In the Supreme Court of the State of California

HELLER EHRMAN LLP *Plaintiff and Petitioner,* v. DAVIS WRIGHT TREMAINE LLP *Defendant and Respondent.* AND RELATED CASES	No. S236208

On Certification from the United States Court of Appeals for the Ninth Circuit
Ninth Circuit Court of Appeals Nos. 14-16314, 14-16315, 14-16317, 14-16318

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF OF AMERICAN BAR ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS

*KEVIN M. FONG #91037
PILLSBURY WINTHROP
SHAW PITTMAN LLP
Four Embarcadero Center, 22nd Floor
San Francisco, CA 94111-5998
Telephone: (415) 983-1000
Facsimile: (415) 983-1200
kevin.fong@pillsburylaw.com

LINDA A. KLEIN (*pro hac vice admission pending*)
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, Illinois 60654
Telephone: (312) 988-5000
Facsimile: (312) 988-5528
abapresidentsoffice@americanbar.org

DAVID G. KEYKO (*pro hac vice admission pending*)
JAY D. DEALY (*pro hac vice admission pending*)
PILLSBURY WINTHROP
SHAW PITTMAN LLP
1540 Broadway
New York, New York 10031
Telephone: (212) 858-1000
Facsimile: (212) 858-1500
david.keyko@pillsburylaw.com
jay.dealy@pillsburylaw.com

Attorneys for Amicus Curiae American Bar Association

CERTIFICATE OF INTERESTED ENTITY

Pursuant to Rule 8.208 of the California Rules of Court, *amicus curiae* American Bar Association states that it is an Illinois nonprofit corporation, has no parent corporation, and does not issue shares of stock. The American Bar Association is a national voluntary organization whose members include attorneys, law students, and related professionals.

APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF

To the Honorable Tani Cantil-Sakauye, Chief Justice of California, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Pursuant to Rule of Court 8.520(f), the American Bar Association ("ABA") respectfully requests permission to file the attached amicus curiae brief in support of Defendants and Respondents. The U.S. Court of Appeals for the Ninth Circuit certified the following question to this Court: "Under California law, 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 matters on an hourly basis?" In answering this question, the ABA urges the Court to consider the important ethical and practical implications that would be raised by using what has been referred to as the "unfinished business rule" in the context of the "practice and business of law." In particular, applying that "rule" to client hourly rate matters and to law firms that are not effectively the successors of dissolved firms raises serious concerns. The ABA urges that, based on these ethical and practical considerations, the certified question be answered in the negative.

The ABA is the leading organization of legal professionals and one of the largest voluntary professional membership organizations in the

United States. Its more than 400,000 members come from all fifty states, the District of Columbia and other jurisdictions, and include lawyers in private law firms, corporations, non-profit organizations, government agencies, and prosecutors' and public defenders' offices. They also include judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[1] In California alone, as of March 3, 2017, the ABA's membership included 31,268 lawyer members, 8,855 law student members, and 1,262 associates.

Since its founding in 1878, the ABA has worked to promote the competence, ethical conduct and professionalism of lawyers as they balance their responsibilities to their clients, to the legal system, and to their own professional interests.[2] This work has included a continuing, intensive discourse and analysis of the standards and policies that should govern attorneys in their endeavors. In 1908, this work resulted in the ABA's adoption of the first Canons of Professional Ethics, which are now the ABA

---

[1] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

[2] *See, e.g.*, ABA Mission and Association Goals, available at http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited April 20, 2017).

Model Rules.[3] Protection of clients' unfettered right to choose their counsel and to terminate that relationship at any time remains a foundation of the ABA Model Rules. In particular, the ABA has submitted amicus briefs in cases involving the "unfinished business rule" to hourly rate matters before the Ninth Circuit (*Diamond v. Hogan Lovells US, LLP*, No. 15-16326, in addition to the Heller Ehrman cases giving rise to the question certified to this Court) advocating in favor of not creating barriers to clients' right to choose their counsel.

When a client moves its hourly rate matters to a lawyer's new firm following dissolution of the lawyer's prior firm, and particularly where that new firm cannot be said to be the successor of the dissolved firm, the unfinished business rule should not be applied to those matters. Plaintiff's position to the contrary rests upon the untenable proposition that a dissolved firm has a property interest in a client's hourly rate matters. Neither law, nor equity, nor policy supports such a conclusion.

---

[3] The ABA Model Rules are available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_ conduct.html. They have been continuously amended and updated through the efforts of ABA members, national, state and local bar organizations, academics, practicing lawyers, and the judiciary. Each Model Rule becomes ABA policy only after it is approved by the ABA House of Delegates, which is composed of 589 delegates representing, among others, states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members, and the Attorney General of the United States. *See* ABA General Information, available at http://www.americanbar.org/groups/leadership/delegates.html (last visited April 20, 2017).

The "unfinished business rule," as articulated and applied to a law firm in *Jewel v. Boxer*, 156 Cal. App. 3d 171, 174 (1984), under the Uniform Partnership Act of 1914 ("UPA"), required contingency fees generated from matters that had been pending at the time of the law firm's dissolution to be shared by the former partners regardless of which former partner provided legal services on the matter after the dissolution. Even assuming *Jewel* was correctly decided under UPA, applying the unfinished business rule to hourly rate matters of a partnership governed by the Revised Uniform Partnership Act would be improper because of the unique rules that govern the operation of all law firms and their relationships with their clients. Doing so would be contrary to the rules of professional conduct intended to protect clients' right to choose their counsel. Those rules have been adopted in every jurisdiction in the United States (generally, and unless otherwise specified, "Rules of Professional Conduct" or "Rules"), including the California Rules of Professional Conduct ("California Rules") and the ABA Model Rules of Professional Conduct (which are not binding except in the manner adopted by a jurisdiction) ("ABA Model Rules"). Such an application would harm clients by entitling a dissolved firm, which can neither perform legal services nor take responsibility for doing so, to profit from the fees earned by another law firm after the client has moved its matters to the other firm. Under the Rules, any division of fees between law firms must be with written client

consent and, if the fees are paid to a firm that did not perform the work, the payment would be unconscionable.

Furthermore, it is not disputed that the unfinished business rule does not apply if a former partner leaves prior to dissolution. If the unfinished business rule were applicable to hourly rate matters pending at the time of a law firm's dissolution—the issue in dispute here—lawyers might well feel compelled by the Rules to leave troubled firms or to counsel clients to hire another law firm to avoid, as stated in California Rule 3-700(A)(2), "reasonably foreseeable prejudice to the rights of the[ir] client[s]." This would foreseeably speed (or unnecessarily cause) the failure of firms, harming the clients of those firms. Finally, the unfinished business rule's application to hourly rate matters that had been handled by a dissolved firm and subsequently by a pre-existing, third-party firm, would result in protracted disputes about how to divide up the fees involving the courts, the dissolved firm, the former partners' new firm, and even clients.

The ABA respectfully submits that the California Rules (like the ABA Model Rules) that govern lawyers' and law firms' practice and business, and the case law and ethics opinions construing them, are particularly important to the resolution of the issue before this Court.[4]

---

[4] In the underlying cases before the U.S. District Court and the Ninth Circuit Court of Appeals, the courts applied California state partnership law and looked to the California Rules. In this brief, the ABA therefore

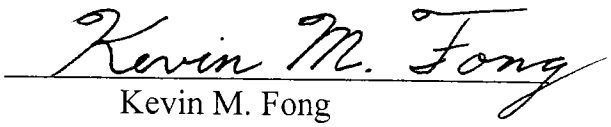
(continued...)

Thus, the unfinished business rule cannot be applied to the hourly rate matters of a dissolved firm, its former lawyers, and their new firms. Accordingly, the ABA respectfully requests permission to file the attached amicus curiae brief.[5]

Dated: April 21, 2017.

LINDA A. KLEIN (*pro hac vice admission pending*)
AMERICAN BAR ASSOCIATION

*KEVIN M. FONG
DAVID G. KEYKO (*pro hac vice admission pending*)
JAY D. DEALY (*pro hac vice admission pending*)
PILLSBURY WINTHROP
SHAW PITTMAN LLP

By 
Kevin M. Fong

Attorneys for Amicus Curiae
American Bar Association

(...continued)
discusses these as well, but notes that Heller Ehrman was a national law firm and many of its former partners and their new law firms may be subject to the laws and rules of other jurisdictions. *See Thelen LLP v. Seyfarth Shaw LLP*, 736 F.3d 213, 220 (2d Cir. 2013) (applying New York law to a limited liability partnership governed by California law).

[5] Pursuant to Rule 8.520(f)(4) of the California Rules of Court, the American Bar Association states that (1) there is no party or any counsel for a party in the pending appeal who authored the proposed amicus brief in whole or in part; (2) there is no party or counsel for any party who made a monetary contribution intended to fund the preparation or submission of the brief; and (3) no other person or entity made a monetary contribution intended to fund the brief.

In the Supreme Court of the State of California

HELLER EHRMAN LLP *Plaintiff and Petitioner,* v. DAVIS WRIGHT TREMAINE LLP *Defendant and Respondent.* AND RELATED CASES	No. S236208

On Certification from the United States Court of Appeals for the Ninth Circuit
Ninth Circuit Court of Appeals Nos. 14-16314, 14-16315, 14-16317, 14-16318

BRIEF OF AMICUS CURIAE AMERICAN BAR ASSOCIATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS

*KEVIN M. FONG #91037
PILLSBURY WINTHROP
SHAW PITTMAN LLP
Four Embarcadero Center, 22nd Floor
San Francisco, CA 94111-5998
Telephone: (415) 983-1000
Facsimile: (415) 983-1200
kevin.fong@pillsburylaw.com

LINDA A. KLEIN (*pro hac vice admission pending*)
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, Illinois 60654
Telephone: (312) 988-5000
Facsimile: (312) 988-5528
abapresidentsoffice@americanbar.org

DAVID G. KEYKO (*pro hac vice admission pending*)
JAY D. DEALY *(pro hac vice admission pending*)
PILLSBURY WINTHROP
SHAW PITTMAN LLP
1540 Broadway
New York, New York 10031
Telephone: (212) 858-1000
Facsimile: (212) 858-1500
david.keyko@pillsburylaw.com
jay.dealy@pillsburylaw.com

Attorneys for Amicus Curiae American Bar Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes and Codes

Rules

Other Authorities

INTRODUCTION

Law firms, whether small or large, are unlike other types of partnerships. They are subject to ethical rules that govern the practice of law. A number of the California Rules of Professional Conduct ("California Rules"), the Rules of Professional Conduct adopted in every jurisdiction (generally, including the California Rules unless otherwise specified, "Rules of Professional Conduct" or "Rules"), and the American Bar Association ("ABA") Model Rules of Professional Conduct (which are not binding except in the manner adopted by a jurisdiction) ("ABA Model Rules"), all are intended to protect a client's fundamental and unfettered right to select, retain, and change counsel at any time. These Rules prevent lawyers from making arrangements that would impede clients from doing so. These Rules recognize that lawyers' clients are not commodities, and neither law firms nor lawyers own their clients or their clients' matters. Two important corollaries to this principle unique to lawyers are that lawyers are not entitled to fees that they did not earn, and clients should not be penalized for changing counsel.

The Revised Uniform Partnership Act ("RUPA") now applicable to California law partnerships does not expressly or impliedly abrogate those Rules simply because a law firm dissolves. To the extent the "unfinished business rule" articulated in *Jewel v. Boxer*, 156 Cal. App. 3d 171, 174 (1984), applying the (since superseded) Uniform Partnership Act of 1914

("UPA"), is relevant to a law firm partnership now governed by RUPA, the "rule" should not extend to hourly rate matters. The *Jewel* court required what was effectively a successor law firm handling contingency fee cases under the original engagement letter to share the fees it received with two former partners, who had borne part of the costs of the work performed on those matters. But significantly, unlike UPA, which prohibits a partner winding up the business of a dissolved partnership from receiving reasonable compensation for those efforts, RUPA permits a partner performing such work to receive reasonable compensation. To apply the unfinished business rule to work on hourly fee matters performed by pre-existing, third-party law firms is inconsistent with the ethical obligations of the new firm and the former partner of the dissolved firm, as set out in the Rules adopted in California and elsewhere across the country and the ABA Model Rules. It is also utterly impractical.

First, to protect clients, the Rules of Professional Conduct place limits on how lawyers conduct business. The Rules govern the legal fees a lawyer and firm may charge the client, and how lawyers can divide those fees with another lawyer or firm. These Rules cannot be squared with a requirement that profits on hourly rate matters be paid to a dissolved firm after the client has moved its matter—and thus has discharged the dissolved firm—to a new law firm that the former partner joined. Contrary to the Rules, which only permit a lawyer and firm to receive legal fees for legal

work they perform or for which they assume responsibility, the application of the unfinished business rule to hourly rate matters would obligate the new firm nevertheless to pay legal fees to the dissolved firm, which performed none of the work, accepted none of the responsibility for performing that work, and was discharged by the client. Further, contrary to the Rules governing the division of legal fees between two firms, such an application of the unfinished business rule would require the new firm to divide legal fees with the dissolved firm without written client consent and in a manner that has no relationship to the services provided.

Second, because it is conceded that the unfinished business rule does not apply if a lawyer leaves a firm prior to its dissolution, a lawyer may feel compelled under the Rules of Professional Conduct to leave a firm at the first signs of financial trouble, to ensure that the lawyer or the lawyer's new firm will not be required to divide hourly fees with a dissolved firm that performed no legal services. Further, because those Rules require lawyers, when leaving, to avoid "reasonably foreseeable prejudice to the rights of the[ir] client[s]," California Rule 3-700(A)(2), lawyers may also feel compelled to counsel a client to move its hourly rate matters before the firm dissolves. The unfinished business doctrine, if applied as Plaintiff urges, would create incentives that would tend to cause law firms to fail prematurely, disrupting client services and causing clients to incur unnecessary transition costs.

Third, the unfinished business rule's application to hourly rate matters, particularly those subsequently handled by pre-existing, third-party firms, faces a number of practical obstacles. Such obstacles could result in protracted disputes about how to divide fees involving the courts, the dissolved firm, the former partners' new firm, and even clients.

ARGUMENT

I. APPLICATION OF THE UNFINISHED BUSINESS RULE TO A CLIENT'S HOURLY RATE MATTERS IS INCONSISTENT WITH THE RULES OF PROFESSIONAL CONDUCT.

Partnerships engaged in the practice of law are different than other partnerships. The "practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will." Comment [1] to ABA Model Rule 1.17. A premise of the California Rules, Rules of Professional Conduct, and ABA Model Rules is that clients, and not lawyers or law firms, own their matters. The Rules give a law firm's client—unlike the customers of other types of partnerships—the right to discharge a law firm at any time. After the former firm has been paid for the work it performed, the lawyer may not impose any further financial obligation on the former client. These principles are not altered merely because the lawyer handling those matters leaves a firm, even when the lawyer must leave because the firm has dissolved and can no longer provide

legal services to the client. Nor does it matter if the former firm incurred costs to land the former matters.

Plaintiff's position, however, is that a dissolved law firm has a continuing property interest in a client's hourly rate matters that the firm was handling at the time of dissolution, even though the firm has been discharged by the client and paid in full for the work the firm performed and billed. This property interest, Plaintiff claims, entitles him to a portion of the hourly rate profits paid to the third-party firms hired by Heller Ehrman's former clients to complete the work started at Heller Ehrman. The basis for the claim is that some of Heller Ehrman's partners joined each of these law firms, none of which can be said to be a successor to Heller Ehrman. Such a claim is ultimately premised upon the fiction that the former partners had the power to "take the work with them," *i.e.*, that the partners of the dissolved firm controlled the firm's clients. In fact, clients decide what law firms to hire.

In keeping with the principle that clients own and control their matters, the California Rules, the Rules of Professional Conduct and the ABA Model Rules impose obligations and restrictions on lawyers and law firms that protect clients' fundamental and unfettered right to select, retain, and change counsel at any time and for any reason, and regulate how

lawyers and firms may be paid for legal services.[1] Application of the unfinished business rule to hourly fee matters would conflict with the Rules and the ethical responsibilities that govern the legal fees that lawyers and firms can charge a client and how lawyers and firms may divide those fees.

A. Application of the Unfinished Business Rule to a Client's Hourly Rate Matters Would Conflict with the Rules Regulating the Legal Fees that the Client Can Be Charged.

This Court has recognized that law firm clients are different than customers of other businesses. In *Fracasse v. Brent*, 6 Cal. 3d 784, 791 (1972), this Court opined that "it is a basic term of the [attorney-client] contract, implied by law . . . that the client may terminate that contract at will." *See also Champion v. Superior Court of San Francisco*, 201 Cal. App. 3d 777, 783 (1988) (noting the close relation between "the client's right to retain counsel of choice" and the client's right to discharge

---

[1] While California has not adopted the ABA Model Rules, this Court has acknowledged that they may be "helpful and persuasive in situations where the coverage of our Rules is unclear or inadequate." *Frye v. Tenderloin Hous. Clinic, Inc.*, 38 Cal. 4th 23, 52 (2006); *accord City & County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 852 (2006); California Rule 1-100(A) ("Although not binding, opinions of ethics committees in California should be consulted by members for guidance on proper professional conduct. Ethics opinions and rules and standards promulgated by other jurisdictions and bar associations may also be considered."); Cal. Formal Op. No. 2013-188 ("[I]n the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance."). On March 30, 2017, this Court received a revised proposal from the California Bar to adopt in large measure the format and content of the Model Rules ("Proposed California Rules").

counsel). Similarly, the U.S. Court of Appeals for the Ninth Circuit has held that "[a] client's power to discharge an attorney, with or without cause, is absolute." *Fed. Sav. & Loan Ins. Corp. v. Angell, Holmes & Lea*, 838 F.2d 395, 395 (9th Cir.1988) (internal quotation marks omitted). The State Bar of California has recognized that "lawyers serve at the pleasure of their clients; a client always maintains the right to terminate the services of a lawyer at any time." Cal. Formal Op. No. 1994-135. *See also* Cal. Civ. Proc. Code § 284. ABA Model Rule 1.16(a)(3) also requires that a lawyer withdraw from a representation if discharged by the client.[2]

And, once a California lawyer has been discharged by a client, the lawyer's rights are narrowly circumscribed. As this Court and other California courts have held, when a client discharges a lawyer, the lawyer is only entitled to compensation for the value of work he or she has performed. *E.g.*, *Oliver v. Campbell*, 43 Cal. 2d 298, 304 (1954) (discharged attorney entitled only to "the reasonable value of services recoverable by the employee for his past performance"); *Jalali v. Root*, 109 Cal. App. 4th 1768, 1777 (2003) (when a client exercises "the unilateral right to discharge his or her attorney with or without cause at any time—even on the courthouse steps," the attorney "only has a right to quantum

[2] Proposed California Rule 1.16(a)(4) also requires a lawyer to withdraw if discharged by the client.

meruit recovery" representing the value of past work).[3] Further, a discharged lawyer must turn over client files to successor counsel even if the client has failed to pay the lawyer's bills.[4] A discharged lawyer cannot use a former client's name in marketing material if the client does not agree.[5] California also forbids a lawyer from disclosing a former clients' confidences.[6]

The client's absolute right to terminate and be free from continuing obligations to a lawyer cannot be squared with Plaintiff's position. If Plaintiff's interpretation of the unfinished business rule were accepted, a dissolved law firm would have the right—after the client has moved the matter and thus has discharged the dissolved firm—to be paid all the profits on a client's hourly rate matters that are earned by a former partner's new law firm, even though the dissolved firm did not and could not perform or

---

[3] In deciding the enforceability of a covenant requiring law partners to *forego* withdrawal benefits under their partnership agreement if they competed with their former firm, this Court in *Howard v. Babcock*, 6 Cal.4th 409, 413 (1993), remarked in its summary of the factual background that the assets of the law firm at issue included "the unfinished business, that is, open files that required additional work that would be billed in the future." However, *Babcock* did not decide as a matter of law that unfinished hourly rate matters were law firm property, nor did it address the question here whether a dissolved law firm was entitled to profits earned on hourly rate matters by a third-party law firm subsequently retained by the client.

[4] California Rule 3-700(D); *Academy of California Optometrists v. Superior Court*, 51 Cal. App. 3d 999, 1006 (1975).

[5] *See* California Rule 3-100(A).

[6] *See id.*

take responsibility for the legal services for which those profits were earned. The dissolved firm would be forbidden from doing so not only because it lacked the resources, but because it was terminated by the client. The Rules of Professional Conduct, including the California Rules and ABA Model Rules, make clear that a firm cannot charge fees for legal services that it did not perform.

In addition, California Rule 4-200 prohibits a lawyer from charging or collecting an illegal or unconscionable fee, and California courts have held that "fees [that] have no relationship whatsoever to the amount of service provided or to be provided by the partnership to the client" are unconscionable. *Champion*, 201 Cal. App. 3d at 783. California Rule 3-700(D)(2) requires that a discharged attorney "[p]romptly refund any part of a fee paid in advance that has not been earned" (excluding a true retainer paid solely to ensure a lawyer's availability).[7] Plaintiff's position would permit a dissolved firm to collect and retain an unconscionable fee on hourly rate matters, and require the former partner and new firm to acquiesce in its doing so.

Likewise, under the ABA Model Rules, legal fees must be earned by performing legal services: ABA Model Rule 1.5(a) prohibits a lawyer from charging or collecting an "unreasonable" fee, while ABA Model Rule

---

[7] Proposed California Rules 1.5(b)(3) and 1.15(e)(2) would not change these limitations on fees California lawyers may charge and keep.

1.5(c) provides that "a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." In addition, ABA Model Rule 1.16(d) provides that "any advance payment of fee or expense that has not been earned or incurred" must be refunded upon termination of the representation. Unlike other businesses, lawyers cannot charge non-refundable fees.

Plaintiff does not contend that Heller Ehrman performed the legal work for the fees it is seeking. Plaintiff does not assert, for example, that the fees were earned prior to Heller Ehrman's dissolution (as might be the case in contingency fee matters) but were mistakenly paid to other law firms. Nor does Plaintiff claim that Heller Ehrman performed work that entitled it to be compensated at the successful conclusion of the matter, as is the case for contingency fee cases. Rather, Plaintiff argues that Heller Ehrman incurred marketing, training and other costs to obtain the hourly rate matter that entitles it to profits from the matter after the firm was discharged. In deciding whether fees are proper, however, no Rule suggests that a law firm can take into account the marketing expense a firm incurred to land a matter or the cost of training the firm's lawyers. The firm made the decision to expend those costs and the client never agreed that it would pay those expenses. Plaintiff is no more entitled to recover these costs than it is to recover expenses Heller Ehrman incurred in

pursuing matters for which it was never actually retained or lost to other law firms before dissolution. In sum, a requirement that a former partner and the new law firm must pay profits on hourly rate matters to the dissolved firm would conflict with the ethics principles that lawyers and their firms may be paid only for the work they perform.

B. Application of the Unfinished Business Rule to a Client's Hourly Rate Matters Conflicts with the Rules Regulating the Division of Legal Fees.

The ethics rules on the division of legal fees must apply in the unfinished business context where a former partner of the dissolved firm continues work on matters at a new firm.

The Rules of Professional Conduct governing the division of legal fees require that the client must consent to and understand the basis for any division of fees between firms, and that the total fee charged must not be increased solely because of the division and cannot be unconscionable. In particular, California Rule 2-200(A)[8] provides:

---

[8] *Compare Anderson, McPharlin & Connors v. Yee*, 135 Cal. App. 4th 129 (2005), in which the court found that California Rule 2-200 did not apply to a partnership agreement that contained a liquidated damages provision under which a former partner was required to turn over 25% of the fees he earned for a 24-month period on matters begun at his former firm. Thus, Rule 2-200 did not apply because the construction of a partnership agreement did not involve two firms. *See also* Cal. Formal Op. No. 1994-38 (no division of fees, and Rule 2-200 did not apply, where a lawyer billed a firm in which he was not a partner or employee for his regular hourly rate, and the firm then re-billed that amount to the client and paid it

(continued...)

> A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:
>
> (1) The client has consented in writing thereto after a full disclosure has been made in writing that the division will be made and the terms of such division; and
>
> (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200.[9]

California Rule 3-310(B)(3) also prohibits a lawyer from accepting or continuing a representation without written disclosure to the client where "[t]he member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter."[10]

The reason for these rules is that how two firms divide fees for a matter creates incentives that may affect how the firms discharge their

---

(...continued)
over to the lawyer when paid by the client; the law firm did not retain any portion of the fee and acted merely as a collection agent).

Here, California Rule 2-200 does apply because Plaintiff has sued pre-existing law firms that were entirely separate from Heller Ehrman. The Plaintiff seeks to impose obligations on these third-party law firms—not simply on former Heller Ehrman partners—to disgorge the firms' profits for an unlimited period of time on matters for which the firms were retained by former Heller Ehrman clients.

[9] Proposed California Rule 1.5.1(a) contains the same restrictions on fee sharing.

[10] Proposed California Rule 1.7(c)(1) adopts this rule.

duties. If all the profits are to go to one of the firms, the other firm has much less of an incentive to devote its full resources to the matter. *See, e.g.*, Los Angeles County Bar Association Op. 467, at pp.3-4 (1992) (noting that obtaining a client's prior consent to fee sharing may address the concern "whether Attorney B will devote sufficient time to the matter in light of the fact that he will be receiving a reduced fee"). *Accord* Comment [5] to ABA Model Rule 1.5 ("An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest.").[11]

Contrary to the intention of these Rules, Plaintiff urges that the unfinished business rule requires a former partner's new law firm to pay over profits on a client's hourly rate matters to the dissolved firm whether or not there has been disclosure and client consent—even though such a payment might well affect the attorney-client relationship. A client properly may question the interests of its lawyer after it is informed that the coffers of the lawyer's former law firm, now in dissolution—but not those of the lawyer's new firm—will be increased.

---

[11] The ABA Model Rules permit a lawyer's former firm to receive fees for work performed by the lawyer while he or she was still at the firm. Comment [8] to ABA Model Rule 1.5 states: "Paragraph (e) [of ABA Model Rule 1.5] does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm." Comment [8], thus, does not apply to the division of fees earned on work performed on a client's hourly rate matter after a firm's dissolution.

ABA Model Rule 1.5(e), which governs the sharing of fees by law firms, likewise requires client consent for such a division of fees. It also imposes an additional limitation: the division of fees may be made only if "the division [of fees] is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation[.]" Comment [7] to ABA Model Rule 1.5 explains: "Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." California case law has similarly imposed a requirement of proportionate sharing of fees. *See Champion,* 201 Cal. App. 3d at 783.

Application of the unfinished business rule urged by Plaintiff, however, would require the new law firm of a former partner of a dissolved firm to: (1) pay over profits that are not in proportion to any services performed; (2) make those payments to a firm that, because it is dissolved, cannot assume ethical responsibility for the representation, or contribute services to the client's representation; and (3) make these arrangements without client consent. *See also* ABA Formal Opinion 464 (2013) (lawyer entering into an arrangement for division of fees "must reasonably believe that the other lawyers' services will contribute to the competent and ethical

representation of the client.") (citing Comment [6] to ABA Model Rule 1.1)[12]

Plaintiff urges that a dissolved firm is entitled to profits without consideration of the relative amount of hourly rate work it performed before being discharged and the amount of work performed by the client's new law firm. Thus, even if the client's new firm might spend years defending a lawsuit—for example, a major antitrust matter—and even if the dissolved firm had only just begun the representation when it dissolved and had already collected all its fees for the work it undertook, application of the unfinished business doctrine, according to Plaintiff, would permit the dissolved law firm to claim years of profits from the client's new firm. Any payment of profits earned by the new firm to the dissolved firm consequently would "have no relationship whatsoever to the amount of service provided or to be provided by the partnership to the client." *Champion,* 201 Cal. App. 3d at 783.

The Plaintiff's interpretation of the unfinished business rule also could be analogized to the division of fees with the estate of a deceased

---

[12] Because a dissolved firm no longer has any ability to perform legal services, California Rule 1-320 may also be relevant. That Rule prohibits a lawyer from directly or indirectly sharing legal fees with a person who is not a lawyer (except in certain circumstances), even with the client's consent. ABA Model Rule 5.4 and Proposed California Rule 5.4 similarly prohibits sharing legal fees with nonlawyers except in limited circumstances not applicable here.

partner. California Rule 1-320(A)(2) provides that a member or law firm "undertaking to complete unfinished legal business of a deceased member may pay to the estate of the deceased member or other person legally entitled thereto that proportion of the total compensation which fairly represents the services rendered by the deceased member." Thus, a partner's estate—like a deceased law firm—cannot receive payments for work performed after the partner's death.

Finally, the ABA's understanding accords with the Rules governing the related situation of a sale or purchase of a law practice, California Rule 2-300 and its counterpart ABA Model Rule 1.17, which likewise protect client choice. In the event of a sale or purchase of a law practice, California Rule 2-300(B) requires the selling lawyer (or purchasing lawyer if the seller is deceased) to provide written notice to clients "stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; [and] that the client may take possession of any client papers and property, as required by rule 3-700(D)." California Rule 2-300(B) further requires the seller to obtain the client's written consent prior to the transfer of the law practice.[13] Thus, the sale-of-practice rules are yet another example of a client's unilateral discretion to decide who handles his or her matter.

---

[13] See Proposed California Rule 1.17, which would govern the sale of a law practice and contains similar restrictions.

By requiring a lawyer to pay profits to a dissolved firm, the application of the unfinished business rule here would be, in these and other ways, completely at odds with the ethical rules governing the division of fees adopted in California and across the country. This application of the unfinished business rule would ignore the unique relationship between lawyers and their clients.

II. POLICY CONCERNS STRONGLY MILITATE AGAINST APPLICATION OF THE UNFINISHED BUSINESS RULE TO A CLIENT'S HOURLY RATE MATTERS.

A. The Unfinished Business Rule Could Destabilize Law Firms by Encouraging Partners and Clients to Leave.

Plaintiff conceded before the District Court that the unfinished business rule does not apply to matters that a former partner takes to a new firm if the partner leaves before dissolution. *See Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP,* Nos. C 14-01236 CRB, C 14-01237 CRB, C 14-01238 CRB, C 14-01239 CRB, 2014 WL 2609743, at *2-3, *6 (N.D. Cal. Jun. 11, 2014). But treating pre-dissolution departures differently from those who depart later, after a firm has become insolvent, creates harmful incentives. As the New York Court of Appeals recognized, "attorneys who wait too long are placed in a very difficult position" compared to lawyers who leave a firm before insolvency. "They might advise their clients that they can no longer afford to represent them, a major inconvenience for the clients and a practical restriction on a client's right to choose counsel." *In*

re Thelen LLP, 24 N.Y.3d 16, 32 (2014). Were the client's chosen lawyer no longer able to continue to represent the client because the fees for continued representation would be given to that lawyer's former firm, the client effectively would be required to change lawyers, potentially imposing significant costs on the client. Application of the unfinished business rule may thus encourage partners to leave their firms at the first sign of financial trouble. That may destabilize law firms and cause them to fail where they otherwise might not have, needlessly imposing on the clients the cost of transitioning matters to new law firms.

Although encouraging clients to leave a troubled firm would certainly further destabilize the firm, doing so would protect clients from the fee division issues that would arise if the unfinished business rule were to apply. Further, the partners might well reason that if they wait until their firm dissolves before joining a new firm, they might not be able to find a new firm that is willing, or that can financially afford, to finish the ongoing matters from their prior firm on which they are working. Few firms would want to take on a matter requiring very significant work—tying up a material part of the firm's resources and possibly causing the firm to forego future work because of conflicts of interest—if the unfinished business doctrine actually meant that there were no economic benefits to handling the matter.

In fact, the larger the matter, the more difficult it likely would be for a former partner to find a new firm that would take it on for diminished or no profit, and the more costly and potentially detrimental to the client it would be to start over at a firm that includes no former partners of the dissolved firm. Of course, any time a client loses its chosen counsel, the economic reality of the application of the unfinished business rule is that the client must endure the cost of bringing new counsel up to speed.

Indeed, if the unfinished business rule applied to a client's hourly rate matters, ethical rules would make it prudent for a lawyer to counsel the client to leave a firm prior to dissolution to avoid its application.

For example, California Rule 3-700(A)(2) provides that a member "shall not withdraw from employment until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules."[14] As explained in State Bar of California Formal Opinion No. 2014-190, "The requirements of rule 3-700(A)(2) apply when an attorney's withdrawal is prompted by the dissolution of the attorney's law firm." And, as elucidated in State Bar of

---

[14] California Rule 3-700(D) similarly requires that a lawyer "promptly release to the client, at the request of the client, all the client papers and property." Proposed California Rule 1.16(d) and (e) are to the same effect.

California Formal Opinion No. 1985-86, which discussed the predecessor to California Rule 3-700, "[T]he rules in these circumstances act as a regulatory framework, and their provisions dictate that the interests of the clients must prevail over all competing considerations if the practitioner's withdrawal from the firm or the firm's dissolution is to be accomplished in a manner consistent with professional responsibility." Similarly, ABA Model Rule 1.16(d) states: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests . . . ." *See* ABA Formal Opinion 414 (1999) at 5 (departing lawyer and responsible members of the firm must notify the client of the client's alternatives and "must make clear that the client has the ultimate right to decide who will complete or continue the matters").

The ABA respectfully submits that lawyers should not feel obligated to leave troubled law firms before dissolution to avoid application of the unfinished business rule to their clients' hourly rate matters. Nor should lawyers need to protect their clients by counseling them to leave such firms before dissolution.

B. The Policy Concerns Expressed in *Jewel* Do Not Warrant the Application of the Unfinished Business Rule to Hourly Rate Matters.

Jewel addressed the allocation of contingency fees for cases that were active at the time a four-partner firm split into two firms. *See* 156 Cal. App. 3d at 175. Under UPA, the departure of a partner automatically

resulted in the dissolution of the firm. UPA §§ 29, 31. One of the firms took the major contingency matters and the fees those cases subsequently generated. That firm, however, sought to force the other two former partners to share the expenses incurred on the contingency fee cases prior to the dissolution. The court concluded that, under UPA, the partners with the contingency fee cases were not "surviving partners" entitled to "extra compensation," and the partner finishing the firm's business was not entitled to any (much less reasonable) compensation for concluding the firm's business. The court therefore held that all contingency fees must be shared based on each partners' ownership interest in the dissolved firm. 156 Cal. App. 3d at 176 (citing Cal. Corp. Code § 15018(f)). In contrast, under RUPA, the partner winding up the dissolved firm's business would be entitled to reasonable compensation for doing so. *Compare* UPA § 18(f) *with* Cal. Corp. Code § 16401(h).

But *Jewel* does not support application of its unfinished business rule to hourly rate cases, or to a partnership like Heller Ehrman's that is governed by RUPA which, unlike the since-superseded UPA at issue in *Jewel*, permits a partner who winds down the firm's business to be paid fair compensation. To begin with, *Jewel* did not so much as *mention*, much less analyze, any of the ethical rules implicated. Indeed, *Jewel* asserted—incorrectly—that "[o]nce the client's fee is paid to an attorney, it is of no concern to the client how that fee is allocated among the attorney and his or

her former partners." 156 Cal. App. 3d at 178. But as noted above, the Rules recognize that clients have a strong interest in how fees are divided, which play an important role in aligning the incentives of those performing the legal work with those of the client. The Rules reflect that interest by requiring informed client consent before a fee may be divided.

Moreover, *Jewel* addressed very different circumstances than are present here. *Jewel* did not address a situation like Heller Ehrman's, which would have been fully compensated for hourly rate work performed prior to its dissolution. Further, the former Heller Ehrman partners, even were they finishing Heller Ehrman business when they worked on matters at their new firms, were entitled under RUPA to reasonable compensation for doing so—presumptively what the clients agreed to pay the new firms.

Importantly, although not deemed "surviving partners," the pair of two-partner firms in *Jewel* effectively succeeded the dissolved firm, and the contingency fee cases were even completed under the original retainer agreement (although the clients signed change of counsel forms). Thus, the *Jewel* court was not faced with a complex situation like Heller Ehrman's, where its former partners (which numbered well over a hundred) dispersed, joining at least sixteen other, pre-existing law firms, each with their own

fee arrangements, cost structures, and personnel.[15] *Jewel* rested in part on its assumption that with just four lawyers participating in the division of fees, the prospect of receiving "a portion of the income generated by such [post-dissolution] work" would still be enough of an incentive for "continued representation of clients by the attorney of their choice." *Id.* at 179. *Jewel* was a special case. The division of such fees among a much larger number of creditors provides much less incentive for continued representation.

In support of its conclusion that the unfinished business rule applied to the contingency fee matters at issue there, the *Jewel* court cited two policy considerations. First, *Jewel* posited that preventing extra compensation to law partnerships "prevents partners from competing for the most remunerative cases during the life of the partnership in anticipation that they might retain those cases should the partnership dissolve." *Jewel*, 156 Cal. App. 3d at 179. *Rothman v. Dolin*, 20 Cal. App. 4th 755, 758 (1993), which similarly involved the dissolution of a two-shareholder firm, applied the unfinished business rule to hourly rate matters on this same ground: "according different treatment to hourly rate and contingency fee cases would lead to the prospect of attorneys shunning

---

[15] *Fox v. Abrams*, 163 Cal. App. 3d 610, 612, 616 (1985), which cited the policy considerations of *Jewel* and applied the unfinished business rule to a dissolved law corporation's contingency fee cases, similarly involved the break-up of a four member firm into two separate firms.

contingency fee cases in anticipation of a possible dissolution of the law firm, and scrambling to get the hourly rate cases . . . ." Because the unfinished business rule would encourage partners and clients to leave a firm before its dissolution, however, it does not actually serve the stated goal. Indeed, the *Jewel* court never had to consider that the unfinished business rule would give lawyers mindful of dissolution an incentive to "compet[e]" for remunerative cases and then promptly leave the firm to avoid losing the resulting fees. The reason is that under UPA, the departure of a partner automatically resulted in the dissolution of a firm. Moreover, regardless of how broadly the unfinished business doctrine were applied, if a firm is in danger of dissolving, it is unlikely that the partners would want to invest their resources in contingency fee cases that would not produce benefits for years to come. *Jewel* and *Rothman* also overstate the ability of partners to compete with each other for matters, because clients control which attorneys work on their matters.

Second, *Jewel* explained that its holding would discourage "former partners from scrambling to take physical possession of files and seeking personal gain by soliciting a firm's existing clients upon dissolution." This concern, too, is exaggerated. Client files belong to the clients, and physical possession of client papers and property is governed by California Rule 3-700(D). Specifically, a departing lawyer must release to the client, upon request, all the client papers and property. Moreover, the concern about

former partners soliciting clients upon dissolution is also misplaced. Solicitation is governed by California Rule 1-400. A lawyer is permitted to solicit current or former clients, and in the context of a law firm's true dissolution (rather than a law firm effectively continuing under another name as in *Jewel*), the client will be looking for new counsel in any event. *See Heller Ehrman LLP v. Davis, Wright, Tremaine, LLP,* Nos. C 14-01236 CRB, C 14-01237 CRB, C 14-01238 CRB, C 14-01239 CRB, 2014 WL 2609743, at *4-5 (N.D. Cal. Jun. 11, 2014) (concluding that *Jewel* is outmoded and inapplicable to the facts presented in this case). Further, unlike UPA, RUPA permits partners of a dissolved firm to compete with the firm for the firm's unfinished business. *Compare Jewel*, 156 Cal. App.3d at 176-77 *with* RUPA § 404 cmt. n.2.

III. APPLICATION OF THE UNFINISHED BUSINESS RULE TO A CLIENT'S HOURLY RATE MATTERS IS UNWORKABLE IN THE CONTEXT OF MODERN LEGAL PRACTICE.

The application of the unfinished business doctrine to hourly rate matters of law firms also raises serious practical concerns, in particular when a former partner joins a pre-existing, third-party law firm with its distinct fee arrangements, cost structure, attorneys, and areas of practice. For instance, it is unclear how the scope of an hourly rate matter should be defined. Suppose a matter called only for antitrust advisory work by a single partner at the dissolved firm, but at the new firm grew into a large-

scale antitrust lawsuit staffed by several partners, associates and paralegals. Would all fees belong to the dissolved firm? If not, how would a court distinguish the matters? Or suppose the new firm is able to provide advice on areas of the law that the dissolved firm could not. For example, suppose a former partner of a dissolved firm continued to advise on a corporate transaction after moving to a new firm, and other attorneys at the new firm provided regulatory advice on the transaction for which the dissolved firm lacked the expertise. Would the former partners of the dissolved firm be entitled to fees from the new firm's regulatory work that the former partners could not have provided themselves (and which would have had to have been provided by another firm)?

Plaintiff claims to be entitled to the profits derived by third-party firms on the hourly fee matters started at Heller Ehrman. Another difficulty is calculating the profits of these firms, including allocating "reasonable overhead expenses" to particular hourly fee matters and determining the "reasonable compensation" a partner is entitled to retain for work winding up partnership business under RUPA. *See Jewel*, 156 Cal. App. 3d at 180; Cal. Corp. Code § 16401(h). Who measures overhead, and who determines how it is allocated among matters? Is a court responsible for reviewing the new firm's books and allocating costs to particular matters? How would a court allocate real estate expenses, health benefit expenses, support staff

salaries, or the costs of malpractice insurance to particular matters?[16] How would "reasonable compensation" for hourly rate matters be determined? The client and the former partner's new law firm would already have agreed that the rates being charged by the new firm were reasonable compensation for the work being performed. Is a court to second guess the client and determine that only some portion of that agreed amount is reasonable compensation for the new firm to retain? Must the client be questioned about whether it really thought the fees it paid were reasonable compensation?

In the context of modern legal practice, application of the unfinished business rule to hourly fee matters would generate protracted disputes between law firms, drawing the courts and potentially clients into complicated questions as to how matters are defined and costs and compensation allocated. The better approach is one that follows the well-established principle that clients own their matters and are free to hire or fire counsel of their choice for any reason at any time.

---

[16] Malpractice insurance raises a further complication. If a dissolved firm were to retain an interest in ongoing hourly fee matters, must it also maintain malpractice insurance? If the dissolved firm did carry insurance, the successor firm would arguably be required to obtain the dissolved firm's permission before reporting errors to the client. *See* ABA Model Rule 1.4; California Rule 3-500. If the dissolved firm did not carry insurance, a successor firm would be placed in the strange situation of bearing full liability without receiving any profits.

CONCLUSION

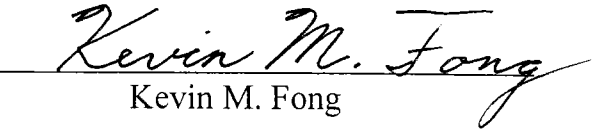
For the reasons stated above, the ABA respectively requests that the Court affirm that a law firm does not have a property interest in hourly fee matters pending at the time of its dissolution.

Dated: April 21, 2017.

Respectfully submitted,

LINDA A. KLEIN (*pro hac vice admission pending*)
AMERICAN BAR ASSOCIATION

*KEVIN M. FONG
DAVID G. KEYKO (*pro hac vice admission pending*)
JAY D. DEALY *(pro hac vice admission pending*)
PILLSBURY WINTHROP
SHAW PITTMAN LLP

By 
Kevin M. Fong

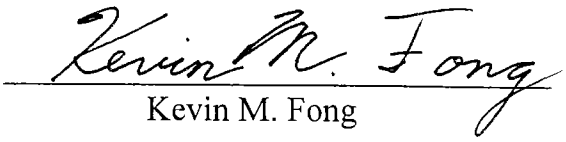
Attorneys for Amicus Curiae
American Bar Association

CERTIFICATE OF WORD COUNT

(California Rule of Court 8.204(d))

The text of this brief consists of 6,948 words, not including tables of contents and authorities, or this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: April 21, 2017.

By 
Kevin M. Fong

Attorney for Amicus Curiae
American Bar Association

Docket No. S236208

PROOF OF SERVICE BY MAIL

I, Donna F. Hunter, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the City of San Francisco, California.

2. My business address is Four Embarcadero Center, 22nd Floor, San Francisco, CA 94111-5998.

3. My mailing address is P.O. Box 2824, San Francisco, CA 94126-2824.

4. On April 21, 2017, at Four Embarcadero Center, 22nd Floor, San Francisco, CA 94111-5998, I served true copies of the attached document titled exactly Application for Permission to File Amicus Curiae Brief of American Bar Association in Support of Defendants and Respondents by placing them in addressed, sealed envelopes and depositing them in the United States mail, first class postage fully prepaid, to the following:

[See Attached Service List]

I declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of April, 2017, at San Francisco, California.

_____

Donna F. Hunter

Party	Attorney
Heller Ehrman LLP : Plaintiff and Appellant	Christopher D. Sullivan Diamond McCarthy LLP 150 California Street San Francisco, CA 94111 Jeffrey T. Makoff Valle Makoff LLP 388 Market Street, Suite 1300 San Francisco, CA 94111 Kevin William Coleman Schnader Harrison Segal & Lewis LLP 650 California Street, 19th Floor San Francisco, CA 94108
Davis Wright Tremaine LLP : Defendant and Respondent	Steven A. Hirsch Keker & Van Nest LLP 633 Battery Street San Francisco, CA 94111 Peter Paul Meringolo PMRK Law, LLP One Sansome Street, Suite 3500 San Francisco, CA 94104 Luther Kent Orton Attorney at Law 1895 White Oak Dr. Menlo Park, CA 94025
Foley & Lardner LLP : Defendant and Respondent	Peter Paul Meringolo PMRK Law, LLP One Sansome Street, Suite 3500 San Francisco, CA 94104 Luther Kent Orton Attorney at Law 1895 White Oak Dr. Menlo Park, CA 94025
Jones Day : Defendant and Respondent	Shay Dvoretzky Jones Day 51 Louisiana Avenue, N.W. Washington, DC 20001 James Scott McDonell Jones Day 555 California Street, 26th Floor San Francisco, CA 94104-1500

Orrick, Herrington & Sutcliffe LLP : Defendant and Respondent	Eric A. Shumsky Orrick, Herrington & Sutcliffe LLP Columbia Center 1152 15th Street, N.W. Washington, DC 20005-1706 Rachel Wainer Apter Christopher Cariello Anjali S. Dalal Orrick, Herrington & Sutcliffe LLP 51 West 52nd Street New York, NY 10019-6142 Pamela Phillips Jonathan W. Hughes Arnold & Porter LLP Three Embarcadero Center, 10th Floor San Francisco, CA 94111-4024