Case No. 14-16318

In the

United States Court of Appeals

for the

Ninth Circuit

HELLER EHRMAN LLP, Liquidating Debtor,
Plaintiff-Appellant,

v.

ORRICK HERRINGTON & SUTCLIFFE LLP,
Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Northern District of California,
No. 3:14-cv-01239-CRB · Honorable Charles R. Breyer

BRIEF OF AMICI CURIAE
THE BAR ASSOCIATION OF SAN FRANCISCO AND THE LOS ANGELES COUNTY BAR ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

JOSHUA R. BENSON
TAYLOR & COMPANY LAW OFFICES, LLP
One Ferry Building, Suite 355
San Francisco, California 94111
(415) 788-8200 Telephone
(415) 788-8208 Facsimile

STEPHEN MCG. BUNDY
SCHOOL OF LAW (BOALT HALL)
UNIVERSITY OF CALIFORNIA
Berkeley, California 94720
(510) 642-1970 Telephone
(510) 643-2673 Facsimile

Counsel for Amici Curiae The Bar Association of San Francisco and The Los Angeles County Bar Association

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the undersigned *amici* states that it is not a corporation that issues stock and has no parent corporation.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

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The **Bar Association of San Francisco** ("BASF") is a non-profit voluntary membership association of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of more than 7,500 individuals, law firms, corporate legal departments, and law schools. Through its board of directors, committees, volunteer legal services programs, and other community efforts, BASF works to advance the professional interests of its members and the interest of the public in effective, ethical legal representation and access to justice.

The **Los Angeles County Bar Association** ("LACBA"), with more than 20,000 members, is one of the largest metropolitan voluntary bar associations in the United States. In addition to meeting the professional needs of its members, LACBA actively promotes the administration of justice, access to the judicial system, and the role of lawyers in facilitating both.

Both BASF and LACBA bring to this case strong interest and expertise in issues of client rights and client protection, the core values of the legal profession, and the ethical rules governing practice in the State of California.

[1] *Amici* have submitted identical briefs—except for the cover pages and captions—in related case numbers 14-16314, 14-16315, 14-16317, and 14-16318. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties to each case have given written consent to these filings.

INTRODUCTION AND SUMMARY OF ARGUMENT

When an insolvent law firm dissolves, client needs are urgent. The client must quickly hire new counsel, discharge old counsel, and transition pending matters to the new firm. At the same time, with its discharge imminent and inevitable, the dissolving firm has no meaningful expectation of further business from its clients. Yet the bankruptcy trustee for Heller Ehrman LLP ("Heller") argues that, at precisely this moment of client vulnerability and law firm collapse, pending hourly fee matters transform into a property interest of the dissolving firm. The firm's creditors may then wield this interest against the new law firms that complete the work that the dissolved firm cannot. This notion effectively nullifies the client's fundamental right to hire, fire, and control counsel, and defies both ethical canons and common sense.

The better interpretation of California law—indeed, the one compelled by client-protecting concerns—is that articulated by Judge Breyer below: A firm forced to dissolve by impending bankruptcy has no property interest in the hourly matters its former clients take to new law firms.

As organizations that seek to promote the integrity of the legal profession, the Bar Association of San Francisco and the Los Angeles County Bar Association have a special interest in this case. In this brief, *amici* argue that the California

Supreme Court would not recognize a property interest in future hourly fees for multiple reasons.

First, creating a property interest in pending hourly matters is inconsistent with controlling precedent establishing the client's absolute right to hire, fire, and retain new counsel. That precedent further establishes that once former counsel is discharged, it has no right to share in fees earned by successor counsel completing the client's work. Yet here, the trustee seeks to turn that principle on its head by creating a property interest in pending hourly matters at the very moment when the law firm is unable to perform, has been discharged, and has no legitimate expectation of further business.

Second, the result sought by the Heller trustee impermissibly burdens the client's interests in continuous, effective representation and free choice of counsel at dissolution. The trustee essentially seeks to collect indefinitely all profits earned by the newly hired firm, even though those fees have no relationship to any work performed by the dissolved firm. This converts the client's new lawyers into "partially paid volunteers," *see Champion v. Superior Court*, 201 Cal. App. 3d 777 (1988), effectively restricting the client's choice of counsel following dissolution. The trustee's theory also would enforce, over client objections, a division of fees that gives rise to many of the evils that California's fee-sharing rules seek to prevent.

Finally, the result sought by the trustee would destabilize law firms and complicate the mechanics of their dissolution, to the detriment of clients.

Because the trustee seeks a result that burdens client interests and is barred by California's law of lawyering, this Court should hold that the Heller firm has no property interest in the hourly fee matters that it abandoned at the time of its dissolution.

ARGUMENT

In September 2008, Heller dissolved and stated its intention to cease serving clients. Following dissolution, former Heller shareholders (referred to as "partners" for consistency with the caselaw) were forced to find employment with new firms, and former Heller clients were forced to retain new counsel.

Overwhelmingly, the new firms retained to handle Heller's former matters were similar to Heller—national, full-service firms capable of supporting complex work. Those clients who wished to preserve their relationship with the Heller lawyers who had handled their matters prior to dissolution retained the firms that the departed Heller partners had joined. In the transitioning of these hourly fee matters from Heller to the new firms, there has been no allegation that either the former Heller partners or the new firms acted unethically, breached any fiduciary duties, or engaged in unfair competition.

Heller was fully paid for the work it performed for these clients prior to the firm's dissolution. However, the bankruptcy plan administrator, standing in the shoes of the former Heller firm and its creditors ("Trustee" or "Heller Trustee"), now claims an ongoing property interest in all hourly fee matters formerly pending at Heller. The Trustee seeks the profits earned from the work on these matters by the new firms—a potentially open-ended and indefinite claim.

No California state court has blessed such a result, including *Jewel v. Boxer*, 156 Cal. App. 3d 171 (1984). In *Jewel*, the Court of Appeal held that, following a voluntary dissolution, California's partnership law required former partners to account for their continued work on a portfolio of pending contingency fee matters, a form of "unfinished business." *Id.* at 179-80. In *Rothman v. Dolin*, 20 Cal. App. 4th 755, 758-59 (1993), the Court of Appeal, with little discussion, applied the holding of *Jewel* to pending hourly fee matters in similar circumstances.

The Trustee now seeks to extend the "unfinished business" rule of *Jewel* and *Rothman* to a situation not contemplated by either: an insolvent law firm, pressed to dissolve by its creditors, incapable of performing further work, with all its clients forced to find new counsel. The Trustee seeks in these circumstances to create an ongoing property interest in the fees earned by the firms completing the work the dissolved firm cannot.

Because the California Supreme Court has never ruled on the question presented by the Trustee's appeal (or, for that matter, on the issues presented by *Jewel* and *Rothman*), this Court must predict how the Supreme Court would decide the question, in light of the Supreme Court's decisions on closely related issues, intermediate state court decisions, decisions from other jurisdictions, treatises, and restatements. *See Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 427 (9th Cir. 2011); 19 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE (JURISDICTION) § 4507 (2d ed.). These authorities make clear that the Supreme Court would reject the Trustee's position because it conflicts with California's law of lawyering, as set forth both in the caselaw and the California Rules of Professional Conduct.

1.0 TREATING HOURLY MATTERS AS FIRM PROPERTY IS INCONSISTENT WITH THE CLIENT'S ABSOLUTE RIGHT TO HIRE AND FIRE.

California has long had a "strong policy, expressed both judicially and legislatively, in favor of the client's absolute right to discharge his attorney at any time." *Fracasse v. Brent*, 6 Cal. 3d 784, 786 (1972). Closely related is the "absolute right to substitute one attorney for another for any reason." *Kallen v. Delug*, 157 Cal. App. 3d 940, 950 (1984). The reason for the rule is to ensure the client's "absolute confidence" in the attorney and, conversely, the right to find new counsel if that confidence falters. *Fracasse*, 6 Cal. 3d at 786.

These principles have led to limits on the right of the discharged lawyer to bring fee claims whose enforcement would in practice constrict the right to hire and fire. These fee-limiting rules may not be altered by contract. *Id.*

For example, when a client discharges a lawyer, the client has no obligation to pay any further fees other than those due at the time of discharge, or, in certain contingency cases, a portion of any future recovery equal to the reasonable value of the work performed to date (i.e., quantum meruit). *Fracasse*, 6 Cal. 3d at 790-92.[2] The rule is the same if the lawyer is forced to withdraw by ethical compulsion, or has another compelling reason to cease the representation. *See, e.g., Rus, Miliband & Smith v. Conkle & Olesten*, 113 Cal. App. 4th 656, 672-73 (2004) (lawyer who withdraws from contingency case is entitled to quantum meruit recovery at most, and even then only if withdrawal is strongly justified). These rules apply regardless of the hardship visited upon the lawyer. *See Kallen*, 157 Cal. App. 3d at 950.

A lawyer who withdraws or is discharged may not evade these rules by attempting to claim fees from successor counsel rather than the client itself. *See, e.g., Kallen*, 157 Cal. App. 3d at 951 (voiding fee-sharing agreement that former counsel demanded from successor lawyer as condition of withdrawal); *Olsen v.*

[2] If the lawyer does not have a formal attorney-client relationship with the client, the lawyer cannot seek fees from the client at all. *See, e.g., Trimble v. Steinfeldt*, 178 Cal. App. 3d 646, 651 (1986) (lawyer "associated" by another firm to assist on case could claim compensation only from the firm, not the client).

Harbison, 191 Cal. App. 4th 325, 341 (2010) (when client discharged one of two firms providing representation, any fee-sharing agreement between the firms "ceased to exist" as well, and the discharged firm had no claim against the other firm).[3]

These rules together stand for a simple proposition recognized across the jurisdictions: The client, not the lawyer or law firm, owns client matters. The client is therefore free to retain new counsel at any time without exposing itself to conflicting fee demands. These principles, in turn, weigh heavily against finding a property interest in pending hourly matters, because the hourly fee lawyer has no right to continued business from the client. New York's highest court recently so concluded. *See In re Thelen, LLP*, 24 N.Y.3d 16, 28 (2014) ("no law firm has a property interest in future hourly legal fees because they are too contingent in nature and speculative to create a present or future property interest, given the client's unfettered right to hire and fire counsel") (quotations omitted).

The Trustee seeks to avoid these clear rules through the fortuity of Heller's collapse. Under California law, it is undisputed that if a Heller partner had left for

[3] A discharged lawyer may have a claim against the successor firm if it committed tortious acts in taking over the representation, but such acts are not alleged here. *See, e.g.*, *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 222-24 (1983) (overruled on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503 (1994)); *but see Olsen*, 191 Cal. App. 4th at 333-36 (noting litigation privilege may sharply limit viability of such tort claims).

a new firm *before* Heller's dissolution, and an hourly fee client of Heller's had followed, Heller would have no claim against the departed lawyer, the client, or the new firm, absent tortious acts.[4] But the Trustee's theory is that if the departure happens *after* dissolution, Heller's claim on the client matter ripens into a property interest. This would seem to be exactly backwards in light of *Fracasse* and related cases. After dissolution, whatever confidence the client may have had in Heller is necessarily reduced to zero, because the firm is unable to perform. And the client's need to find new counsel is immediate. In such circumstances, how can Heller have a legitimate expectation of further business?

In response, the Trustee points to language in intermediate court decisions stating that "a partner completing unfinished business cannot cut off the rights of the other partners in the dissolved partnership by the tactic of entering into a 'new' contract to complete such business." *Rosenfeld*, 146 Cal. App. 3d at 219; *see also Jewel*, 156 Cal. App. 3d at 179 (citing *Rosenfeld* with apparent approval). This statement made sense in *Rosenfeld*, a breach of fiduciary duty case where the new retention was in effect a sham transaction, designed by the departing lawyer and the client to deprive the law firm of its property rights in a fee that it was already owed. Similarly, in *Little v. Caldwell*, 101 Cal. 553 (1894), upon which *Rosenfeld*

[4] The firm might have a quantum meruit claim for departed *contingency* matters, but this arises from the fact that, until the contingency ripens into a recovery, the lawyer has been working without compensation and therefore has an equitable interest in a portion of future fees. *See Fracasse*, 6 Cal. 3d at 791.

relied, the discharge and new retention were part of an unlawful scheme by a surviving partner to deprive the heirs of a deceased partner of their equitable share of an ongoing case.

The concerns expressed in those cases, however, plainly have no application here, because neither the client's discharge of Heller nor its retention of the defendant firm was "tactical," lawyer-driven, or in breach of duty. Rather, both were compelled by Heller's inability to provide services and the client's consequent need to retain a new firm that could complete its work. While the issue of client choice may have been illusory in *Rosenfeld* or *Little*, in this case it is authentic, urgent, and compelling. *Fracasse* and its progeny should therefore control.

2.0 THE TRUSTEE'S POSITION IMPERMISSIBLY RESTRICTS CLIENT CHOICE OF COUNSEL AT DISSOLUTION.

California strongly emphasizes the client's right to select and preserve counsel of choice. This policy interest emerges under a variety of rules that, among other things, bar claims for fees that have no connection to value generated for the client, create heightened client protections at dissolution, and forbid certain kinds of fee-sharing. All of those policies weigh against the Trustee's position here.

2.1 A firm may not claim fees that have no relationship whatsoever to the amount of work performed for the client.

In a variety of contexts, California has held that a law firm may not claim or receive compensation that bears no relationship to the work performed or value generated by the firm for the client.

For example, CRPC 4-200 requires fees to be reasonably tethered to the value of services rendered. *See* CRPC 4-200(B)(1). As a consequence, a firm may not receive fees if it does nothing to generate value for the client. *See Champion v. Superior Court*, 201 Cal. App. 3d 777, 782-83 (1988).[5]

Champion exemplifies this principle in circumstances analogous to what the Trustee demands here. In *Champion*, a partner left a partnership and took several pending client matters with him. A provision of the partnership agreement required the departing partner to remit approximately 98% of the fees earned on those matters going forward, regardless of whether the old firm performed any further work for the clients.

The Court of Appeal concluded the fee arrangement was unconscionable under Rule 2-107, the predecessor to CRPC 4-200(B)(1), and voided the provision in the partnership agreement. As the court explained, "These fees have no

[5] Permissible referral fees are consistent with this rule because they tend to "assure the best possible representation for a client" by creating "an economic incentive to less capable lawyers to seek out experienced specialists to handle a case." *Moran v. Harris*, 131 Cal. App. 3d 913, 921-22 (1982).

relationship whatsoever to the amount of service provided or to be provided by the [former] partnership to the client. No consideration is given to the stage of litigation at the time of [the lawyer's] departure. ... A fee of this size, without any relationship to services rendered, must shock the conscience." *Id.* at 782-83.

The Court explained that any other result would convert the departed lawyer into essentially a "partially paid volunteer." *Id.* at 783. As a result, as a "practical matter, the client is deprived of representation by the very lawyer most familiar with the case and most desired by the client." *Id.* The Trustee's position violates the spirit of *Champion*, if not its letter.

A related idea emerges in the caselaw: When a lawyer is unable or unwilling to continue work for a client, the lawyer may not claim the fruit of the successor lawyer's labors. Thus, when a lawyer withdraws from a contingency-fee representation, the lawyer cannot claim any portion of the fee earned by successor counsel in the successful prosecution of the case. *See Rus*, 113 Cal. App. 4th at 671-72.[6]

The rationale is two-fold. First, lawyers should not be able to "capitalize on their own voluntary actions in leaving clients lawyerless." *Id.* at 675. Second, the lawyer should not receive a windfall for work not performed. *Id.* at 675-76. The

[6] At most, the lawyer may recover in quantum meruit from the client for the value of work performed prior to the withdrawal if it was sufficiently justified. *Rus*, 113 Cal. App. 4th at 674-78.

court explained that allowing a lawyer to recover for someone else's work amounts to a "a free ride as to many of the headaches of litigation which he or she otherwise would have had to endure." *Id.* at 676. "[I]t is unassailably unfair to allow him or her to escape that labor absent the most compelling of permissive reasons." *Id.*[7]

The result urged by the Trustee violates the principles of *Champion*, *Rus*, and CRPC 4-200. It would allow the dissolved firm to receive compensation for work it has not performed, cannot perform, and that bears no relationship to any value generated for the client. As discussed further in the following section, it also converts the new firms actually performing the work into "partially paid volunteers," an arrangement inimical to client interests.

2.2 The Trustee's position burdens the client's right to preserve counsel of choice at precisely the time when the client is most vulnerable.

As a matter of public policy, clients have a strong interest in choosing and preserving counsel of choice. This interest is heightened when a law firm dissolves, because the chaos of dissolution can threaten the orderly management of the client's matter. As a result, California has adopted several rules to protect clients during a firm's dissolution. Here, the Trustee seeks a result that both

[7] In certain circumstances, the lawyer may even be required to refund a portion of his or her prior fees to pay the client's expenses in retaining and educating new counsel. American Law Institute, Restatement (Third) of the Law Governing Lawyers § 32, comment *(h)(ii)*(2000).

violates these rules and impermissibly burdens the client's right to choose and preserve counsel.

When a law firm dissolves, its obligations to clients are paramount. Chief among them are the duties to keep its clients informed of the situation and avoid "reasonably foreseeable prejudice" to client interests. *See* CRPC 3-500; CRPC 3-700; California State Bar Formal Opinion No. 2014-190. A key potential for prejudice is the loss of the client's investment—both emotional and financial—in the lawyer who has represented the client to date. *See Kirk v. First American Title Ins. Co.*, 183 Cal. App. 4th 776, 809 (2010) (recognizing the client's interest in continuity of representation).

Client choice is a paramount value: If the dissolution forces the client to choose among different or successor firms, the dissolving firm must advise the client of its right to preserve current counsel or retain new counsel. *See* California State Bar Formal Opinion No. 1985-86. Because the "interests of the clients must prevail over all competing considerations if…the firm's dissolution is to be accomplished in a manner consistent with professional responsibility," all lawyers "involved directly in [the dissolution] have a responsibility to see that the client receives the protections required by this rule." *See id.*

The Trustee's position is inconsistent with these principles. Avoiding prejudice to the client at dissolution requires *maximizing* the client's opportunity to preserve chosen counsel, but the result urged by the Trustee would burden that right in several different ways for the benefit of creditors.

For one, a former Heller partner working on former Heller matters will essentially be working at cost indefinitely—all profits earned from the representation would be remitted to the Trustee. The result extends to any law firm that employs a former Heller partner. This creates strong disincentives for law firms to hire lawyers of a dissolving firm, reducing the quality and range of firms available to clients at precisely the moment when finding new counsel is imperative. It also jeopardizes the client's ability to maintain continuity of representation in those cases where lawyers from the dissolved firm are the best positioned to work on the case going forward.

Even if the client's matter finds a home with a new firm willing to take on a former Heller partner, the Trustee's claim on the profits earned from the client creates a powerful disincentive against optimum work. Although the client will be paying full fees—and should be entitled to the advantages that flow therefrom—the client's lawyers will be working for a sharply reduced rate that simply covers their costs. Inevitably, and despite their professional obligations, the lawyers will be placed under a temptation to devote more time and energy to new matters rather than pending ones inherited from Heller. *See In re Thelen LLP*, 24 N.Y.3d at 32 ("clients might worry that that their hourly fee matters are not getting as much attention as they deserve if the law firm is prevented from profiting from its work on them"). No client would willingly consent to such a misalignment of attorney incentives.[8]

In effect, then, the regime sought by the Trustee puts the former Heller client to an unenviable choice. If the client wishes to continue working with his or her lawyer of choice, the client must accept a radical fee structure that may not adequately incentivize the lawyer, and that limits the number of firms willing to take on the matter at all. In the alternative, the client can find—at the client's cost—new counsel who have no experience or familiarity with the case. This is a serious curtailment of client rights. As the courts have recognized, demanding that a client's lawyer work as a "partially paid volunteer" effectively deprives the client of its choice of counsel. *Champion*, 201 Cal. App. 3d at 783.

Treating hourly fees as unfinished business also conflicts with the client's interests by prolonging the dissolution and winding-up process. Determining the dissolved firm's share of profits in hourly matters may take years—the Trustee is

[8] The *Jewel* court suggested that, under the unfinished business rule it articulated, departed partners would not be working without compensation because (1) they would ultimately receive their allocated share of what would have been the partnership's profits and (2) all partners had an obligation to continue such work and not "free ride" on the labor of the other departed partners. *Jewel*, 156 Cal. App. 3d at 179. Neither rationale is present here. All profits earned by the former Heller partners are claimed by the Trustee, and the former partners are not entitled to share in the compensation generated by anyone else. Unlike in *Jewel*, the former Heller partners are quite literally being asked by the Trustee to work for free or, at most, at cost.

essentially asserting an open-ended right to fees. And the determination itself is likely to involve complex and contested factual questions that are costly to litigate and may well involve (and impose costs upon) the client long after his or her association with the dissolved law firm has ended.

In short, instead of putting the "interests of the clients" ahead of "all competing considerations," *see* California State Bar Formal Opinion No. 1985-86, *supra*, the Trustee's approach subordinates those interests to the dissolved firm's creditors. It is no surprise, then, that commentators have argued for a rule that terminates a firm's claim on pending hourly matters when the firm is discharged and new counsel is hired. *See, e.g.*, Robert Hillman, LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS § 4.11.4 at 4:156-57 (Supp. 2013) (suggesting that clients will benefit from a rule that client termination of the dissolved firm also terminates obligations to allocate income among former partners). This rule flows naturally from the protection of client interests and the right to preserve counsel of choice—interests the Trustee wholly ignores.

2.3 The Trustee's position is inconsistent with California's fee-sharing rules.

The result urged by the Trustee is also inconsistent with California's fee-sharing rules. California prohibits fee-sharing among separate firms unless the client provides informed written consent to the fact and "terms of such division." CRPC 2-200(a). Fee-sharing between a lawyer and non-lawyer is absolutely barred except under narrow circumstances not present here. CRPC 1-320.

The purpose of CRPC 2-200 is to ensure the client is fully informed about who is working on his or her case—and to guard against fee arrangements that misalign the interests of the lawyers and the client. As the courts have explained, fee-sharing can create mismatches between which lawyer does the work and which collects the fee, potentially affecting the "tactical decisions in the litigation." *Mark v. Spencer*, 166 Cal. App. 4th 219, 225 (2008); *see also Chambers v. Kay*, 29 Cal. 4th 142, 156-57 (2002). Therefore, the client is entitled to understand *and reject* such an arrangement. *Chambers*, 29 Cal. 4th at 157.

The fee-sharing rule is not merely prophylactic. Even when two lawyers work under a fee-sharing agreement, the client is entitled to terminate the fee-share at any time by discharging one of the two attorneys. The discharged attorney is thereafter limited to a quantum meruit recovery based on work performed prior to discharge. *See Olsen*, 191 Cal. App. 4th at 341 (when joint representation ends, any fee-sharing arrangement "cease[s] to exist" as well). The result may burden the attorney, but it flows from the client's right to hire and fire. *See id.*[9]

[9] In articulating the unfinished business doctrine, *Jewel* suggested the client has "no concern" about how his or her fee is divided once paid. *Jewel*, 156 Cal. App. 3d at 178. This is simply incorrect. For one, the client *does* have an interest

CRPC 1-320, prohibiting fee-sharing with non-lawyers, has a similar but starker rationale. The prohibition ensures that the independence and judgment of the lawyer is not restricted or degraded by the financial interests of a non-lawyer who does not have the same ethical and professional obligations. *See McIntosh v. Mills*, 121 Cal. App. 4th 333, 345-46 (2004) (summarizing numerous conflicts that can arise when fees are shared with non-lawyers). The rule guards against the "possibility of control by the lay person, interested in his own profit rather than the client's fate." *Id.* at 345. It also recognizes that, as with CRPC 2-200, "the attorney's handling of the matter may be adversely affected if the fee-sharing agreement turns out to be disadvantageous to the attorney as the case unfolds." *Id.* at 345 n.15.

The arrangement sought by the Trustee is inconsistent with the policies animating CRPC 2-200 and 1-320—if not their text.[10] The new firms are forced

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in how a fee is apportioned, which is precisely why CRPC 2-200 exists and requires informed consent. For another, *Jewel* considered only arrangements dividing fees *after* they were paid. Here, the Trustee seeks a rule that is wholly prospective and creates a pressure on an ongoing client representation.

[10] *Anderson, McPharlin & Connors v. Yee*, 135 Cal. App. 4th 129 (2005), is not to the contrary. That case concerned a provision of a partnership agreement that required a lawyer leaving the firm to pay a limited portion of certain future fees: 25% of revenues received from matters pending at the firm at the time of departure, for a period of 24 months. The Court of Appeal held that this provision did not involve prohibited fee-sharing because it was originally entered into between partners in the same firm (and not between separate firms), and because it was intended not as a division of fees, but as a "termination payment" to compensate the former law firm for the costs of generating the business that the

to remit fees to a separate dissolved law firm. More realistically, the fees are being shared with Heller's non-lawyer creditors. The creditors have no fiduciary or contractual relationship with the client, have no professional obligations, and are free to maximize their economic interests, yet seek to assert a property right in the client's case.

More importantly—and regardless of how the Trustee's property interest is classified—the remittance of client fees would occur despite the fact that (1) the client has not consented to the arrangement; (2) the client is unable to terminate the arrangement; and (3) the arrangement creates a stark misalignment of incentives that no client would voluntarily adopt. The fact that the Trustee's arrangement leads to many of the same dangers as fee-sharing without client consent counsels strongly against its adoption here.

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firm had lost. *Anderson's* facts bear no resemblance to this case. Here, there is no agreement between Heller's partners establishing that hourly matters are the property of the firm, nor could there be. Moreover, it is clear that the arrangement urged by the Trustee would require sharing of fees between wholly separate law firms. Further, the remedy sought by the Trustee is not a time-limited termination payment, but rather a forward-looking and potentially open-ended claim to all post-dissolution profits. Finally, there was no evidence in *Anderson* that any client of the former firm had objected to the agreement. Here, in contrast, it is clear that many have done so. In short, the potential evils that the rule against fee-sharing is intended to prevent are fully present here in a manner not at issue in *Anderson*.

3.0 THE TRUSTEE'S POSITION WILL DESTABILIZE LAW FIRMS TO THE DETRIMENT OF CLIENTS, AND DOES NOT ADVANCE ANY PRO-COMPETITIVE INTERESTS.

3.1 The Trustee's regime will encourage lawyers to leave firms as soon as those firms encounter fiscal difficulty.

The California Supreme Court has recognized that law firms have a legitimate interest in their own economic stability. Such stability also benefits the client by ensuring the quality and continuity of representation. *See Howard v. Babcock*, 6 Cal. 4th 409, 424 (1993). *Jewel* itself argued that its interpretation of the unfinished business rule would promote stability by preventing partners from "competing [with each other] for the most remunerative cases" in the expectation of a dissolution that would work to their benefit. *Jewel*, 156 Cal. App. 3d at 179.

But the result sought by the Trustee will have exactly the opposite effect here. It will destabilize law firms and hasten their dissolution, to the detriment of clients.

Consider a firm facing financial uncertainty—as almost all do at some point. If a partner leaves the firm prior to dissolution, and his or her hourly clients follow, the former firm has no claim against either the departed lawyer or the new firm, even if the former firm subsequently dissolves. On the other hand, if the lawyer decides to stay with the firm in an effort to save it, and the firm subsequently dissolves, both the lawyer and his or her new firm are subject to the Trustee's claims. As Judge Breyer correctly observed in the decision below, the effect of this dichotomy is to encourage lawyers to jump ship at the first sign of trouble, rather than remain with their firm to try to save it.

In such circumstances, the client also has an interest in leaving rather than staying (or, more particularly, in encouraging the lawyer to leave so the client can follow), in order to avoid the debilitating incentive structure outlined in Section 2.1. This, in turn, raises issues about how and when the lawyer should inform the client about a firm's potential dissolution.

Consider the situation of an experienced lawyer at a firm facing some risk of dissolution. The lawyer is handling several large hourly fee cases for a single client. The lawyer knows that the cases require the support and resources of a very large firm, and that the range of firms willing to take on the matters will materially shrink once dissolution occurs. In such circumstances, the lawyer may well feel that he or she has an ethical obligation to find a new firm as soon as possible, and to advise the client to retain the new firm as soon as practicable. Yet at the same time, the lawyer has continuing ethical and professional obligations to the current firm.

To be sure, the specific duties of the lawyer in this situation are not well-settled and must be determined on a case-by-case basis. *See generally* California State Bar Formal Opinion 2014-190 at n. 3 (noting the issue of an obligation to advise the client concerning a potential dissolution remains open). What is settled is that the Trustee seeks a result that, going forward, will necessarily destabilize law firms and put lawyers in a quandary if they suspect their firm is at risk of bankruptcy.

3.2 California caselaw allowing reasonable partnership provisions to protect firm stability and promote competition counsels against the result sought by the Trustee.

California has held that, in the interest of promoting law firm stability, partnerships may adopt reasonable contractual limits on a departing partner's ability to compete with his or her former firm. *Babcock*, 6 Cal. 4th at 425; *see also Anderson*, 135 Cal. App. 4th at 133-35. The Trustee leans heavily on *Babcock* to argue for a property interest in hourly matters and to suggest, more broadly, that California's approval of these limited restrictions somehow alleviates or eliminates the client-protecting ethical concerns discussed above. But *Babcock* is fundamentally concerned with preserving legitimate law firm competition—something that inures to the client's benefit—and not the parameters of a dissolution forced by creditors. Equally important, *Babcock's* animating concern with law firm stability weighs strongly *against* the result sought by the Trustee here.

In *Babcock*, the Supreme Court addressed whether a law partnership could enforce a provision of its partnership agreement that required a withdrawing partner to forfeit a portion of his withdrawal benefits if the departing partner competed with the firm in the same geographic area in the subsequent year. The forfeited benefits consisted of a share of future net profits that would have accrued to the partner had he stayed at the firm.

The Supreme Court held that the plain language of Business and Professions Code section 16602, authorizing partnerships to agree to reasonable post-dissolution restrictions on competition, required enforcement of the provision. The Court then concluded that the rules of professional responsibility did not compel a different result, because the restriction was reasonable, narrowly tailored, and consistent with CRPC 1-500, which forbids an agreement that "restricts the right of a member to practice law." *See Babcock*, 6 Cal. 4th at 418-19.

The Court also held that the provision promoted law firm stability, an important value for both lawyers and clients, and did not unduly limit competition or lawyer mobility. *See Babcock*, 6 Cal. 4th at 424 ("a noncompetition agreement, or a penalty for competition, may actually serve clients as well as the financial well-being of the law firm. Without such an agreement, the culture of mistrust that results from systemic grabbing is very likely to damage, if not destroy, the law firm's stability") (quotations omitted).[11]

[11] Similarly, in *Anderson*, the Court of Appeal upheld a partnership provision that required a departing partner to remit, for two years, 25% of fees earned from firm clients who followed the partner to his new firm, citing *Babcock*. *Anderson*, 135 Cal. App. 4th at 131-32.

Babcock and related cases do not support the Trustee's position. If anything, they compel the opposite conclusion. To begin, *Babcock* is concerned with competition between a firm and its departed partner. It presumes that the partner has a choice to stay or go; that the client has a choice between the former firm and the new one; and that law firm stability is promoted by permitting partners to set the terms of their departure by contract. *Babcock*, 6 Cal. 4th at 423-25.

Here, though, the circumstances are entirely different. The former Heller partner is not voluntarily leaving Heller to compete with Heller. The lawyer is leaving because there is no option to stay. Heller cannot compete with its former partners for business—it cannot perform legal services at all. And the client does not have an informed choice between old and new counsel; it has no choice but to retain a new firm. Both the factual scenario and policy rationale underlying *Babcock*—preserving legitimate firm competition—are simply not in play here.[12]

[12] Two other aspects of *Babcock* distinguish it. First, the Supreme Court concluded that approval of the contractual restrictions was statutorily compelled by Business & Professions Code section 16602. There is no similar legislative directive in modern partnership law or elsewhere requiring pending hourly fee matters to be treated as unfinished business at dissolution. Second, *Babcock* enforced a partnership provision that was freely entered into by all parties—including the departed lawyer who later sought to escape its effect. Here, in contrast, not only is there no contract compelling the result sought by the Trustee, but the Trustee seeks a default rule that would *override* Heller's contractual election *not* to treat hourly matters as unfinished business. There is a world of difference between enforcing a contract—as the Court did in *Babcock*—and adopting a default rule that *cannot be overridden by contract* even though it creates serious ethical problems, destabilizes firms, and restricts client choice.

What *are* in play are two other powerful interests animating *Babcock*: law firm stability and client choice. As noted above, *Babcock* reasoned that narrow contractual restrictions on a departing partner promote law firm stability, and thus ultimately work to the client's benefit. In this case, however, as shown in Section 3.1, the regime urged by the Trustee would *destabilize* firms, encourage the exit of partners, and hasten the firms' demise. To the extent *Babcock* prioritizes the benefits of firm stability, the case supports the conclusion of the district court below, not the Trustee.

Second, *Babcock* reiterated the importance of client choice of counsel, but found that the effect of the partnership restriction on this interest was *de minimis*. If the lawyer chose to compete with his former firm, the lawyer only forfeited what was in effect a bonus. The departing lawyer was free to retain all profits earned by new business. Client choice was almost completely unimpaired. As the Court explained, the minor "toll" on competition it upheld would not discourage continued representation, and therefore was reasonable. *Babcock*, 6 Cal. 4th at 423-24.

Here, however, the Trustee seeks a result that impairs client choice far more severely than the modest restriction upheld in *Babcock*, and therefore would be unlikely to survive the Court's scrutiny. As discussed above, the former Heller partners are forced to work at cost. And the firms hiring those partners are forced to forfeit all profit earned on hourly matters, discouraging them from taking on former Heller partners or clients in the first place. Nothing in *Babcock* can be read as approving a forfeiture of this kind and its concomitant limits on lawyer mobility and client choice.[13]

In short, the Supreme Court's holding in *Babcock*—cautious approval of a limited restriction on law firm competition—is largely irrelevant to whether a dissolved firm has a property interest in hourly fee matters. To the extent *Babcock* is relevant, the important client-serving interests in firm stability and lawyer mobility that *Babcock* identified both weigh heavily against the result urged by the Trustee. Finally, *Babcock*, like *Fracasse* and *Chambers*, illustrates the Supreme Court's abiding concern with harmonizing rules of general application—like the laws of property and partnership in this case—with the Rules of Professional Conduct and client protection. That concern strongly suggests that, far from agreeing with the Trustee, the Supreme Court would reject a novel extension of *Jewel* that harms client interests in so many obvious and immediate ways.

[13] For similar reasons, *Anderson* does not support treating hourly fee cases as assets of a dissolving firm. *Anderson* concerns an express agreement governing competition following withdrawal from a firm. It says nothing about the content of a default rule for allocating fees following a firm's dissolution under threat of bankruptcy, where by definition the new firms will not be competitors of the old. Moreover, while the Court of Appeal's decision does not consider or discuss the impact of the contractual provisions upon lawyer incentives and client choice, it is apparent that the provision there was much more limited, both in time and impact, than the effect of the rule proposed by the Trustee here.

CONCLUSION

The Trustee seeks a result that is barred by California law and harmful to clients. The decision of Judge Breyer, by contrast, correctly identifies the controlling authority, respects client interests, and advances important public policies. For these reasons, *amici* respectfully urge affirmance of the decision below.

Dated: February 24, 2015

Respectfully submitted,

/s/ Joshua R. Benson
Joshua R. Benson
Taylor & Company Law Offices, LLP

/s/ Stephen McG. Bundy
Stephen McG. Bundy
School of Law (Boalt Hall)
University of California, Berkeley

Counsel for Amici Curiae
The Bar Association of San Francisco and
the Los Angeles County Bar Association
in Support of Defendant-Appellee and Affirmance

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32 and Rule 29 of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 6,979 words.

Dated: February 24, 2015

/s/ Joshua R. Benson
Joshua R. Benson
Taylor & Company Law Offices, LLP

CERTIFICATE OF SERVICE

I hereby certify that on February 24, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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s/ Stephen Moore
Senior Appellate Paralegal
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