these questions is not without difficulty and presents, as in many cases of confidential communications, a situation where different interests conflict. At least in related circumstances, the matter has been previously considered by this Committee and other ethics committees in the United States.

The duty of nondisclosure of information confidentially communicated from client to attorney is treated by Canon 37 of the Canons of the American Bar Association. This Canon reads, in pertinent part:

> "It is the duty of a lawyer to preserve his client's confidences . . . The announced intention of a client to commit a crime is not included within the confidence which he (the law-

yer) is bound to respect. He may properly make disclosures as may be necessary to prevent the act or protect those against whom it is threatened."

The rule of this Canon was a rule of the common law (6 Holdsworth, History of English Law, 433) and is in substance enacted as a rule of privilege in California (Cal. Code Civ. Proc., Section 1881 (2)). The rule is widespread in effect and applies even though the disclosure of the confidence is highly important and relevant to the trial of an issue (Taft, Ethics in Service, 31-32). The rule applies even where the facts are already part of a public record or where there are other sources of information (Michigan Bar Association, Ethics Opinion No. 45); New York County Bar Association, Ethics Opinion No. 401). However, there are exceptions to the rule. A non-exclusive exception is stated in the Canon itself.

Generally, the right and duty to disclosure has been principally recognized when the disclosure is necessary to prevent a potential crime. The duty to keep silent is most clearly established when the crime or fraud has already been committed. There is not total agreement upon the subject among all authorities. Difficult situations are specially presented where the acts of the crime or fraud have already been committed but the effect or ramifications are continuing. The California courts appear to have adopted an extremely strict rule in favor of the privilege. In People vs. Singh (1932) 123 Cal. App. 365, Singh and others were accused of assault with a deadly weapon with intent to commit murder. The defense was based upon an alibi. Bennington, who had been Singh's attorney during the preliminary phases of the case, was called as a witness by the prosecution and testified that during a conference in jail shortly after the arrest, the defendant had confessed the crime and had disclosed plans to bribe witnesses to support an alibi and had suggested the plan of bribing one or two jurors at the trial. Singh was convicted and appealed upon the ground that this communication to Bennington was confidential and that the witness should not have been permitted so to testify. After castigating the lawyer's conduct as unethical, Mr. Presiding Justice Preston, speaking for an unanimous court, reversed the conviction, stating in conclusion:

> "In permitting the judgments herein to stand, we would be sacrificing a part of the body of the law itself in the fatuous hope of preserving the social fabric through a process of destroying the fibre." (123 Cal. App., at 372).

Thus, the California law protects the client's confidences where the communication relates to future crimes if the same is made in connection with the confession of past crime. People vs. Singh, supra, has recently been cited by the Supreme Court without disapproval. (People vs. Linden, 52 A.C. 1, 23.)

In addition to the authority of People vs. Singh, supra, a most persuasive argument is derived from the circumstances that in 1928, the State Bar proposed a rule which would have required a member of the Bar, upon learning confidentially of misconduct, to disclose the fact to the presiding judge or judicial officer before

whom the matter was pending even against the consent of his client. The proposed rule further provided that such disclosure was not a violation of the rule pertaining to confidential communications (The State Bar Journal, April 1928, p. 205). The Supreme Court failed to adopt the rule. See: Radin, The Privilege of Confidential Communication Between Lawyer and Client, 16 Cal. Law Review 487, 494 et seq.

In this connection, American Bar Association Opinion 268 holds:

> "While ordinarily it is the duty of a lawyer, as an officer of the court, to disclose to the court any fraud that he believes is being practiced on the court, this duty does not transcend that to preserve the client's confidences."

It is clear that a client who is a guardian or an administrator is entitled to the same protection of the rule against disclosure of confidential communications as is a client who retains counsel purely in a personal capacity (Magee vs. Brenneman, 188 Cal. 562). This Committee recognizes that the implications of its prior opinion (Opinion No. 132, September 17, 1940) are in basic principle contrary to this opinion. To the extent that there is anything in Opinion No. 132 contrary to this opinion, Opinion No. 132 is disapproved.

It is clear at the same time that the attorney should use every effort to cause the client to rectify the malappropriation without violating the confidential communication rule and, of course, that the attorney may not prepare or file an account which is false, either by reason of positive misstatement or significant nondisclosure.

The Committee, therefore, is of the opinion that the answers to the questions posed above are as follows:

(1) No.
(2) No.
(3) No.

(4) Ordinarily, this Committee does not render legal advice as to the course of conduct to be followed by either clients or attorneys; however, in this case, the intimate relationship of the course of conduct to be followed and the ethical question involved are such that the Committee feels it appropriate to state that in its opinion the attorney should advise the client to prepare and sign a true account in which the malappropriation is revealed and in which the guardian treats herself as liable, to the extent of the amount misused, to the estate. The attorney should further advise the client to repay to the estate the amount so misused at once. If the client has no funds with which to pay, she may use such portion of the fee, if any, to which she is entitled for such repayment. In the event there is either no fee allowed or an insufficient fee and there are no other funds available, the attorney should advise the client to file an account in which the malappropriation is disclosed and the surcharge or debt as the case may be remains as an unsatisfied debt. This, the Committee feels, follows as a matter of necessity in the nature of things. If the client refuses to sign a true account as suggested hereinabove, the attorney has no option except to refuse to file any account. In such case, it will appear that the client will be cited for failure to file an account in due course with

such consequences as the law provides in such cases.

EDITOR'S NOTE: See Opinion No. 264, supra, and note thereto.

Opinion No. 268 (February 16, 1960)

ADVERTISING. It is improper for an attorney for an organization to permit the use of his picture and biography to be included in advertisements of the organization.

A member of the Association asks the Committee's opinion on the following:

A federal savings and loan association issued a four page pamphlet advertising the institution and mailed copies to the public at large. Across two of the four columns of the inside two pages appears the pictures and description of some of the experience of two attorneys for the institution. The brochure states:

"A & B
LEGAL COUNSEL FOR OUR ASSOCIATION
The firm of A & B serves Federal as legal counsel together with our own C, Executive Vice President, who is also an attorney. Their combined legal astuteness assures the Association constant awareness of every legal change and influencing event."

Following the descriptions of the experience of the two attorneys is a list of directors of the institution and their business or professional association. Following this list there is the legend:

"COUNSEL
A & B
C"

C is also identified as an Executive Vice President of the association. It is assumed that so much of the pamphlet as relates to the attorneys was prepared and published with their knowledge and consent.

The question presented is whether it is unethical for an attorney to permit the use of his picture and name in such an advertisement.

The Rules of Professional Conduct of the State Bar of California prohibit an attorney from soliciting professional employment by advertising or otherwise (Rule 2). The rule includes the prohibition against using pamphlets or any medium of communication to advertise the name of the lawyer or his law firm or the fact that he is a member of the State Bar or the Bar of any jurisdiction. This rule and Rule 2a mention several practices such as the use of professional cards, telephone directory listings and listings in law lists which are not deemed to be in violation of Rule 2 Prior to its amendment, effective January 5, 1960, Rule 2 did not specifically refer to advertising the name of a lawyer in pamphlets or in other media. Since the publication here involved was made before January 5, 1960, the Committee bases its opinion on the rules as they existed before 1960. However, the Committee's conclusion would be the same if the matter was considered under Rule 2a.

The Canons of Professional Ethics of the American Bar Association provide that it is unprofessional to solicit professional employment by circulars and the like (Canon 27). This canon also lists certain practices which are not deemed to be in violation of the canon.

The Committee on Professional Ethics and Grievances of the American Bar Association has held that it is in violation of Canon 27 for law firms engaged in general practice to permit a manufacturing association to specify their names as general counsel on letterheads used for correspondence with the general public or on bulletins sent out from time to time by the association (Opinion 285).

This Committee has held that an attorney may not ethically permit a corporation, trade organization or collection agency represented by him to advertise his employment as such counsel in newspapers, circulars or upon a letterhead (Opinion 43).

There is no possible justification for the advertisement under consideration. Neither A nor B is a director or officer of the institution. The pamphlet is not sent to members only. The purpose may be to get business for the institution, but generally it is not the function of lawyers to promote a client's business through advertisements and particularly through advertisements which advertise the experience of the lawyer.

The facts here presented differ considerably from those where an attorney is a director of a financial institution and his name with a designation of his profession appears with the names and business or professional connection of the other directors of the institution. In the latter case, the purpose is to identify the directors, not to advertise their legal experiences.

The A.B.A. Committee, in Opinion 285, referred to above, said:

"The purpose of the provisions of Canon 27 condemning advertising is emphatically to discourage all forms of self-laudation by lawyers, not only direct, but also indirect. The latter include any suggestion or encouragement of commendatory statements by others designed to call attention to the lawyer for the purpose of promoting his professional employment. In every case, of course, the situation must be wholly free from any actual or apparent suggestion or connivance on the part of the lawyers in their own interest."

In the opinion of this Committee, the publication of the pamphlet with the knowledge or consent of the attorneys is a decided violation of Rule 2 and of Canon 27 on the part of the attorneys. It is also improper to even carry the names of the attorneys on such a pamphlet.

EDITOR'S NOTE: See Opinion No. 289, infra; cf. Opinions Nos. 241, 256, supra.

Opinion No. 269 (January 17, 1962)

ATTORNEY-CLIENT — ADVERSE INTERESTS — CONFIDENTIAL COMMUNICATIONS. An attorney who formerly was co-counsel for executors of a decedent's estate and for the testamentary