

**STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 3
May 22, 1987**

QUESTION - May a non-profit legal services corporation, as part of its retainer agreement, contract with its clients to receive all money in its clients' trust fund accounts not claimed by the clients within a three-year period following the corporation's attempt to locate the clients and return the funds?

ANSWER - No.

QUESTION - May a non-profit legal services corporation's retainer agreement provide that any amounts less than \$1 remaining in a trust fund account when a file is closed become the property of the corporation?

ANSWER - Yes.

AUTHORITIES RELIED ON

Nevada Rules of Professional Conduct
(Supreme Court Rules) 155, 158 (1986)

DISCUSSION

As a preliminary matter, it has been widely held and is apparently generally accepted that "an indigent person seeking assistance from a legal services office forms the same lawyer-client relationship with its staff of lawyers as any other client who retains a firm to represent him." Breger, Disqualification for Conflicts of Interest and the Legal Aid Attorney, 62 B.U.L. Rev. 1115, 1122 (1982). Both ethics committees and courts have held that traditional conflicts doctrines apply to legal aid societies. *Id.* While a non-profit legal services corporation is not a law firm, for purposes of ethical analysis it should be treated as one, unless extraordinary circumstances require a different result. See, e.g., *Borden v Borden*, 277 A.2d 89 (D.C. 1971). Therefore, these questions will be analyzed in the context of a traditional client-firm relationship.

The first question--whether a law firm may contract for the forfeiture of money left in trust funds by clients who cannot be located--presents unique issues involving fees and conflicts of interest. It is the opinion of the Committee that the contemplated forfeiture could not be part of a reasonable fee arrangement, and that such an arrangement would cause unacceptable conflicts of interest between client and counsel.

"A lawyer's fee shall be reasonable." S.C.R. 155(1) (1986). A forfeiture of client funds held in trust accounts cannot be classified as a reasonable fee. The factors set out by the rule to be considered in determining the reasonableness of a lawyer's fee do not include the possibility that a client will be difficult or impossible to locate. *Id.* Only the anticipated cost of prosecuting a matter or a fee contingent on the outcome is permitted.

A forfeiture provision in a retainer agreement with an indigent client is particularly objectionable, since any non-trivial amount forfeited would be relatively substantial compared with the client's income. Consent to such a forfeiture provision would be highly suspect, considering that the indigent client would likely have nowhere else to go to seek legal representation and advice. See Breger, *supra* p.1, at 1136.

The forfeiture provision also poses a conflict of interest. "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client . . ." S.C.R. 158(10) (1986). The Nevada Supreme Court interpreted a former, similar rule, S.C.R. 183 (1985), as prohibiting "a member of the state bar from purchasing or otherwise acquiring, directly or indirectly , any

interest in the subject matter of the litigation which he is conducting." *Eikelberger v. Tolotti*, 96 Nev. 525, 530-31, 611 P.2d 1086, 1090 (1980). A potential for forfeiture of any amounts recovered for a client gives the attorney a clear interest in the cause of action. Such an interest is impermissible. In addition, the corporation's duty to locate the client and return trust funds is a direct conflict with the corporation's rights, pursuant to the retainer agreement, to retain the funds of clients it fails to locate.

However, in the opinion of the committee, a forfeiture of amounts less than \$1 in a client's trust account may constitute part of a reasonable fee arrangement, since the administrative cost of maintaining such an account could reasonably be charged to the client. Thus, an assignment of insignificant amounts to the corporation is permissible.

CONCLUSION

A non-profit legal services corporation may not, as part of its retainer agreement, contract with its clients to receive all money in its clients' trust fund accounts not claimed by the clients within a three-year period following the corporation's attempt to locate the clients and return the funds.

A non-profit legal services corporation's retainer agreement may provide that any amounts less than \$1 remaining in a trust fund account when a file is closed become the property of the corporation.

This opinion is issued by the standing committee on ethics and professional responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its board of governors, any persons or tribunals charged with regulatory responsibilities, or any member of the state bar.