

# Disengaged

A motion to disqualify counsel might be an attorney's ultimate nightmare regarding conflicts and engagement agreements

**D**ick Consulate slumped in a dark corner of Yancey's Bar, telling his tale of woe to his colleague, Jane Smith. A motion to disqualify Consulate had been filed in litigation in which, he said, "I represent my best client, Big Bucks, in its attempt to recover money from defendant Small Fry."

He continued: "Small Fry is a deadbeat. I should know, because I represented them years ago in a lawsuit. Against the odds, I recovered a significant amount of money. Nonetheless, they stiffed me. That was many years ago, but I have not forgotten the sting of not being paid."

"Small Fry filed a motion to disqualify me, declaring I have a conflict of interest in representing Big Bucks against Small Fry—even though I believe my representation of Small Fry ended many years ago."

Smith asked, "What does the motion say?"

"It says that under the one-page engagement agreement I had entered into with Small Fry, with a nominal retainer fee, the attorney-client relationship continues." Consulate moaned. "Big Bucks is not happy with this and has told me I have to defend the motion at my own expense—and if I lose, Big Bucks will not only terminate its relationship with me but will

require that I reimburse it for all fees paid to date and will not pay the outstanding invoice, which is huge."

"I thought I had learned all about engagement agreements when I attended a county bar association seminar on ethics. The speakers were excellent, and they urged the use of a detailed, multipage engagement agreement. They spoke about such agreements specifically identifying the purpose of the engagement and about limiting the scope of the engagement to that purpose, reserving to the client and the attorney the ability to enter into amendments to deal with any future matters that might arise. They termed that a

'framework agreement,' when future representation requires reciprocal actions by both client and attorney—as requested by the client and as confirmed by the attorney. They explained that such an agreement terminates the attorney-client relationship when the assignment is completed. They compared that with a classic retainer agreement, where the relationship continues until expressly terminated.

"A multipage engagement agreement does not work for me—or so I thought," said Consulate, sighing. "I try to use a one-page simple agreement. Some clients do not want to have a complicated, lengthy legal document. That was certainly true with Small Fry when I agreed to the representation. The agreement I prepared simply said I would represent Small Fry for a nominal retainer and did not limit the representation to any particular matter."

Smith had just read the advance sheets and said, "Division III of the Fourth Appellate District in *Banning Ranch Conservancy v. Superior Court* (City of Newport Beach) 2011 D.J. DAR 4206 addressed this issue. *Banning* discusses the scenario where a classic retainer agreement is entered into and, until the representation is formally ended, the attorney-client relationship continues; it is ongoing and open-ended. Even though you represented Small Fry years ago and were stiffed, you may still have an attorney-client relationship with them. The Rules of Professional Conduct prohibit simultaneous representation of adverse clients."

Consulate sputtered. "There is no relationship between my prior representation of Small Fry and the current matter!"

Smith sighed and said, sadly, "That does not matter. Even though you have no relevant confidential information, your duty of loyalty to your client may require disqualification."

"Barkeep! I need another drink—fast!" ☞

*Charles Berwanger (cberwanger@gordonrees.com) is a partner at Gordon & Rees. This article represents the opinions of the author and not the SDCBA's Legal Ethics Committee.*

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**In a framework agreement, future representation requires reciprocal actions by both client and attorney—as requested by the client and as confirmed by the attorney.**