priety. We have often quoted ABA Opinion 49 which states:

"If the profession is to occupy that position in public esteem which will enable it to be of the greatest usefulness, it must avoid not only all evil but likewise avoid the appearance of evil."

The Committee is of the opinion that Canon 6 is applicable to the factual situation presented by the inquiry because the lawyer's duty to his prospective client and his duty to the city council and the public create conflicting legal interests; while acting as a council member the lawyer could not ignore the fact of his status as a lawyer and the fact that the public and the other members of the city council may be relying upon his legal knowledge and training.

In conclusion, it is the opinion of this Committee that under the circumstances a lawyer who is a member of a city council may not represent a client charged with a violation of a city ordinance.

EDITOR'S NOTE: See Opinion No. 276, infra; ABA Supp. Opinion C-700 (p. 70).

Opinion No. 274 (October 25, 1962)

CONFIDENTIAL COMMUNICATIONS—FILES. An attorney may not disclose confidential communications concerning improper diversion of an estate's assets by lawyer-administrator without client's consent; certain documents should be retained in attorney's files.

The Committee has been asked for an opinion based on the following facts:

Attorney A, who represents X as administrator of an estate currently in probate, discovered that X, who is also an attorney, has been improperly diverting assets from the estate for his personal use. The corporate surety on X's bond as administrator is obligated in excess of X's liability and with the consent of X has been informed of the defalcation. X will not consent to any further disclosure and has specifically advised A that the communications from him to A should be considered confidential communications between client and attorney and therefore not to be revealed to third parties. A does not feel he can continue to act as attorney without making a full disclosure to all interested parties and the State Bar. X has therefore agreed to execute a substitution whereby A will be relieved as attorney and X will substitute himself as attorney "in pro per." In addition X is now attempting to restore all assets to the estate.

The questions asked of this Committee arising out of the foregoing facts are as follows:

1. After being substituted out as attorney for X, does A have any ethical obligation to disclose the facts to the Court, the heirs, the District Attorney's Office, or the State Bar?

2. If X employs another attorney to represent him as administrator, does A have any ethical obligation to apprise the new attorney of X's misconduct?

3. If A is questioned by the heirs or representatives as to why he withdrew in favor of X, does A have any ethical obligation to disclose the facts to them and if not, would it be proper for A to respond "for personal reasons"?

4. If there are false documents in A's file based on information supplied to him by X can he turn the file over to X or a new attorney without revealing that the file may contain false information?

In answering these questions it is necessary to resolve some apparent conflicts among the Canons applicable to the set of facts presented to this Committee.

Canon 37 of the Canons of Ethics of the American Bar Association provides as follows:

"It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information."

Knowledge of X's defalcation was acquired by A as the attorney for X, who is entitled to independent counsel in the capacity of administrator, and during the existence of confidential relations with X. Unless it can be said that X's consent to the single disclosure to the corporate surety constituted a waiver of A's duty to preserve his client's confidence, the matters learned by A would appear to be within the scope of Canon 37. This is a question of law however, rather than ethics, and the Committee makes no formal findings in this regard.

The ethical duty set forth by Canon 37 is complemented by California Business and Professional Code Section 6068(e) which states that it is the duty of an attorney:

"To maintain inviolate the confidence, and at every peril to himself to preserve the secrets of his client."

These California statutory provisions have been rigidly adhered to by the courts and their command given a liberal application. People v. Singh, 123 Cal. App. 365 (1932).

Canon 37, however, unlike the California provisions, contains a specific exception to the attorney's duty to preserve his client's confidences in the case of an "announced intention of a client to commit a crime." The interpretation of this exception has been the subject of recent Opinions of this Committee, Nos. 264, 267 and 269. In each instance it was concluded that in view of the California provisions and the judicial decisions construing the same, together with opinions of the ABA Committee, a strict construction of this exception was applied, and disclosure was prohibited. The exception does not extend to prevention of an intended civil fraud as opposed to an actual criminal act and may only be operative where the attorney has no doubt of the existence of an imminent danger that a crime will be committed.

It seems relatively clear that X's misappropriation constitutes a past crime. Moreover, it is not a continuing crime as evidenced by the statement that X is now at-

tempting to restore all assets to the estate. Therefore, the self-contained exception of Canon 37 should provide no basis for disclosure here.

A more difficult problem is presented by the clear obligation placed on A by the terms of Canon 29 of the Canons of Ethics of the American Bar Association. The first sentence of Canon 29 provides:

> "Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client."

Drinker, in commenting on this Canon at page 60 of his work on Legal Ethics states that it is a lawyer's duty to see to it that no lawyer is permitted to continue in practice who has proved himself unworthy or untrustworthy to advise or represent clients, or an unworthy member of an honorable profession. He further notes at page 24 that the most obvious demonstration of a lawyer's lack of reliable character is in being proven guilty of a violation of the duties of honesty, fidelity, candor and fairness, which as a lawyer he owes to his clients. The question of whether an attorney should expose the dishonest conduct of a client who is also an attorney has been considered in ABA Committee Opinion 202 where the circumstances were somewhat similar. In that opinion an attorney for a trust company had acquired knowledge of a transaction whereby embezzlement by an employee of the company was concealed from the beneficiaries of the trust fund which had been depleted. Certain officers of the company who apparently participated in the fraudulent concealment were members of the Bar. The opinion concludes that the attorney could not, without the consent of his client, institute disciplinary action against the officers of trust company who were members of the Bar if to do so would involve the disclosure of confidential communications to him.

In the instant case X is not only a member of the Bar but, as administrator of the estate, an officer of the court. As a result he may well be guilty of a more serious violation of his professional responsibilities than those discussed in ABA Committee Opinion 202. On the other hand there is less danger of serious injury to the estate and its beneficiaries under the facts presented in view of the bonding company's liability in the matter. While it is difficult to ignore the possibility that X may never be disciplined for his reprehensible conduct and that he may, as a result, in the future again abuse the privileges accorded him by his professional standing, the conclusion seems inescapable that Canon 29 is subject to Canon 37 and that A must preserve the confidence reposed in him. See Drinker, Legal Ethics 137; N.Y. County 253; N.Y. County 190.

In addition to Canon 29, Canon 41 of the Canons of Ethics of the ABA is of possible application in this instance. Canon 41 provides:

> "When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it, at first by advising his client and, if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps."

If X is in fact restoring the assets to the estate it would appear that A is relieved of any further obligation under Canon 41. If, however, it is clear to A that X is not doing so, then an additional issue arises as to whether A may inform the court or the heirs of the estate despite the confidential character of his knowledge. In Opinion 287, the ABA Committee considered a stronger case for disclosure involving perjury by the client. However, despite the additional authority of Canon 29 where perjury is involved, the opinion concludes that the conflict should be resolved in favor of Canon 37 and the attorney bound to preserve the confidence even if directly questioned concerning his client's misconduct.

If A withdraws pursuant to the substitution executed by X he is not thereby discharged of his duty to preserve his former client's confidences, for Canon 37 states: "This duty outlasts the lawyer's employment."

Upon termination of employment of an attorney, this Committee has noted in Opinion 253 the duty of the attorney to deliver the file to his client if so requested. In this instance, A should return any documents belonging to X and supplied to A which may be contained in the file, but A should not deliver any documents prepared by himself which are based on false information. His duty under Canon 16 to restrain his client from improprieties and his obligation not to counsel his client regarding dishonest or fraudulent acts would be applicable here. A's refusal to deliver to X would not involve disclosure of confidences and therefore that obligation does not interfere with the carrying out of the duty imposed by Canons 15, 16 and 32.

If a new attorney becomes involved and A is requested to turn over the file to him he should refuse to do so only insofar as this position is consistent with his duty to preserve his client's confidences. This may depend on X's insistence that A cooperate with the new attorney but it is unlikely that X would jeopardize his delicate position by forcing the issue. In any event A may not inform the new lawyer of X's defalcation and is bound to preserve the confidence even if he ascertains that the new lawyer is being imposed upon. ABA Committee Opinion 268.

In answer to the questions propounded, it is the opinion of this Committee that:

1. A may not disclose the facts of X's defalcation to anyone, including the court, or a new attorney, without his client's consent.

2. If directly questioned as to the reasons for his withdrawal, A is not obligated to answer the question. If he does respond he should do so in a manner least likely to put others on inquiry. For "personal reasons" would appear to be a satisfactory answer.

3. A should turn over the file on the matter to X if requested by his client and to a new attorney if requested by X but A should retain any documents actually prepared by him which he believes are based on false information.

This should not prevent Attorney A from pursuing all proper

means to induce X to make full restitution of all assets improperly diverted from the estate.

EDITOR'S NOTE: See Note to Opinion No. 264, supra, for additional opinions on subject; see also Note to Opinion No. 253, supra, on subject of lawyer's duty with respect to delivery of file to suceeding lawyer.

Opinion No. 275 (January 31, 1963)

CONTINGENT FEES. Opinion No. 263 (July 9, 1959) holding that it is improper for an attorney to handle the collection of past-due obligations for support and maintenance ordered in divorce case in California on a contingent basis is withdrawn.

In Opinion No. 263 issued July 9, 1959, the Committee ruled that it was improper for an attorney to handle the collection of past-due obligations for support and maintenance ordered in a divorce case in California on a contingent basis.

The opinion turned on the question of whether as a matter of law in California such a contract was valid.

The Committee has reconsidered the opinion and has concluded that since it rested on a determination of law, the answer to which is in doubt, and since it is not within the function of this Committee to pass on conclusions of law, and without now expressing its opinion on the legal question, it has determined that Opinion No. 263 is no longer the opinion of the Committee and should, therefore, be and is hereby withdrawn.

Opinion No. 276 (February 21, 1963)

ADVERSE AND CONFLICTING INTERESTS. A City Prosecutor employed on a part-time basis and engaged in the private practice of law may not ethically represent defendants in criminal actions arising in the Judicial District but not in the City by which he is employed.

The Committee has been asked to render an opinion on the following matter:

In a district composed of nine municipalities, city prosecutors are employed on a part-time basis and simultaneously engage in private law practice. Can such city prosecutors ethically represent defendants in criminal cases arising in the district, but not in the city by which they are employed as prosecutors?

A city prosecutor cannot ethically represent defendants in criminal cases.

Prior opinions of the American Bar Association Committee on Professional Ethics and Grievances and of this Committee unequivocally condemn as unprofessional conduct a public prosecutor's representation of persons charged with crime. The conduct is no less censurable because the public officer is a part-time employee, or because the defense is undertaken in a jurisdiction different from the place of his employment. See A.B.A. Op's: 30 (prosecuting officer of one state cannot defend persons accused with crime in another state); 34 (part-time city attorney cannot represent persons charged with crime and held for trial in county in which attorney's city is located); 118 (county prosecutor cannot undertake to obtain pardon or parole of offender convicted in another county); 142 (assistant prosecutor cannot appear on behalf of defendants in criminal cases); L.A. Op's. 242 (partner of part-time city attorney cannot defend persons charged with crime in city in which such city attorney employed); cf. 117 (former Assistant U.S. Attorney could not undertake defense of person charged with crime during period attorney was in U.S. Attorney's Office); and see, Drinker, Legal Ethics, 118-19: "A public prosecutor in one state may not properly defend a person accused of a crime in another state; to permit this would undermine confidence in him and in his office."

The principal rationale of the opinions is that the conduct violates Canon 6 forbidding representation of conflicting interests. No question of consent can be involved as the public is concerned and it cannot consent. The positions of prosecutor and defense attorney are inherently antagonistic.

Other factors which have been considered are these: The cooperation between prosecutors and various law enforcement agencies, which benefits the administration of criminal justice, would be seriously impaired were the conduct condoned. (See L.A. Op. 242.) The same cooperation may permit the attorney to acquire confidential information and thus to lead him into a violation of Canon 37.

EDITOR'S NOTE: See Rules 5, 6 and 7; Opinion No. 273, supra.

Opinion No. 277 (June 17, 1963)

AIDING UNAUTHORIZED PRACTICE OF LAW — LAY EMPLOYEES. It is ethical for a lawyer to employ a layman to negotiate settlements of personal injury cases provided the lawyer does not delegate his professional discretion to the layman and provided that the assistance given by the layman does not constitute the practice of law.

The opinion of the Committee has been requested in the question of whether it would be unethical for a lawyer representing plaintiffs in personal injury actions to employ a layman to negotiate with the adverse parties' insurance companies with respect to the settlement of such cases.

A lawyer cannot properly delegate the exercise of his professional discretion to a lay employee. A layman working for a lawyer must, in all of his work, act as agent for the lawyer who must supervise his work and be responsible for his good conduct. (Opinion No. 85 of the A.B.A. Committee on Professional Ethics; Opinion No. 166 of this Committee).

The negotiation of settlements