

Chapter 1

Opposing General Motions

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§ 1:1 Sample opposition to motion to disqualify counsel or law firm

[Attorney name, address]

State Bar Number *[_____]*

Telephone *[_____]*

Fax No. *[_____]*

Email *[_____]*

Attorneys for Plaintiff/Defendant, *[_____]*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF *[_____]*

[Plaintiff's name],) CASE NO.: *[_____]*
)
) PLAINTIFF'S/
) DEFENDANT'S
) OPPOSITION TO
) MOTION OF
) _____ TO
) DISQUALIFY
) *[ATTORNEY NAME /*
FIRM NAME],

Plaintiff,	)	COUNSEL FOR _____
	)	IN THIS
	)	ACTION;
	)	MEMORANDUM OF
	)	POINTS
	)	AND AUTHORITIES
vs.)	
	)	[Declaration(s) of
	)	_____] filed
	)	separately]
)	
	)	[Rules of Prof. Conduct,
	)	Rule 3-310E]
[Defendant's name],	)	(successive
	)	representations)]
)	
	)	Hearing Date:
	)	Time:
	)	Department:
Defendant)	
	)	Complaint Filed:
)	_____]
	)	Trial Date: [_____]
	)	Judge: [Hon._____]

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

Plaintiff/Defendant, _____, hereby opposes the motion of _____ to disqualify [name of attorney] from his/her representation of Plaintiff/Defendant, _____, in this action.

This Opposition is based upon [INSERT factual basis for opposition, e.g., (1) moving party fails to establish that _____ was "represented" by _____ giving rise to an attorney-client relationship (and/or) (2) there was no opportunity for _____ to acquire confidential information (and/or) (3) there is no substantial relationship between the prior and current matters justifying an inference that confidential information was acquired bearing on the present case.]

This Opposition is further based upon the complete file and records in this action, the attached Memorandum of Points and Authorities, [the Declaration(s) of _____ and _____], and any and all documentary or oral evidence as may be presented at the time of the hearing on this Motion.

Dated:

Respectfully submitted,
 [FIRM NAME]

By: _____
 [_____]

Attorneys for [Plaintiff/Defendant],
 [name of Plaintiff/Defendant]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

[INSERT factual explanation of alleged conflict, e.g., successive representations, and summary of why counsel should *not* be disqualified from representing the party in the action. Reference applicable Declarations.]

II. THE CIRCUMSTANCES OF THE ALLEGED CONFLICT DO NOT WARRANT DISQUALIFICATION

Where successive representation is involved, Professional Rules of Conduct, Rule 3-310E, prohibits an attorney, without the informed written consent of the client or former client, from accepting employment adverse to a client or former client where, “*by reason of such representation, the member has obtained confidential information material to the employment.*” Prof. Rules of Conduct, Rule 3-310E (emphasis added).

The right of a party to be represented in litigation by an attorney of his or her choice is a significant right and ought not to be abrogated in the absence of some indication the integrity of the judicial process will otherwise be injured. *Oaks Management Corp. v. Superior Court*, 145 Cal. App. 4th 453, 471, 51 Cal. Rptr. 3d 561 (4th Dist. 2006), reh’g denied, (Dec. 28, 2006). Where the potential conflict of an attorney is one that arises from the successive representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality. *Oaks Management Corp. v. Superior Court*, 145 Cal. App. 4th 453, 463, 51 Cal. Rptr. 3d 561 (4th Dist. 2006), reh’g denied, (Dec. 28, 2006).

Motions to disqualify counsel present competing policy considerations. On the one hand, a court must not hesitate to disqualify an attorney when it is satisfactorily established that he or she wrongfully acquired an unfair advantage that

undermines the integrity of the judicial process and will have a continuing effect on the proceedings before the court. On the other hand, it must be kept in mind that disqualification usually imposes a substantial hardship on the disqualified attorney's innocent client, who must bear the monetary and other costs of finding a replacement. A client deprived of the attorney of his or her choice suffers a particularly heavy penalty where his or her attorney is highly skilled in the relevant area of the law." *Oaks Management Corp. v. Superior Court*, 145 Cal. App. 4th 453, 462–463, 51 Cal. Rptr. 3d 561 (4th Dist. 2006), reh'g denied, (Dec. 28, 2006) (citing *Gregori v. Bank of America*, 207 Cal. App. 3d 291, 300, 254 Cal. Rptr. 853 (1st Dist. 1989), opinion modified, (Feb. 17, 1989)).

The moving party has failed to make a showing that client confidentiality has been jeopardized in any manner, or that there could be any unfair advantage gained as to the present matter, or that the integrity of the judicial process will in any manner be jeopardized. Thus, _____'s significant right to his or her counsel of choice should not be abrogated in favor of disqualification. [*Reference applicable Declarations.*]

III.

NO PRIOR ATTORNEY-CLIENT RELATIONSHIP WAS ESTABLISHED

In this case, there was no prior representation. _____'s prior affiliation with _____ was in the nature of _____, and does not support disqualification. [*Reference applicable Declarations.*]

In *Oaks Management Corp. v. Superior Court*, 145 Cal. App. 4th 453, 51 Cal. Rptr. 3d 561 (4th Dist. 2006), reh'g denied, (Dec. 28, 2006), the Court of Appeal reversed an order disqualifying a law firm from representing a condominium association based on prior lender-borrower relationships between two of the firm's attorneys and the developer that ended several years before litigation commenced. The court declined to find that a conflict under Rule 3-310 existed because no prior attorney-client relationship existed, rather, only an "arms-length" transaction that did not rise to the level of a fiduciary relationship between the borrower and the lender.

"[R]ule 3-310 never becomes applicable where the party seeking the attorney's disqualification fails to establish that such party was or is 'represented' by the attorney 'in a manner giving rise to an attorney-client relationship.'" *Id.*, at p. 465, citations omitted.

"Mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification. . . . Such a rule would nullify a party's right to representation by chosen counsel any

time inadvertence or devious design put an adversary's confidences in an attorney's mailbox." *Id.*, at p. 467.

Here, similar to the loan transactions in The Oaks Management Corp., the only relationship that existed between _____ and _____ involved [*INSERT nature of involvement and prior transaction*]. Such a prior relationship involved only an arms-length transaction and did not establish an attorney-client or fiduciary relationship such that disqualification is necessary or warranted under Rule 3-310, or at all. [*Reference applicable Declarations.*]

IV.

THERE WAS NO EXCHANGE OF CONFIDENTIAL INFORMATION

A former client may seek to disqualify a former attorney from representing an adverse party by showing the former attorney actually possesses confidential information adverse to the former client. *H. F. Ahmanson & Co. v. Salomon Brothers, Inc.*, 229 Cal. App. 3d 1445, 1452, 280 Cal. Rptr. 614 (2d Dist. 1991). For example, in *Pound v. DeMera DeMera Cameron*, 135 Cal. App. 4th 70, 36 Cal. Rptr. 3d 922 (5th Dist. 2005), a declaration supporting the motion to disqualify stated that the attorney-declarant had a one-hour discussion with the disqualified attorney and "discussed the case in specific terms, including issues, personalities, vulnerabilities, and other topics properly described as attorney work product." *Pound, Id.*, 135 Cal.App.4th at p. 74. Thus, because attorney work product is confidential, the court's findings that the disqualified attorney obtained confidential information were supported by substantial evidence. See *Faughn v. Perez*, 145 Cal. App. 4th 592, 604, 51 Cal. Rptr. 3d 692 (5th Dist. 2006).

In this case, there is no evidence showing acquisition by _____ of confidential information. On the contrary, the circumstances of the prior representation weigh against the possibility that confidential information bearing upon the instant case was acquired. _____'s involvement in the prior matter was peripheral, and the issues in that matter had no relationship whatsoever to the instant case. [*Reference applicable Declarations.*]

V.

THE FACTS DO NOT SUPPORT A PRESUMPTION THAT CONFIDENTIAL INFORMATION WAS ACQUIRED

A. There Is No Substantial Relationship Between the Prior and Current Representations

A presumption that the targeted attorney obtained confidential information during the prior attorney-client