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5 UNITED STATES BANKRUPTCY COURT  
6 NORTHERN DISTRICT OF CALIFORNIA

7 In re

8 MARGARET M. ELLIS,

No. 03-12065

9 Debtor(s).  
10 \_\_\_\_\_/

11 Memorandum on Motion to Disqualify  
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12 Debtor Margaret Ellis and her former husband, Robert Ellis, have for many years feuded with  
13 their neighbors, William and Rebecca Bertain. The Bertains are the Ellis' largest creditors, having  
14 obtained a state court judgment against them prior to their filing of individual Chapter 7 bankruptcy  
15 proceedings.

16 The Bertains have filed a motion to disqualify the Arnot Law Firm, which represents both  
17 Margaret and Robert. There clearly are conflicts of interests between Margaret and Robert, as they are  
18 divorced, Margaret has remarried, and they have a marital dissolution agreement. However, Stephen  
19 Arnot of the Arnot Law Firm has filed a declaration averring in no uncertain terms that both Margaret  
20 and Robert "have signed written waivers of conflicts as required under Professional Rule 3-310 so as to  
21 allow this office the continue to represent both . . . ." <sup>1</sup> The Bertains have no concerns whatsoever about  
22 protecting Margaret's interests, and care not a whit about her welfare. Their sole motivation in bringing  
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25 <sup>1</sup> The declaration is somewhat vague as to what written disclosure has been made to Margaret,  
26 as the conflicts go well beyond merely obtaining a deed of trust. The Arnot Law Firm would probably  
do well to review its *written* disclosure to Margaret, as required by Rule 3-310(A)(2), and make sure  
that she still consents.

1 the motion is to gain an advantage in the ongoing litigation between them and the Ellises.

2 The general rule is that courts do not disqualify an attorney on the grounds of conflict of interest  
3 unless a former client moves for disqualification. *In re Yarn Processing Patent Validity Litigation*,  
4 530 F.2d 83, 88 (5<sup>th</sup> Cir. 1976); *Colyer v. Smith*, 50 F.Supp.2d 966 (C.D.Cal. 1999). At the very least,  
5 a third party seeking disqualification of opposing counsel must demonstrate that its rights are improperly  
6 prejudiced by the continued representation. *Decaview Distribution Co., Inc. v. Decaview Asia Corp.*,  
7 2000 WL 1175583 (N.D.Cal. 2000).

8 A motion to disqualify counsel is not an arrow normally in the quiver of a litigant. A motion for  
9 disqualification of counsel is a drastic measure which courts should hesitate to impose except when of  
10 absolute necessity. *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983). They are often tactically  
11 motivated; they tend to derail the efficient progress of litigation. *Evans v. Artek Systems Corp.*, 715 F.2d  
12 778,791 (2nd Cir. 1983). The moving party therefore carries a heavy burden and must satisfy a high  
13 standard of proof. (*id.*) Because of the potential for abuse, disqualification motions should be subjected  
14 to particularly strict judicial scrutiny. *Optyl Eyewear Fashion International Corp. v. Style Companies*,  
15 *Ltd.*, 760 F.2d 1045, 1049 (9th Cir. 1985) citing *Freeman v. Freeman*, 689 F.2d 715,721- 722 (7th Cir.  
16 1982). The court may sanction counsel for making a motion to disqualify opposing counsel where no  
17 evidence or facts are presented justifying the motion. *Adriana International Corp. v. Thoren*, 913 F.2d  
18 1406,1416 (9th Cir. 1990).


19 The Bertains have not come anywhere close to meeting their heavy burden. Their argument that  
20 the rights of the Chapter 7 trustee are harmed by the representation does not give them standing to make  
21 the motion. Whether or not the Arnot Law Firm has given sufficient disclosure to Margaret to obtain her  
22 consent to continued representation despite the conflicts of interest is strictly a matter between the law  
23 firm and Margaret.<sup>2</sup>

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25 <sup>2</sup>The court has formed the impression, from the litigation heard thus far, that Margaret dislikes the  
26 Bertains far more than she may distrust her former spouse. There is no basis in any of the record for the  
court to assume that Margaret has not made an informed consent.

1 For the foregoing reasons the motion to disqualify will be denied, without prejudice to the rights  
2 of Margaret or the Trustee. Counsel for Margaret shall submit an appropriate form of order.

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4 Dated: December 12, 2004

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6 Alan Jaroslovsky  
7 U.S. Bankruptcy Judge  
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