FORMAL OPINION NO. 40*

Members of our association advise that there appears to be a bank policy where its trust department has been engaged in a fiduciary capacity, to hire as its legal representative the attorney who first contacted the bank to undertake the fiduciary position.

The following examples are given:

> Attorney X represents a client who seeks to be appointed guardian of an incompetent person. Attorney Y represents another party seeking the same object. Both parties have individual claims against the estate of the incompetent person. The court appoints neither party, but rather, a bank to act as guardian. Attorney X contacts the bank to ascertain if it will undertake the trust. May Attorney X represent the bank? Is the bank's policy to hire the first attorney who contacts it about the trust proper in this instance? Would another attorney who is not representing either side be preferable?
>
> Attorney Y represents A, an elderly and disabled person, in a suit brought to recover certain funds alleged to have been wrongfully appropriated by B. Attorney X represents B. This suit is settled when it is agreed that the funds will be transferred to a trustee, a bank, which shall administer the funds for the benefit of A. Attorney Y contacts the bank to ascertain if it will undertake the trust. Y continues to represent B, who (1) may or (2) may not have claims against the trust fund. May Y represent the trustee? Is the bank's policy to hire the first attorney who contacts it about the trust proper in either (1) or (2)? Would another attorney who is not representing either side be preferable?

It is suggested that in such cases there might be a violation of professional ethics because of a conflict of interest, or the contact by the attorney might constitute the soliciting of business.

The Committee does not feel that it is within its province to render an opinion as to the propriety of the actions of the bank in such cases.

Assuming that the attorney who approaches the bank is the proper person to request its services, his action in contacting the bank would not amount to a violation of Professional Canon No. 27, which prohibits the solicitation of business. The primary purpose of the attorney in contacting the bank is to obtain its services. The resulting hiring of the attorney is incidental.

It is quite possible, however, that under certain circumstances, there could be a violation of either Professional Canon No. 6, which prohibits the representation of conflicting interests, or Professional Canon No. 37, which requires an attorney to preserve his clients' confidences. Should it appear that there is a conflict of interest or that there would result a disclosure of a client's confidences, the attorney should not accept the employment unless he has made a full disclosure to all persons involved.

Even full disclosure and consent does not make the conduct proper if it places the attorney in the position of giving unfavorable public impressions created by representation of conflicting interests. The discreet lawyer would not allow himself to be placed in a position of representing conflicting interests, or of being subject to a charge of betraying professional confidence. As we recently stated in I.S.B. Opinion No. 35: "The inherent evils of dual representation are ordinarily not eliminated by full disclosure to the client."

It is the opinion of the committee that in the two examples hereinbefore set forth there would be such a conflict of interests. In any event the employment should not be accepted by the attorney without a full disclosure to all persons involved and consent.

DATED this 27th day of February, 1963.

*See, DR 5-105, Idaho Code of Professional Responsibility.