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**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF XXX**

In the Matter of	)	Case Number: XXXX
	)	
(Child 1) et al.,	)	
	)	<b>MEMORANDUM OF POINTS AND</b>
	)	<b>AUTHORITIES IN SUPPORT OF FINDING</b>
Children.	)	<b>NO CONFLICT OF INTEREST TO</b>
	)	<b>WARRANT DISQUALIFICATION OF MS.</b>
	)	<b>XXXX AS COUNSEL FOR SIBLINGS</b>
	)	
	)	Date: May 25, 2006
	)	Time: 8:30 a.m.
	)	Dept.: XXXX

**INTRODUCTION**

Counsel for the children, (Child 1), (Child 2), (Child 3), (Child 4), (Child 5), and (Child 6), submits this memorandum of points and authorities in support of her argument that her prior representation of child J.B. does not warrant her disqualification. J.B. has Down Syndrome, is severely developmentally delayed and unable to communicate effectively. Thus, no confidential information was ever obtained from him. For the same reason, J.B. is incapable of understanding that an attorney-client relationship ever existed. Therefore, he is not prejudiced by counsel's continued representation of his siblings. However, it would be highly prejudicial to (Child 1), (Child 2), (Child 3), (Child 4), (Child 5), and (Child 6) to disqualify their attorney of nearly three years absent a clear conflict of interest mandating disqualification.

1 **STATEMENT OF FACTS**

2 At the detention hearing held on June 4, 2003, XXXX, an attorney with XXX, was  
3 appointed to represent all seven children in this matter: (Child 1), J.B., (Child 2), (Child 3), (Child  
4 4), (Child 5), and (Child 6). On August 31, 2005, the date of the initial Welfare and Institutions  
5 Code<sup>1</sup> section 366.26 hearing, Ms. XXXX declared a conflict of interest between J.B. and his six  
6 siblings and requested to withdraw from representing J.B. only. The County Social Services  
7 Agency (Agency) was recommending that J.B. be adopted by his caretaker, which would sever  
8 J.B.'s relationship to his siblings. The court granted Ms. XXXX's request. No party objected to  
9 Ms. XXXX's continued representation of (Child 1), (Child 2), (Child 3), (Child 4), (Child 5), and  
10 (Child 6). New counsel was appointed for J.B.

11 At the continued section 366.26 hearing held on January 5, 2006, Ms. XXXX informed the  
12 court and all counsel that (Child 1), (Child 2), (Child 3), (Child 4), (Child 5), and (Child 6) planned  
13 to assert the section 366.26, subdivision (c)(1)(E) sibling relationship exception as a defense to  
14 termination of parental rights over J.B. Again, no one objected. The contested section 366.26  
15 hearing was set for February 23, 2006, but was continued several times before commencing on  
16 May 4, 2006.

17 A March 15, 2006 Regional Center progress report stated that J.B. was functioning at the  
18 cognitive level of a two to four-year-old. (XXXX Regional Center Prog. Rpt. dated 3/15/06, p. X.)  
19 An Individualized Education Plan (IEP) also dated March 15, 2006 noted that J.B. was "mostly  
20 nonverbal," though he could recite the alphabet, imitate certain sounds and produce words like  
21 "'Mom, my, mine, boy, bus, ball, ... etc.'" (XXXX County Office of Education IEP dated 3/15/06,  
22 p. X.)

23 On May 4, 2006, in a chambers conference, J.B.'s counsel raised for the first time the  
24 possibility that Ms. XXXX should be disqualified from representing J.B.'s siblings because of her  
25 prior representation of J.B. Agency counsel agreed. However, after consulting with her  
26 supervisor, counsel for J.B. withdrew her objection and indicated that she did not believe there was  
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28 <sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

1 a legal basis to disqualify Ms. XXXX. Ms. XXXX stated her position that J.B. was not prejudiced  
2 because she had never obtained any confidential information from him and because he was unable  
3 to appreciate that an attorney-client relationship had ever existed. Agency counsel maintained that  
4 Ms. XXXX had a conflict and should be disqualified. The court then ordered Ms. XXXX to  
5 submit points and authorities on the issue by May 10, 2006, and continued the section 366.26  
6 hearing to May 25, 2006.

### 7 ARGUMENT

8 Rule 5.660 of the California Rules of Court<sup>2</sup> was amended effective January 2006 to  
9 provide conflict of interest guidelines for attorneys representing siblings in juvenile dependency  
10 proceedings. (Rule 5.660(c), eff. Jan. 1, 2006.) With regard to withdrawal after an actual conflict  
11 of interest develops during the representation of siblings, the rule provides:

12 (F) After an actual conflict of interest arises, the attorney may continue to represent  
13 one or more siblings whose interests do not conflict only if:

14 (i) The attorney has successfully withdrawn from the representation of all  
15 siblings whose interests conflict with those of the sibling or siblings the attorney  
continues to represent;

16 (ii) The attorney has exchanged no confidential information with any sibling  
17 whose interests conflict with those of the sibling or siblings the attorney continues  
18 to represent; and

19 (iii) Continued representation of one or more siblings would not otherwise  
20 prejudice the other sibling or siblings.

21 (Rule 5.660(c)(2)(F).)

22 Thus, rule 5.660 makes clear that an actual conflict of interest that develops mid-  
23 representation does not necessarily require withdrawal as counsel for all of the siblings. Instead,  
24 counsel may continue to represent one or more of the siblings if no confidential information was  
25 obtained from, and if continued representation would not otherwise prejudice, the sibling or  
26 siblings from whom counsel seeks to withdraw. (See also Rule 5.660(c)(2)(D)(ii) and (c)(2)(E),  
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28 <sup>2</sup> All further references to rules are to the California Rules of Court unless otherwise specified.

1 which expressly allow an attorney faced with an actual conflict to request, and the court to order,  
2 withdrawal “from representation of *some or all of the siblings*” [italics added].)

3 Although the conflict of interest rule was not yet in effect at the time Ms. XXXX declared  
4 the conflict between the children in August 2005, her actions nevertheless conformed with rule  
5 5.660. As soon as she learned that the Agency was recommending adoption for J.B. apart from his  
6 siblings, Ms. XXXX declared a conflict and successfully withdrew from representing J.B. (See  
7 Rule 5.660(c)(2)(F)(i).) It is clear from the record that Ms. XXXX could not have received any  
8 confidential information from J.B. (See Rule 5.660(c)(2)(F)(ii).) Therefore, only if Ms. XXXX’s  
9 continued representation of the siblings would somehow “otherwise prejudice” J.B. could she be  
10 disqualified. (See Rule 5.660(c)(2)(F)(iii).) As discussed below, case law instructs that the ‘other  
11 prejudice’ referred to in Rule 5.660(c)(2)(F)(iii) is the potential damage to a child client’s  
12 confidence in the attorney-client relationship when an attorney with whom the child has developed  
13 a rapport later takes a position on behalf of a different client that is adverse to the child’s wishes.

14 In *In re Jessica B.*, the court of appeal held that a child was not prejudiced by a district  
15 attorney’s continued representation of the child welfare agency after withdrawing from  
16 representing the child, because the child was a brain-damaged infant and thus no confidential  
17 communications could have passed between the child and the attorney. (*In re Jessica B.* (1989)  
18 207 Cal.App.3d 504.) The court explained that the disqualification rule sought to protect two  
19 separate interests, neither of which were at issue in the case of a client incapable of effective  
20 communication:

21 The rule requiring that an attorney disqualify himself or be disqualified because he  
22 is representing the client with interests adverse to a former client is founded on two  
23 interests. The first is the interest in protecting confidential information obtained in  
24 the former attorney-client relationship. The second is the interest in protecting the  
25 confidence clients repose in an attorney in an established relationship that goes  
beyond the disclosure of confidences and into the mechanics of the relationship  
itself.

26 (*Id.* at p. 511.) Ordinarily, if there is a substantial relationship between the former and current  
27 representations, prejudice to the former client will be presumed because it is assumed that  
28 confidential information was exchanged during the attorney-client relationship. (*Id.* at p. 512.)

1 However, the party seeking the attorney's disqualification must first show that he or she was  
2 "represented" by the attorney in such a way that an attorney-client relationship was actually  
3 formed. (*Ibid.*, citing *Civil Service Com. v. Superior Court* (1984) 163 Cal.App.3d 70, 76-77.)

4 According to the court in *Jessica B.*, where it was clear that no confidential  
5 communications had taken place between the former client and attorney, the reason for the rule  
6 presuming prejudice did not exist. (*Jessica B.*, *supra*, 207 Cal.App.3d 504, 512.) Likewise, with  
7 regard to the second interest sought to be protected by the disqualification rule -- preserving the  
8 client's confidence in the attorney-client relationship -- the court said "there could not possibly  
9 have been any rapport between Jessica and the district attorney. Thus, the fact that the district  
10 attorney continued to represent the Department when he had formerly represented Jessica could not  
11 have resulted in prejudice to her." (*Ibid.*)

12 In *In re Katrina W.*, the Second District Court of Appeal followed *Jessica B.* and held that  
13 County Counsel could continue to represent DCFS after withdrawing from representing the  
14 children in the case because the attorney for the county had not obtained any confidential  
15 information from the children, so they were not prejudiced. (*In re Katrina W.* (1994) 31  
16 Cal.App.4th 441.) Although the Fourth Appellate District suggested in *Carroll v. Superior Court*  
17 that a public defender who represented seven siblings and later declared an actual conflict had to be  
18 relieved as counsel for all of the children, the attorney in that case did not seek to continue  
19 representing any of the siblings. (*Carroll v. Superior Court* (2002) 101 Cal.App.4th 1423, 1430.)  
20 Thus, the court had no reason to consider whether counsel could continue to represent some of the  
21 siblings. A case is not authority for a proposition that was not considered. (*Kinsman v. Unocal*  
22 *Corp.* (2005) 37 Cal.4th 659, 680.) Additionally, *Carroll* was decided before rule 5.660(c) was  
23 enacted expressly allowing continued representation of some siblings after an actual conflict arises  
24 if no confidential information was exchanged and no other prejudice is shown.

25 In this case, it is undisputed that Ms. XXXX never exchanged any confidential information  
26 with J.B. J.B. is essentially non-verbal and is incapable of effective communication. He functions  
27 at the cognitive level of a two to four-year-old. For the same reason, no rapport could have  
28 developed between Ms. XXXX and J.B. Thus, under both rule 5.660 and case law, there is simply

1 no conflict of interest that would justify Ms. XXXX's disqualification. Purely theoretical or  
2 abstract conflicts of interest between siblings are not sufficient to disqualify counsel. (Rule  
3 5.660(c)(1)(C)(iii), (c)(2)(B)(iii).) Moreover, when dealing with sibling conflicts in dependency  
4 cases, "the importance of independent representation" for a child should be balanced "with the  
5 practicality of not overburdening the dependency system when unnecessary." (*Carroll, supra*, 101  
6 Cal.App.4th 1423, 1430 [reconciling the tension between Rules Prof. Conduct 3-310 and § 317,  
7 subd. (c) to allow one attorney to represent multiple siblings despite potential for conflict]; accord,  
8 *In re Celine R.* (2003) 31 Cal.4th 45, 58.)

9 It is also significant that J.B.'s counsel is no longer asking that Ms. XXXX be disqualified.  
10 A client may consent to and waive an objection to adverse representation. (*In re Lee G.* (1991) 1  
11 Cal.App.4th 17, 34.) However, whether an attorney for a nonverbal dependent child may waive a  
12 conflict on the child's behalf has not been addressed. In any event, because J.B. is incapable of  
13 expressing an informed preference between adoption and preserving his sibling relationships, any  
14 conflict is not with *J.B.'s wishes* but rather with those of his attorney, who has decided that  
15 adoption is in J.B.'s best interests.

16 Last, even if the court were to find that a conflict existed, laches should apply to bar any  
17 request to disqualify Ms. XXXX at this late date. (See *Lee G., supra*, 1 Cal.App.4th 17, 34.) No  
18 party objected when Ms. XXXX declared the conflict on August 31, 2005 and the court approved  
19 her request to be relieved from representing J.B. and to continue representing his siblings. Since  
20 that time, over eight months have passed. In addition, between August 31, 2005 and May 4, 2006,  
21 seven hearings were held in this matter. Yet, no concerns were ever raised about Ms. XXXX  
22 continuing as counsel for the siblings. Under these circumstances, any motion to disqualify Ms.  
23 XXXX now should be denied as untimely.

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**CONCLUSION**

For the reasons stated, (Child 1), (Child 2), (Child 3), (Child 4), (Child 5), and (Child 6) respectfully request that the court find that there is no conflict of interest requiring disqualification of their counsel, Ms. XXXX.

Dated: May 10, 2006

Respectfully submitted,

XXXXXX XXX XXXXXX

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By: XXXX XXXX, Esq.  
Attorney for (Child 1), (Child 2), (Child 3), (Child 4),  
(Child 5), and (Child 6), Children