Case No. S236208

SUPREME COURT
FILED
MAR 29 2017
Jorge Navarrete Clerk
Deputy

In The
Supreme Court of California

HELLER EHRMAN LLP,
Plaintiff and Petitioner,
v.
DAVIS WRIGHT TREMAINE LLP,
Defendant and Respondent.

AND RELATED CASES

After a Decision by the U.S. Court of Appeals for the Ninth Circuit, Case Nos. 14-14314, 14-16315, 14-16317, 14-16318
Appeal from the U.S. District Court for Northern District of California, San Francisco Division
Case Nos. 14-01236, 14-01237, 14-01238, 14-01239

APPLICATION TO FILE *AMICUS CURIAE* BRIEF, AND *AMICUS CURIAE* BRIEF, OF THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules

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Supreme Court of California

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF OF THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS IN SUPPORT OF RESPONDENTS

Pursuant to Rule 8.520(f) of the California Rules of Court, The Association of Professional Responsibility Lawyers ("APRL") requests permission to file the accompanying brief *amicus curiae* in support of Respondents. APRL has approximately 500 members in more than 40 States and in other countries. Its membership includes lawyers who represent other lawyers (and sometimes other lawyers' clients) in all aspects of legal ethics and professional responsibility. In addition to

also advise lawyers and law firms on risk management, legal malpractice, and other aspects of the law of lawyering. APRL also numbers academics and judges among its members. It is the largest organization of private practitioners devoted exclusively to this area of the law. It also issues public statements and files *amicus* briefs in federal and state courts.

In short, APRL is an organization focused exclusively on the law governing lawyers, and their relationship with their clients, both generally and regarding the issue presented to this Court. APRL believes its views will assist the court in understanding the issue presented from the perspective of lawyers whose practices concentrate in the areas of professional responsibility and risk management, who routinely advise lawyers and law firms, and who speak and write about legal ethics, including the Unfinished Business Rule and its effects. APRL recognizes that the Court's decision will have a significant impact on the way that individual lawyers and law firms of all sizes conduct their practices, and view their ethical

responsibilities towards their clients.

Dated: March 23, 2017

Respectfully submitted,

HINSHAW & CULBERTSON LLP

By: _____

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Attorneys for The Association of Professional Responsibility Lawyers as amicus curiae

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS IN SUPPORT OF RESPONDENTS

CERTIFIED QUESTION

Does a dissolved law firm have a property interest in legal matters that are in progress but not completed at the time the law firm is dissolved, when the dissolved law firm had been retained to handle the matter on an hourly basis?

INTRODUCTION

In this case the bankruptcy estate of a dissolved law firm, acting principally on behalf of the firm's creditors, asserts a property right in legal matters that clients have asked to be handled by former firm partners at their new firms. According to the late firm's bankruptcy trustee, the firm's creditors are entitled to any fees the clients pay to those successor firms for completing work the defunct firm, as a result of its dissolution, was literally *unable* to complete. Such a result would be bad for everyone involved except for the former's firm's creditors, who have no interest whatsoever in seeing the ongoing matter properly completed. It would be bad for lawyers whose mobility and continued ability to serve their clients would be impaired. It

ARGUMENT

A. Application of the "Unfinished Business" Rule In This Case Will Be Bad For Clients, Whose interests Are Paramount.

It is the province of the California Supreme Court to regulate the legal profession, and to promulgate rules that are designed to safeguard the public and the legal system. The most important guiding principle to which the Court has adhered in doing so is that attorneys must always act in the best interests of their clients. Indeed, this Court has long recognized that "the dignity and integrity of the legal profession demands at all times the protection of the interests of a dependent and confiding clientage." *Tomblin v. Hill* (1929) 206 Cal. 689, 693–94, 275 P. 941, 943.

When that principle is applied to the facts of this case, the Certified Question must be answered in the negative. Application of the so-called "unfinished business" rule in the circumstances presented by this case would place clients in the middle of a tug-of-war between a dissolved law firm's creditors and a solvent successor law firm that rightly expects to be paid for hourly work performed by its lawyers on the clients' behalf. Lost in that

would be bad for successor firms, who could only take on and serve clients (or lawyers) of the old firm under prohibitive economic conditions. Most critically though, it would be bad for the former firm's clients, who will, if the trustee prevails, be forced either to spend more money on new lawyers or to try to convince the lawyers who have been working on their matters all along to keep doing so without getting paid. That result is unacceptable given the priority the legal profession places on the interests of clients.

The U.S. District Court, hearing a bankruptcy appeal, rejected the trustee's position, and the trustee appealed to the U.S. Court of Appeals for the Ninth Circuit. That Court, in turn, certified to this Court the question of California law set forth above. APRL submits this brief *amicus curiae* in order to assist the Court in evaluating the ethical issues presented by the Certified Question.

conflict would be the clients' own interests—interests that should come first, not last.

If the Heller Plan Administrator ("Heller" or "Petitioner") prevails in applying the "unfinished business" rule to the hourly matters that the former firm's clients have of necessity taken elsewhere, the ultimate losers will be the clients of dissolved firms. Those clients will be forced into choosing between two unappealing options: start afresh with a brand new lawyer (and pay her to become familiar with the case while completing work on it), or try to convince the lawyer who had handled the matter at the now-dissolved firm, and her new firm, to complete the matter without being compensated for doing so, regardless of how long that may take.

Just describing the second option suggests how unlikely it is. Few firms or solo practitioners, if any, will find it financially sustainable to take on such a burden—or possibly, in the case of firms, even to take on the departing lawyer, thus encumbered, into the firm at all. In those circumstances the lawyer will in all probability have no choice but to seek to withdraw from the matter in order to find a law firm that will take her in without

that obligation as baggage. "The notion that law firms will hire departing partners or accept client engagements without the promise of compensation ignores commonsense and marketplace realities. Followed to its logical conclusion, the trustees' approach would cause clients, lawyers and law firms to suffer, all without producing the desired financial rewards for the estates of bankrupt firms." *In re Thelen LLP* (2014) 24 N.Y.3d 16, 32, 20 N.E.3d 264, 273. In the end, then, clients will, in all likelihood, not really be able to exercise the second option at all, and may be forced to go elsewhere and start over with new counsel. In reality, the second option is entirely illusory.

Client choice is central to this dispute. As explained by the District Court, because the Heller firm went under, its clients had no choice but to "seek representation elsewhere." *Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP* (N.D. Cal. 2014), 527 B.R. 24, 31. Judge Breyer added that "the law firms that hired the departing lawyers came to the rescue of these clients and provided them with legal services on ongoing matters." *Id.*

In order to preserve the ability of successor firms to serve clients who come to them, and to pay more than lip service to the

client's right to control the handling of its case, the client must be able to pay the law firm that is actually performing the ongoing work, and that firm must be able to retain those fees, as it would in the normal course. Application of the "unfinished business" rule, as Heller urges, would preclude this option because firms would be "discourage[d]... from accepting lawyers and client engagements from a dissolved law firm for fear that a substantial portion of the resulting profits may be turned over to the dissolved law firm or its creditors. An untoward disruption in client services might result." *In re Thelen LLP* (2d Cir.) 736 F.3d 213, 223 *certified question accepted sub nom. Thelen LLP. v. Seyfarth Shaw LLP* (2013) 22 N.Y.3d 1017, 4 N.E.3d 359, *and certified question answered* (2014) 24 N.Y.3d 16, 20 N.E.3d 264.

Thus, application of the "unfinished business" rule to an hourly matter after a firm's dissolution, as the Petitioner urges here, will be most likely to result in the client being abandoned when, as will often be the case, taking the new matter along without compensation is not a viable option for the client's lawyer and her new firm. This outcome runs afoul of the

principle of serving the client's interests that is at the heart of our profession. As lawyers we are bound to act in the client's best interests in accordance with the "higher standard of conduct on lawyers than that applicable to other professionals." *Howard v. Babcock* (1993) 6 Cal. 4th 409, 418. And even in the rare cases in which a lawyer and her new firm—however reluctantly—would agree to complete the matter without compensation, doing so would necessarily create a conflict of interest between the lawyer's and firm's interest in minimizing the amount of uncompensated work on the one hand, and the client's expectation (and right) to be represented thoroughly, diligently and competently on the other.

Although Heller blithely insists all this is speculation, the Court should see through that baseless assertion. The scenario described above, in which a lawyer or her new firm would balk at the idea of handling a substantial matter when compensation for doing so would go elsewhere, is hardly fanciful; indeed, it is hard to imagine an alternative outcome in many cases. And any effort to force that result (even if it were possible) is plainly inconsistent with the duty of lawyers and law firms to put client

interests first. "[C]onsidering the policies favoring the primacy of the rights of clients over those of lawyers, it is essential to provide a market for legal services that is unencumbered by quarrelsome claims of disgruntled attorneys and their creditors." *Heller Ehrman LLP,* 527 B.R. at 26.

It is also notable that, from both the clients' perspective and that of the courts, litigants are likely to be disproportionately disadvantaged over clients with transactional matters. This is because litigation matters are inherently open-ended and can go on for years, and the lawyers involved may have little or no control over the amount of time that it will take to complete them, while in most instances transactions are concluded—successfully or unsuccessfully—in a matter of months, and sometimes less. As a result, not only will clients and the courts be burdened by the application of the rule; so also will lawyers who litigate. Having to complete existing litigation matters for the economic benefit of a former employer (or, more precisely, its creditors) will make it much harder for litigators to move to new firms, which will not want, or in some cases will be unable, to take on the indeterminate burden of completing the lawyer's

open cases without compensation. By contrast, the burden with respect to unfinished transactional matters is at least somewhat more amenable to accurate assessment, and likely to be smaller, thereby making it much easier for the firms to absorb the lawyer and the matters, even in the absence of compensation. Accordingly, clients in litigation are likely to be the most burdened by the application of the unfinished business rule. And, of course, a side effect will necessarily be burdens on courts, as well as the litigants on the other side of matters where these situations arise, because of the delays that inevitably follow a change of counsel for a party mid-stream. Thus, in addition to the demonstrated harm to clients' interests, these effects are inconsistent with the professional responsibilities of lawyers as well as the courts' interest in the smooth operation of the judicial system.

B. Client Matters Are Not Firm Property.

All parties and *amici* agree, as they must, that the client, not the lawyer or law firm, owns a matter—hourly or otherwise—because the client can take it away from the lawyer at any time, for any reason. *Fracasse v. Brent* (1972) 6 Cal. 3d

784, 790. "A law firm *never* owns its client matters. The client *always* owns the matter, and the most the law firm can be said to have is an expectation of future business." *Heller Ehrman LLP,* 527 B.R. at 30 (emphasis added). Moreover, the client's "ownership" and control is not contingent on the payment of fees. "The fact that the attorney has rendered valuable services under his employment, or that the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action, does not deprive the client of this right." *Id.* Even when a client is indebted to the lawyer or law firm for services rendered, then, the client is still permitted to take its case elsewhere, and pay another firm to complete the work.

This is not a controversial concept. Rather, the controversy resides in Heller's position that, where the former firm is bankrupt, leaving its lawyers to find employment at new firms, the "client as owner" principle simply disappears. According to Heller, when a firm dissolves its clients no longer have the ability to pay a new firm for the work that firm performs on her behalf if that firm also hires the lawyer who has been handling the case all along, perhaps to the client's great satisfaction;

instead it must, in effect, continue paying the old, now-defunct firm.[1] This approach makes client ownership irrelevant.

Omitting the most important party from the equation, Heller argues that refusal to apply the "unfinished business" rule here would "elevate the financial interests of lawyers over the rights of largely non-lawyer creditors." (Heller Opening Brief, p. 39). This argument misunderstands whose interests are actually at play. The real result of declining to apply the rule in this case would be to elevate the *client's* interests in controlling the handling of its own case and obtaining competent representation by the lawyer of its choice over the rights of uninvolved creditors of a defunct firm. But that is just where the client's interests belong rather than being subverted to the rights

---

[1] Heller may argue that the client still pays the new firm, which must then "account" to the defunct firm's creditors, and thus claim that the client in reality still "chooses" to pay the new firm. Such a contention would simply ignore reality. The new firm owes a fiduciary duty to tell the client about its financial arrangement, *i.e.*, that the new firm will not actually be paid for the services they will perform on the client's behalf, and instead will act as a middle-man in funneling the funds to a bank, creditors or former shareholders that owe the client no fiduciary duties. As discussed in Argument A above, this is not much of a choice.

of non-lawyer creditors. Surely, preference for client interests above all others—especially those of third party creditors of another entity—is exactly as it should be.

Though its mistake is illuminating, Heller's position thus rests on the same faulty logic that was advanced, and rejected, in *Hogan Lovells US LLP v. Howrey LLP* (N.D. Cal. 2015) 531 B.R. 814. In that case the District Court, reversing a Bankruptcy Court order allowing a defunct firm's claims against successor firms to proceed, noted that those claims were premised on an argument—the same argument Heller is making in this case—that client matters are like paintings that a law firm hangs in its lobby and that a departing partner had "'ripped off the wall of the reception area'" and taken to his new firm. *Id.* at 822, quoting *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP* (S.D.N.Y.2012) 480 B.R. 145, 157, rev'd in part, *In re Coudert Bros. LLP* (2d Cir.2014) 574 Fed.Appx. 15. As the District Court in this case correctly concluded, that analogy fails because it rests on the false notion that the firm, rather than the client, owns the client's matter. If a legal matter is to be compared to a painting—doubtful analogy though that might

be—it should more accurately be compared to a painting owned by a client and loaned to a firm to hang in its office and to enjoy for as long as the client wanted it to hang there. As the owner of the painting the client would be entitled to instruct the departing lawyer to take the painting down on his way out the door and, if it wanted to, also to permit him to hang it in the reception area of his new firm.

When the balance of interests is properly framed and the client's interests in choosing her counsel and controlling her case are afforded the proper deference, the rationale for the unequivocal rejection of the unfinished business rule becomes overwhelming.

C. The Client's Interests In Paying Counsel of Its Choice For Services Rendered Outweigh Heller's Speculative Interest In Fees Generated from Unfinished Business.

Heller's reliance on *Howard v. Babcock* (1993) 6 Cal. 4th 409, is misplaced. In that case the Court considered a non-compete clause in a partnership agreement that barred voluntarily withdrawing partners from practicing a certain type of work (insurance defense) in a specific geographic area for a period of one year after withdrawal on pain of forfeiting their rights to

withdrawal benefits. The clause was challenged as an improper restraint on competition and, specifically, on lawyer mobility under California Rules of Professional Conduct, Rule 1-500 (Rule 1-500). In addressing the competing interests involved, the Court sought "to achieve a balance between the interest of clients in having the attorney of choice, and the interest of law firms in a stable business environment." 6 Cal. 4th at 425. With respect to the firm's interests, the Court noted that increased lawyer mobility had put strain on the economic interests of firms:

> The firm has a financial interest *in the continued patronage of its clientele.* The firm's capital finances the development of a clientele and the support services and training necessary to satisfactorily represent the clientele. In earlier times, this investment was fairly secure, because the continued loyalty of partners and associates to the firm was assumed. But more recently, lateral hiring of associates and partners, and the secession of partners from their firms has undermined this assumption.... Withdrawing partners are able to announce their departure to clients of the firm, and many clients defect along with the attorneys with whom they have developed good working relationships. The practical fact is that when partners with a lucrative practice leave a law firm along with their clients, their departure from and competition with the firm can place a tremendous financial strain on the firm.

Id. at 420–21 (emphasis added).

In addressing the issue in that way, the Court thus expressed concern for a significant institutional component of our legal system: the law firm. But that concern is entirely absent in this case, where the firm whose partners left—in this case because they had no choice—no longer exists and the economic interests asserted on its behalf are not those of an ongoing concern in its economic stability—that ship has sailed—but instead those of third-party creditors. Heller (the defunct firm) no longer has any interest in preserving "the continued patronage of its clientele," since it will no longer provide them with legal services and is no longer pursuing longevity and financial growth. There is thus no longer an interest in a "stable business environment" at Heller (the firm) to balance against the interests of its former clients in being represented by the lawyers of their choice.

Moreover, the *Howard* court emphasized that a properly crafted non-competition clause could actually *benefit* the client: "[A] noncompetition agreement . . . may actually serve clients as well as the financial well-being of the law firm. Without such an agreement, [t]he culture of mistrust that results from systemic

grabbing is very likely to damage, if not destroy, the law firm's stability . . . Law firms have an affirmative obligation to the client to provide an atmosphere most conducive to the development of the attorney-client relationship and to the efficient, diligent completion of work." *Id.* at 424 internal quotations omitted). Again, here, the interest in preserving the "financial well-being of the law firm" to serve the client is not at play. To the contrary, having the ruling Heller urges on the books would encourage partners to grab clients and files before a perhaps shaky firm's dissolution, thus hastening (or even precipitating) its demise. Such a result would be the exact opposite of the interest in the economic stability of law firms and practices that the Court invoked in *Howard.*

Thus, *Howard* does not aid Heller. It does, however, teach that this Court's duty to regulate the legal professional often involves the balancing of countervailing interests concerning the practice of law. In that regard, the Court said,

> It is not our intent to relegate clients to the position of commodities, nor to elevate commercial concerns over the lawyer's bedrock duty of loyal and vigorous advocacy on behalf of the client. Rather, we have exercised our duty to regulate the practice of law with a care to understanding the world as it

> is, uninfluenced by rhetoric that appears to obscure, rather than clarify, the problem.

Id. at 425–26. As explained above, the speculative commercial interests of non-lawyer creditors who advocate for a rule that will have no benefit whatsoever for the legal profession must give way to the client's right to representation by the lawyer of her choice.

It is therefore demonstrably clear that one of the most important rights of the client in a matter lies in its mobility, which interest is in turn served by the mobility of the lawyers who have been handling the matter and whom the client wishes will continue to do so. Application of the "unfinished business" rule in this situation undercuts any financial interest of Heller or its creditors in ongoing hourly matters because that interest cannot be monetized. In short, the client's interests in a smooth and efficient transition of her matter to a solvent firm, and her legitimate desire to avoid having to hire entirely new counsel, patently outweigh the insolvent firm's right to fees that may, in any event, never materialize.

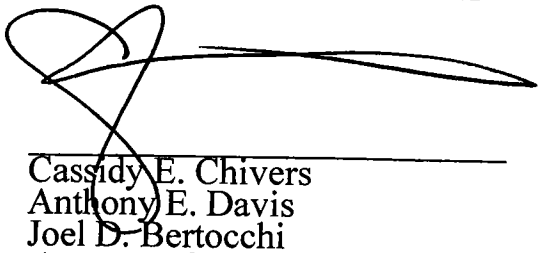
CONCLUSION

For the foregoing reasons, this court should answer the Certified Question in the negative and preserve the integrity of our legal profession.

Dated: March 23, 2017

Respectfully submitted,

HINSHAW & CULBERTSON LLP



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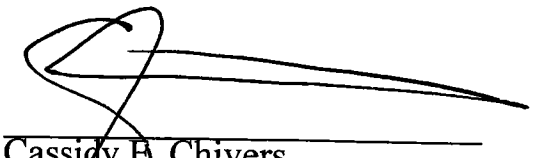
CERTIFICATE OF COMPLIANCE

The text of this brief consists of 3,361 words as counted by the Microsoft Word program to generate this brief.

Dated: March 23, 2017

Respectfully submitted,

HINSHAW & CULBERTSON LLP

By: 

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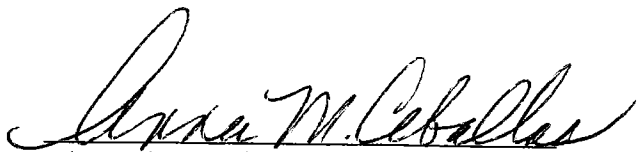
CERTIFICATE OF SERVICE

I am more than eighteen years old and not a party to this action. My business address is Hinshaw & Culbertson, LLP, One California Street, 18th Floor, San Francisco, CA 94111. On March 24, 2017, I served true copies of the **APPLICATION TO FILE AN AMICUS CURIAE BRIEF OF HINSHAW & CULBERTSON LLP IN SUPPORT OF APPELLEES** with the Clerk of the Court for the California Supreme Court.

SEE ATTACHED SERVICE LIST

I am employed in an office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 24, 2017,, at San Francisco, California.



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