who had been sterilized as a condition of continued receipt of government benefits under the Medicaid Program. The lawyer advised the women of their legal rights and suggested that a lawsuit was possible. Following the meeting, the lawyer sent a letter to one of the women who had been present, advising her that the ACLU would provide her with free legal representation should she institute suit against the doctor who performed her sterilization surgery. For this the lawyer was disciplined. The Supreme Court reversed. The Court place primary emphasis on the absence of financial motivation by the lawyer.[3] The Court emphasized that any fees generated by ACLU sponsored litigation (such as court awarded fees under 42 U.S.C. § 1988 (Civil Rights Litigation) or 28 U.S.C. § 2412 (Equal Access to Justice Act)) would go to the ACLU not the cooperating attorney. The Court specifically declined to state whether the result would be different if the attorneys were allowed to share in the award of attorney's fees. 436 U.S. at 431, n. 24. In this matter there is no intimation that the solicitation of clients is being conducted by a public interest group to advance constitutional or public policy issues.

Second, the California Supreme Court held in Jacoby v. State Bar (1977) 19 Cal.3d 359 that "(a) communication is not 'primarily directed' toward solicitation unless viewed in its entirety, it serves no discernible purpose other than the attraction of clients. If a legitimate purpose appears on the face of a publication or in the demonstrated motivation of an attorney, the publication must receive at least prima facie First Amendment protection." Id. at 371. Jacoby did not deal with a live in person solicitation, as is presented by the Inquiry, but with a lawyer's cooperation with the publication of a newsworthy topic. See Leoni v. State Bar (1985) 39 Cal.3d 609, 623-624. Hence, on its face Jacoby is not controlling. See Ohralik v. Ohio State Bar Association (1978) 436 U.S. 447, 455-456 (state prohibition of live in person solicitation of clients is not barred by First Amendment). Moreover, here the sole motivation for the solicitation is the attraction of clients. Consequently, the prohibition of such conduct violates neither the letter nor the spirit of Jacoby.

Third, California courts have recognized that class action plaintiffs may engage in precertification communications to potential class members to involve them directly in the litigation. See Atari, Inc. v. Superior Court (Carson) (1985) 166 Cal.App.3d 867, 872. Communication is allowed, however, only where the "court has been given the opportunity in advance to assure itself that there is no specific impropriety." Id. Here, the Inquiry neither proposes that the litigation will be maintained as a class action nor that the form and content of proposed communications to prospective clients will receive advance judicial review. See also Gulf Oil Co. v. Bernard (1981) 452 U.S. 89 (interpreting Rule 23, Fed. R. Civ. Proc. as allowing direct contact of potential class members when necessary to proceed under the Rule).

Fourth, the Inquiry does not propose the use of a State Bar approved Lawyer Referral Service. See California Business & Professions Code § 6155. Nor does it involve a legal services program sponsored by an organization protected by the First Amendment. See, e.g., United Transportation Union v. Michigan State Bar (1971) 401 U.S. 576 (upholding right of union representative to visit injured union members and solicit them to retain union-selected private lawyers).

The United States Supreme Court recently held in Edenfield v. Fane (1993) 113 S. Ct. 1792 that the First Amendment invalidated Florida's per se rule barring solicitation by CPAs. The Court was careful, however, to recognize that each profession may be subject to different levels of state regulation. 113 S. Ct. at 1802. This Committee expresses no opinion whether the Court's opinion in Edenfield would be likewise dispositive of state regulation of attorney solicitation of clients whether directly or through intermediaries.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinions are based on such facts as set forth in the Inquiries submitted.

1. Under the Rules of Professional Responsibility arrangements between lawyers and non lawyers may create actual or de facto partnerships prohibited by Rule 1-310 or may involve fee splitting prohibited by Rule 1-320, or both. Where the aggregate fee received by A and PI exceeds what would be a reasonable fee for A alone, a violation of Rule 4-200 may arise if any of PI's work, for which the client is being separately billed, would normally be considered part of the A's fee. Cf. Ojeda v. Sharp Cabrillo Hosp., (1992) 8 Cal.App. 4th 1 (combined lawyer and medical-legal consulting firm contingent fee cannot exceed MICRA fee caps where medical-legal consulting firm provides services normally provided by lawyer). The employment by A of PI, who has an interest in the subject matter of the representation, raised potential conflicts which must be disclosed to the client (Rules 3-310(B), 3-500 and Bus. & Prof. Code § 6068(m)). Similarly, the use of PI in the dual role of case preparation assistant and finder of future clients raises a potential problem since PI is being paid by C for case work while PI and A are obtaining new clients as a result of PI's case work. A's intent to represent other claimants may present a potential conflict if that representation would in any material way reduce or hinder C's recovery. There may be problems with these issues under the Rules of Professional Responsibility which the Committee does not address in this Opinion.
2. Unlawful solicitation of clients in particular contexts may also violate provisions of California law. See, e.g., Cal.Bus. & Prof. Code §§ 6151-52; Cal. Pen. Code §549; Cal.Ins. Code §750.
3. Rule 1-400(B), California Rules of Professional Conduct incorporates the Primus standard by tieing a prohibited solicitation to the presence of pecuniary gain on the lawyer's part.

Formal Opinion No. 475

SUMMARY:

CLIENT PAPERS—DUTY TO RETAIN OR RETURN. When a law firm maintains in storage client files relating to matters that have been closed for several years, and then the law firm dissolves, the members of the firm who have responsibility for winding up the affairs of the firm have an ethical obligation to use all reasonable means to contact the former clients to notify them that their files may be retrieved. If, after diligent efforts to notify a former client of the availability of the closed file and of the plan to destroy the file if no contrary instruction is received, and after a sufficient period of time has passed since the notice was sent and since the matter was closed, the former client makes no response, then the dissolved firm's former partners may destroy the file, with the exception of any intrinsically valuable materials.[1] They must not reveal any client confidences or secrets in the process of destroying

the files. The Committee strongly recommends that lawyers arrive at some agreement with their current clients regarding the handling and disposition of files once matters are closed in order to avoid the ethical and practical problems which may be caused by not having instructions from former clients as to the disposition of closed files. Ideally, this subject should be addressed expressly in writing at the outset of an engagement.

AUTHORITIES CITED

California Rules of Professional Conduct, Rules 2-300(2)(a), 3-700(D), 4-100(B)(3);
California Code of Civil Procedure §§ 1500, et seq.;
Weiss v. Markus, 51 Cal.App.3d 590 (1975);
Goldstein v. Lees, 46 Cal.App.3d 614 (1975);
Los Angeles Bar Association Ethics Opinion Nos. 330, 362, 386, 405, 420, 436, 456;
San Francisco Bar Association Opinion No. 1984-1;
State Bar Formal Opinion No. 1976-37;
ABA Code of Professional Responsibility, Ethical Consideration 4-6.

FACTS AND ISSUES:

The AB&C law firm had been in existence for over 30 years by the time it dissolved in 1992. Over time, the firm had accumulated several thousand storage boxes of clients files. AB&C's retainer agreements contained no provision regarding the storage or destruction of closed matter files. Currently, AB&C has in storage approximately 3,000 boxes containing files that relate to matters that have been closed for several years. Many of these matters were handled by attorneys who had retired, died or withdrawn from AB&C before its dissolution. There is no reliable index of last known addresses for the former clients of AB&C to match to the files in the boxes in storage, and locating last known addresses for the former clients could require opening each file. AB&C is fairly confident that there are no intrinsically valuable papers, such as wills, promissory notes, or bonds, in the files since it was the firm's policy not to retain such items in the files.

The questions presented to the Committee are: (1) whether the former partners of AB&C who have been charged with winding up the affairs of the dissolved firm (hereinafter referred to as "AB&C") may destroy the closed files in storage pursuant to a new, proposed records destruction policy — e.g., a policy to the effect that all closed files will be destroyed seven years after the matter was closed, without notice to the former clients; or (2) alternatively, whether AB&C must attempt to notify all the former clients of the availability of the files and seek the former clients' instructions regarding disposition of the files; (3) if so, what steps AB&C would have to take to notify the former clients; and (4) what AB&C may do if, after attempting contact, the former clients do not respond with instructions.

DISCUSSION:

A. The Former Client's Interest In the Closed Files.

Papers and material in a client file belong to the client. "[I]n most cases, virtually everything in a client's files is the property of the client because it either has been copied at the client's expense, or the time utilized to create it has been at client expense." Los Angeles County Bar Association Ethics Opinion No. 405, citing Weiss v. Markus, 51 Cal.App.3d 590, 599 (1975) ("'work product' of an attorney belongs to the client, whether or not the attorney has been paid for his services"). See also Los Angeles County Bar Association Ethics Opinions Nos. 330, 362, 405, 420; Cf. San Francisco Bar Opinion No. 1984-1 (any material in the case file must be made available to the client upon the client's request).

The client's right to the contents of the file continues even after the client's relationship with the attorney has ended. In Los Angeles County Bar Association Ethics Opinion No. 330, this Committee concluded, in the case of a lawyer whose representation of a client has been terminated, that notwithstanding the existence of a dispute between the attorney and former client, the former attorney must provide the client with original documents provided by the client as well as all materials for which the client has paid. The Rules of Professional Conduct apply this principle expressly to an attorney whose employment has been terminated:

> (1) [The attorney must] promptly release to the client at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, experts' reports and other items reasonably necessary to the client's representation, whether the client has paid for them or not.

Rule 3-700(D).[2]

Although Rule 3-700(D) and Opinion No. 330 appear to assume that the matter to which the files pertain is open at the time of the termination of the attorney-client relationship, the principle of the client's rights in and ownership of the file applies equally after the matter is closed. The file belongs to the client. Further, the client may, for reasons known or unknown to the lawyer, find something of significant economic or personal value in the file even after the case is over. In the criminal law context, this Committee concluded in Ethics Opinion No. 420 that a public law office must preserve closed client criminal files unless and until the client authorizes the destruction of the file.

The Ethical Considerations of the ABA Code (adopted in New York and other states), which is not binding upon California lawyers, but which sometimes provides valuable guidance on matters not specifically addressed by the California Rules of Professional Responsibility, direct the lawyer whose practice has terminated to follow the wishes of his or her (former) client as to the disposition of client papers. The directive in EC No. 4-6 is based on the principle of maintaining client confidences[3]:

> ...A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability or retirement. For example, a lawyer must provide for personal papers of the client to be returned to him [sic] and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

EC No. 4-6.

Where, as here, there was no agreement with the client allowing the lawyer to dispose of closed files, the Committee believes that the lawyer may not simply destroy all the

material in the closed files now in storage. AB&C has an ethical obligation to try to return the files to the former clients or to try to obtain authorization to destroy the files. If AB&C chooses the latter, it must use all reasonably appropriate means and act diligently to notify the former clients to whom these files belong of the existence of the files pertaining to specific matter(s) and their right to retrieve same from AB&C.

B. Notification of the Former Client Regarding the Closed Files.

The Committee believes that appropriate diligence in this situation means pursuing all reasonably available means to notify the former client in writing of the availability of the files and to request instructions as to their disposition. Written notice, preferably by certified mail, must be sent to the former client's last known address. In determining the last known address, the lawyer should refer to sources that are appropriate for locating persons and companies, such as public telephone directories, organizations' membership directories, other individuals known to the lawyer who may have information as to the former client's whereabouts, and the like. If the last-known address of the former client can be found only by inspecting the files themselves, then this must be done. If the reliability of the last known address is uncertain, but the attorney is aware of another person who has a current (or at least more recent) relationship with the former client (e.g., one of the former partners of AB&C), notice should then also be sent to the former client in care of that attorney.

The content of the notice to the former client depends to a great extent on the situation. At a minimum the notice must offer the files to the former client, seek instructions as to what to do with the files, and, if it is the lawyer's desire to dispose of the files absent contrary instruction from the former client, the notice must contain a warning that the files will be destroyed (if no contrary instruction is received from the former client) and when.

C. Alternatives If Former Client Cannot Be Located Or Fails to Respond.

The question next arises: What may or must AB&C do with the files of former clients who cannot be located or fail to respond to the notice? The Committee is of the opinion that, with the exception of intrinsically valuable documents, AB&C is not required to maintain the files in storage forever. In the situation where the former client cannot be located or does not respond to the lawyer's letter requesting instructions and informing of the plan to dispose of the file unless otherwise instructed, the Committee's views on the minimum amount of time that must pass before disposing of the closed files are as follows.

The Committee recommends that AB&C retain the file in a civil matter for at least five years past the date the matter was closed (unless the former client was a minor, in which case the file should be retained for five years past the closing date or until the former client reaches majority, whichever is longer), unless authorized by the former client to destroy the file or to otherwise release it sooner. The five year period is recommended by analogy to Rule of Professional Conduct 4-100(b)(3), which requires a lawyer to maintain and preserve records of client funds and other properties of which the lawyer had acquired possession for no less than five years after final distribution. It may be prudent for the lawyer to keep the file longer, depending on the circumstances.

The Committee does not believe, however, that in every civil matter it is ethically mandatory for the lawyer to retain all material in a closed file during a period of time after the matter has closed and before five years passes (or before the former client authorizes disposition or requests return of the file). Recognizing that photocopies, duplicates and drafts make up a large portion of the paper generated in modern practice, retention of all such materials after a matter concludes could pose an unnecessary hardship on the lawyer. When a matter ends, it may be reasonable and appropriate to reduce the volume of paper to be stored by disposing of duplicates and other unimportant material in the file, so long as intrinsically valuable and potentially significant material is retained. "Intrinsically valuable" material is defined below. What material is "potentially significant" will vary with each representation, and the lawyer will have to be guided by her own judgment. We offer the observation that in a litigation matter, "potentially significant" material that should be retained for at least five years after the case closes (unless authorized to dispose or release it earlier by the former client) would normally include at least the court clip, correspondence files, and legal research files.

Even after five years has elapsed, the lawyer may not destroy documents that have intrinsic value without the consent of the former client. Intrinsically valuable documents are those materials, such as money orders, travelers checks, stocks, bonds, wills, original deeds, original notes, judgments and the like, which have value, or may have value, in and of themselves,[4] or which themselves create or extinguish legal rights or obligations.

In a criminal matter, the lawyer must maintain the file for the life of the former client, unless authorized by the former client to destroy it or otherwise release it. Cf. Los Angeles County Bar Association Opinion No. 420, supra. Considerations pertaining to the criminal defendant's liberty interest in the proceedings and to the possibility of review of criminal convictions by appeal or writ (even many years after conviction) warrant especially cautions treatment of criminal case files.

The Committee is of the view that, after proper notice has been given or diligently attempted, AB&C may destroy the civil matter files if AB&C does not receive a request to the contrary from a former client and if sufficient time has elapsed after notice and after the matter was closed. What is a sufficient amount of time to wait for a response after notice is sent also may vary with the circumstances of the case, and the lawyer must be guided by her own judgment. The Committee is of the view that, in general, the minimum time is 90 days. The lawyer's letter giving notice should state, inter alia, the date that the lawyer will dispose of the file unless otherwise instructed beforehand.

D. Method of Disposing of the File.

In disposing of the file, AB&C must take care not to permit client confidences or secrets to be disclosed. See Bus. & Prof. Code 6068(e) quoted supra in fn.2. "Secrets" include more than attorney-client communications; "secrets" include information gained from any source, and whether or not privileged, that the client would not like to have disclosed to third parties. Goldstein v. Lees, 46 Cal.App.3d 614, 621, n. 5 (1975); State Bar Formal Opinion No. 1976-37; Los Angeles County Bar Association Ethics Opinion Nos. 386, 436, 456. Thus, for example, care must be taken in disposing even of files that contain arguably

public record information, if the former client would be embarrassed by the disclosure. In many instances, it would not be ethically proper, for example, to simply discard old client matter files in a dumpster at the back of the lawyer's office due to the risk that others might see the contents of the files. Destruction should be by incineration or shredding, or other suitable means of assuring against breaches of confidentiality.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte, and its opinion is based on such facts as are set forth in the question presented.

1. This Opinion addresses only the ethical responsibilities of State Bar members in handling closed files of former clients. This Opinion does not address legal duties or duties of care that may be owed by members to former clients.
2. Rule 2-300(2)(a) similarly requires an attorney to notify the client in the event of the sale of a law practice that the client has "a right to take possession of any client papers or property."
3. Section 6068(e) provides that a lawyer has a duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."
4. Under California's Unclaimed Property Law, C.C.P. §§ 1500, et seq., certain intrinsically valuable unclaimed property escheats to the State after seven years. What constitutes "unclaimed" property in the context of closed client files is a question beyond the scope of this opinion.