Case No. S236208

SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HELLER EHRMAN LLP,
Plaintiff and Petitioner,

vs.

DAVIS WRIGHT TREMAINE LLP & FOLEY LARDNER LLP,
Defendants and Respondents.

Question Certified by the United States Court of Appeals
for the Ninth Circuit
Case Nos. 14-16314 & 14-16317

APPLICATION TO FILE AMICUS BRIEF AND BRIEF OF AMICI CURIAE PROFESSOR GEOFFREY C. HAZARD JR. AND PROFESSOR RICHARD ZITRIN SUPPORTING DEFENDANTS AND RESPONDENTS

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APPLICATION TO FILE BRIEF OF AMICI CURIAE PROFESSOR GEOFFREY C. HAZARD JR. AND PROFESSOR RICHARD ZITRIN IN SUPPORT OF DEFENDANTS AND RESPONDENTS

Professor Geoffrey C. Hazard, Jr. and Professor Richard Zitrin are two of the profession's leading scholars in the field of legal ethics and professional responsibility. They seek leave to file the accompanying amici curiae brief in support of Defendants and Respondents. Professor Hazard and Professor Zitrin are familiar with the contents of the parties' briefs.

Professor Hazard is Thomas E. Miller Distinguished Professor of Law Emeritus, Hastings College of the Law, University of California, Trustee Professor of Law Emeritus University of Pennsylvania, Sterling Professor of Law Emeritus, Yale University, and Director (Executive Director) Emeritus of the American Law Institute. He has been a member of the California Bar since 1960. He was the Reporter for the American Bar Association Model Rules of Professional Conduct (promulgated in 1983) and draftsman-consultant for the ABA Model Code of Judicial Conduct (promulgated in 1972). He has published widely in the area of legal ethics and professional responsibility.[1]

---

[1] Including THE LAW OF LAWYERING (4th ed. 2015) (with W. William Hodes & Peter R. Jarvis), MORAL FOUNDATIONS OF AMERICAN LAW: FAITH, VIRTUE AND MORES (2013) (with Douglas W. Pinto Jr.), THE LAW AND ETHICS OF LAWYERING (5th ed. 2010) (with Susan Koniak, Roger Cramton, George M. Cohen & W. Bradley Wendel), PROFESSIONAL RESPONSIBILITY AND REGULATION (2d ed. 2007) (with Deborah L. Rhode), PRESERVING AND PROTECTING THE MODERN LAW FIRM (1992) (with Ira M. Millstein), ETHICS IN THE PRACTICE OF LAW (1978), *The Morality of Law Practice* (2015) 66 HASTINGS L.J. 359, *"Lawyers for Lawyers": The Emerging Role of Law Firm Legal Counsel* (2005) 53 U. KAN. L. REV. 795, *Lawyer as Wise Counselor* (2003) 49 LOY. L. REV. 215, *Equality and Affiliation as Bases of Ethical Responsibility* (2000) 61

Professor Zitrin has taught legal ethics since 1977, since 1994 at Hastings College of the Law, University of California. He has been a member of the California Bar since 1974. He served on the California State Bar's Committee on Professional Responsibility and Conduct from 1990 to 1996, as Chair in 1994-95 and Special Advisor in 1995-96. He founded and was the first Director of the University of San Francisco School of Law's Center for Applied Legal Ethics. His curriculum vitae includes numerous publications on legal ethics and professional responsibility.[2]

Amici have dedicated much of their professional lives to the rules of professional conduct. Amici have no interest in or connection with any of the parties in this case.[3] They seek to file this brief because they believe the rule proposed by Plaintiff and Appellant Heller Ehrman LLP would seriously undermine a fundamental precept of California's law governing attorney professional ethics, particularly clients'

LA. L. REV. 173, *Responsibility, Professional and Otherwise* (1999) 31 CONN. L. REV. 1139, and *Under Shelter of Confidentiality* (1999) 50 CASE W. RES. L. REV. 1.

[2] Including LEGAL ETHICS: RULES, STATUTES, AND COMPARISONS (2016) (with Kevin E. Mohr), LEGAL ETHICS IN THE PRACTICE OF LAW (4th ed. 2013) (with Carol M. Langford & Liz Ryan Cole), THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED (1999) (with Carol M. Langford), *Regulating the Behavior of Lawyers in Mass Individual Representations: A Call for Reform* (2013) 3 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 86, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?* (2004) 32 HOFSTRA L. REV. 1565, *Five Who Got It Right* (2003-2004) 13 WIDENER L. J. 209, and *The Case Against Secret Settlements (Or What You Don't Know* Can *Hurt You)*, (1999) 2 [HOFSTRA] J. INST. FOR STUDY OF LEGAL ETHICS 115.

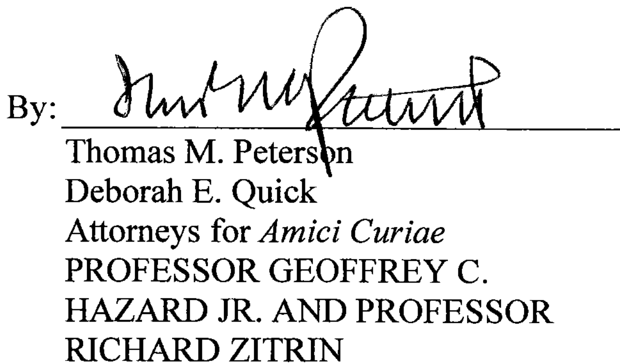
[3] Professor Hazard previously expressed his views on related subjects as an expert for the Orrick firm in the Brobeck bankruptcy case, *In re Brobeck, Phleger & Harrison* (Bankr. N.D. Cal. 2009) 408 B.R. 318. The views expressed in this brief are entirely his own, for which he has not been compensated.

representation by the counsel of their choice. Amici believe the accompanying brief will be helpful to the Court in resolving the certified question, and therefore respectfully submit the same.

Dated: April 14, 2017

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By: 

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BRIEF OF AMICI CURIAE PROFESSOR GEOFFREY C. HAZARD JR. AND PROFESSOR RICHARD ZITRIN IN SUPPORT OF DEFENDANTS AND RESPONDENTS

I. INTRODUCTION

The certified question before the Court is this:

> Under California law, what interest, if any, does a dissolved law firm have 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?

The Heller Ehrman bankruptcy estate asks the Court to grant dissolved law firms a share of the hourly attorney fee revenue generated by post-dissolution work on legal matters that had been handled by attorneys of the dissolved firm before that firm ceased operating.

That response to the certified question is wrong. Requiring payments to a dissolved law firm would undercut clients' right to create and control their relationships with attorneys of their choosing. That concept has been repeatedly advanced in California rules and precedent. The correct answer to the certified question is that a dissolved law firm has no proper interest in fees paid on an hourly fee basis for work done after the firm has dissolved on legal matters that had been handled before the dissolution.

A. California Law Consistently Protects Client Prerogatives In Selecting Attorneys And Regulating Payment of Fees. Accordingly, A Dissolved Law Firm Should Not Be Entitled to Share in Fees Paid For Work Done After The Firm Dissolves.

Protecting client interests and preserving trust and confidence in the client-lawyer relationship require that clients have control over attorney compensation. That goal is

advanced by the rules governing how attorney-client relationships are formed and ended, conferring on the client the right to control attorney compensation. Guided by these principles, the Court should hold that a dissolved law firm has no interest in hourly fees paid for legal services provided after the firm dissolves.

Were the Court to adopt the rule promoted by the Heller Ehrman bankruptcy estate, at the time a law firm dissolves, a client with open hourly-fee matters at the point when a law firm dissolves would be forced to choose between two unappealing choices:

- Having the exiting attorneys handle open matters even though they are not fully compensated because they are required to share the fees with the dissolved law firm.
- Find new counsel, imposing search costs on both client and lawyers in building a new relationship, and denying the client counsel of choice.

Requiring payments to the dead hand of a dissolved law firm disrupts existing relationships and diverts client fees from lawyers doing the work.

1. Rules Governing Attorney Fee Relationships Promote Client Trust And Confidence.

Client choice and control of the attorney-client relationship is sustained by rules governing lawyers' fees. When an attorney-client relationship ends, so does the attorney's entitlement to fees for work not-yet-performed. The discharged attorney's claim to fees is limited to fees for work already performed. Thus, when asserting an attorney's lien "[i]n the context of hourly fees ... the amount of the attorney's lien would generally be the balance due on the client's account." Spencer, *Ethical Enforcement of*

Attorney's Liens—Avoiding Traps for the Unwary (2013) CAL. BAR J.; *see also Grossman v. State Bar* (1983) 34 Cal.3d 73, 79-80 (attorney properly disciplined for retaining fees in excess of those provided for in contract).

Other rules also promote client choice and client control. Rule 3-310, for example, requires disclosure to the client of any adverse interests of the attorney and client consent for a representation despite such a conflict. Rule 4-200 prohibits attorneys from charging "unconscionable" fees. Under Rule 3-300, during a representation an attorney "shall not enter into a business transaction with a client; or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client" without the client's informed, written consent—including advising the client "in writing that the client may seek the advice of an independent lawyer of the client's choice." As this Court has explained, "[t]his is not a great deal more than is now required for most fee agreements: attorneys are required, with limited exceptions, to put most fee agreements in writing and explain fully the terms of the agreement." *Fletcher v. Davis* (2004) 33 Cal.4th 61 at 71.

California law recognizes that fee transactions can be used to shape the rendering of a lawyer's services and the character of an attorney-client relationship. "Just as a client has a right to know how his or her attorney's fees will be determined, he or she also has a right to know the extent of, and the basis for, the sharing of such fees by attorneys." *Chambers v. Kay* (2002) 29 Cal.4th 142, 156–57, quoting *Margolin v. Shemaria* (2000) 85 Cal.App.4th 891, 903.

> Knowledge of these matters helps assure the client that he or she will not be charged unwarranted fees just so the attorney who actually provides the client with representation on the legal matter has 'sufficient compensation' to be able to share fees with the referring attorney.

Chambers, 29 Cal.4th at 156; *see also* Rule 2-200(A).

In answering the certified question, the Court should bear in mind that even legally sophisticated clients are seeking not merely technical expertise but also individual and particularized professional judgment and appreciation of the client's activities and goals: "'What you want to know when you hire a firm is who will be on the other end of the phone when you call with a question, and whose professional judgment will be guiding the work done and the decisions made.'" DiLucchio, *"We Hire The Lawyer, Not The Law Firm"—Really?* (2009) LEGAL INTELLIGENCER. Attorneys "must also express a complex balance between encouragement to the client, in the face of legal uncertainty and resistance from the other side, and 'cooling out' unrealistic hopes." Hazard, *Under Shelter of Confidentiality* (1999) 50 CASE W. RES. L REV. 1, 17 (internal citation omitted).

> [L]ong-term relationships permit attorneys to become well acquainted with the needs and preferences of their clients and thus to serve them more effectively. By the same token, as clients learn to trust their attorneys, they can be more forthcoming about their own problems and thus put their attorneys in a better position to provide valuable service.

Litan and Salop, *Reforming the Lawyer-Client Relationship Through Alternative Billing Methods* (1994) 77 JUDICATURE 191, 193. Resolution of the certified question here

should help clients form relationships of trust and confidence with lawyers and firms of their choosing.

B. *Jewel v. Boxer*

Jewel v. Boxer (1984) 156 Cal.App.3d 171, 178, is the principal authority giving dissolved law firms a continuing interest in fees generated by post-dissolution work. *Jewel* attempted to distinguish between the client's right to select counsel and what that court described as "the rights and duties between the former partners with regard to income from unfinished partnership business." *Jewel* stated 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." *Ibid.* But of course the allocation *is* of concern, especially in the context of an insolvent dissolved law firm that had held the hourly fee engagement. The supposed *Jewel* rule, literally applied here, where the former firm is insolvent and dissolved, would impair both client choice and client control over legal representations.

A full understanding of *Jewel* shows why it is inapposite to the current situation. *Jewel* implicitly assumed all former partners of the dissolved firm *would participate in wrapping up work* on representations that were pending at the time of dissolution *and* that all would share in the income from that work *as if they were still in partnership*—consistent with honoring their ongoing fiduciary duties to their former partners. *Id.* at 179. But that assumption is false in the current situation. The entity to which the partners owed a duty no longer exists. The remaining duty owed by the individual lawyers (and former partners) is to *their ongoing clients*. To impose the entire panoply of

Jewel duties in the context of a dissolved and insolvent law firm will directly interfere with client choice "at the critical time when the choice is foisted upon the client due to the firm's dissolution." Morrison and Trache, *Jewel v. Boxer: The Unfinished Business of Bankrupt Law Firms* (2012) AM. BANKR. INST. J. 28, 93.

Consider how a rule requiring ongoing payments to a dissolved law firm would play out in the context of the dissolution of a large firm serving clients with complex matters. Those matters require a law firm with sufficient depth, experience and resources. When such a law firm is unraveling—often quickly[4]—clients face a choice.

On the one hand, the client may continue with the services of attorneys who have represented the client and have now moved their practices elsewhere. A client making that choice faces the prospect that a material portion of the fees it pays will be siphoned off to the dissolved firm—an entity unable to perform legal services. The client will have to compete for attention at a new law firm with other matters not burdened by the dissolved firm's claim to fees generated by the new firm's work. The client will be competing at a disadvantage because—for reasons completely beyond the client's control—the lawyer will be receiving *less* remuneration from the client's case than all others not encumbered by the dissolved law firm's fee claims.

On the other hand, the client may engage new attorneys, unfamiliar with the client's legal affairs, in order to avoid the reach of the dissolved firm. New attorneys will

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[4] "[W]hen law firms collapse, they fall apart in a very unusual way. Their explosions are swifter, more violent and more complete than those of ordinary companies. ... [F]or example, Chicago's Altheimer & Gray went from apparent health to dissolution in a matter of weeks." Morley, *Why Law Firms Collapse* (June 12, 2015) LAW 360.

incur time and expense in becoming familiar with issues that the preexisting lawyers know well. They will not have the exiting attorneys' established relationship of trust and confidence. The client is thus effectively denied counsel of choice.[5]

C. *Howard v. Babcock*

The Heller Ehrman bankruptcy estate argues that *Howard v. Babcock* (1993) 6 Cal.4th 409, 425, establishes that California's Rules of Professional Conduct must yield to partnership law. But *Howard* is not inconsistent with Amici's position, and its reasoning is of limited value in resolving the certified question.

Howard held that "an agreement among partners imposing a reasonable cost on departing partners who compete with the law firm in a limited geographical area is not inconsistent with [Rule of Professional Conduct] 1-500 and is not void on its face as against public policy." *Ibid.* The cost imposed on the departing partner in *Howard* was loss of certain withdrawal benefits, including a portion of one year's worth of post-withdrawal profits "arising from the unfinished business of the firm" as of the withdrawal date. *Id.* at 414. This Court held such agreements are sanctioned by California's partnership law authorizing agreements among partners not to compete upon dissolution and do not offend Rule 1-500's prohibition on agreements restricting the right of members to practice law. *Id.* at 417, citing former Business and Professions Code

[5] Moreover, the now-former attorney from the dissolved firm has, at least indirectly, breached her fiduciary duty to the now-former client by putting that client at a competitive disadvantage due to an overly broad reading of the *Jewel* rule.

§16602.[6] In essence, the departing partner in *Howard* was presented with a choice: be paid by his former partners to refrain from taking certain representations for a limited period of time, or forfeit that subsidy and be immediately available for any and all representations. Client choice is no more infringed by the result in *Howard* than it is infringed when a lawyer declines a representation because she has a conflict or he does not have sufficient capacity to take on additional work. Notably, in *Howard* the prior firm was still in existence and able to continue the work.

In support of its conclusion in *Howard,* the Court also drew on its "recognition that a revolution in the practice of law has occurred requiring economic interests of the law firm to be protected as they are in other business enterprises." *Id.* at 420. The Court sought to "achieve a balance between the interests of clients in having the attorney of choice, and the interests of law firms in a stable business environment." *Id.* at 425. In striking that balance, the Court was "confident that our recognition of a new reality in the practice of law will have no deleterious effect on the current ability of clients to retain loyal, competent counsel of their choice." *Id.* at 420.

The Court in *Howard* thought that reasonable non-competition agreements promote the stability of law firm partnerships in two ways. First, they dis-incentivize withdrawal by imposing a "reasonable toll"— limited as to both time and geography—on "the propensity of withdrawing partners in law firms to 'grab' clients of the firm and set up a competing practice." *Id.* at 412, 420. In the case of a bankrupt, dissolved law firm,

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[6] Notably, unlike the agreement in *Howard*, the rule proposed by the Heller trustee would not be limited by geography or time.

nobody is "grabbing" its clients. Rather, lawyers are stepping in to protect client rights once the dissolved firm is unable to do so.

The second concern motivating *Howard* was that imposing a "reasonable toll" on those who withdraw from an ongoing law partnership will support the financial stability of the former partners: "'[T]he remaining partners remain able to preserve the stability of the law firm by making available the withdrawing partner's share of capital and accounts receivable to replace the loss of the stream of income from the clients taken by the withdrawing partner to support the partnership's debts.'" *Id.* at 419-420, quoting *Haight, Brown & Bonesteel v. Superior Court* (1991) 234 Cal.App.3d 963, 969-970. That is not of concern here, where the law firm's dissolution forces clients to seek representation elsewhere. When a dissolving firm terminates its clients, it can no longer provide legal representation and there is no law partnership left to stabilize. In that situation, the attorneys' duty is to ensure that client representations are smoothly transitioned so client interests remain fully protected. Cal. State Bar Formal Opn. No. 2014-190

D. No California Precedent Supports The Rule Urged By The Heller Ehrman Trustee.

The rule proposed by the Heller Ehrman bankruptcy estate has no real roots in California law. We have addressed *Howard v. Babcock* and *Jewel v. Boxer*. Only one published opinion holds that a dissolved law firm has an interest in hourly fee work performed post-dissolution, *Rothman v. Dolin* (1993) 20 Cal.App.4th 755. *Rothman* assumed, without analysis, that hourly fee engagements should be treated like contingent fee and fixed fee engagements. That assumption is simply insupportable. The implication

from this assumption proposed by the Heller Ehrman bankruptcy estate would unfairly restrict client choice and control.

II. CONCLUSION

The dissolved Heller Ehrman law firm has been compensated for the work performed by the lawyers who were affiliated with it. The firm is no longer available to represent anyone. The clients whose matters are now at issue have created new engagements with attorneys of their own choosing. This Court should hold that a dissolved law firm has no post-dissolution right to any share of fees paid on an hourly basis for legal matters that were in progress at the time of the firm's dissolution.

Dated: April 14, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

I hereby certify that pursuant to California Rules of Court, Rule 8.204(c)(1), the attached brief, including footnotes, but excluding the caption page and this certification, contains 2,592 words, as counted by the Word 2010 word-processing program used to generate the brief.

Dated: April 14, 2017

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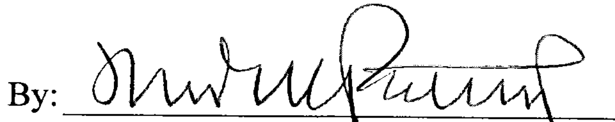
By: 

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CERTIFICATE OF SERVICE

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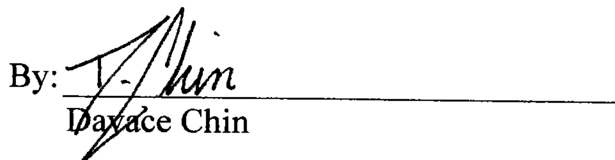
I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct. Executed on April 14, 2017, at San Francisco, California.


By: ______________________
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