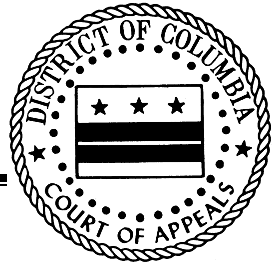

Clerk of the Court
Received 07/12/2018 07:20 PM
Filed 07/12/2018 07:20 PM

No. 18-SP-0218

In the
District of Columbia Court of Appeals

ALLAN B. DIAMOND,
CHAPTER 7 TRUSTEE OF HOWREY LLP,
Appellant,

v.

BENSON KASOWITZ, ET AL.,
Appellees.

On Questions Certified by the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

The Bar Association of the District of Columbia (BADC) respectfully submits this brief as *amicus curiae* in support of Appellees. Founded in 1871, the BADC is a non-profit organization that serves as the oldest private voluntary association of lawyers practicing in the District of Columbia. The BADC and its members have a long and proud history of working closely with the judiciary, courts, the D.C. council, and the U.S. Congress on the administration of justice. As the District of Columbia's voluntary bar, it lobbies on behalf of its members, provides a reduced fee lawyer referral service, and mentors young lawyers.

The Ninth Circuit has asked this Court to consider the Trustee's extreme conception of the so-called "unfinished business rule," under which a law firm that is no longer able to provide legal services because it has dissolved would retain a perennial right to profits on hourly client matters that originated at that firm, even though the clients who own those matters fired the now-defunct law firm and took their matters to other firms. As the Ninth Circuit recognized, the adoption of such a rule would have sweeping implications "for D.C. attorneys and their clients." *Diamond v. Hogan Lovells US LLP*, 883 F.3d 1140, 1147 (9th Cir. 2018).

As part of its ongoing mission to promote the competence, ethical conduct, and professionalism of attorneys practicing in the District of Columbia, the BADC

[1] All parties have consented to the filing of this brief. *See* D.C. Ct. App. R. 29(a)(2).

has a direct interest in ensuring that the Court's decision in this case fully accounts for the interests of both clients and the attorneys who represent them. As explained below, a proper accounting for those interests, as well as other considerations, should result in this Court's rejection of the Trustee's position.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the wake of the 2008 financial crisis, Howrey LLP—once a well-known, national law firm—collapsed due to its own financial problems. The firm was insolvent by early 2010 and in bankruptcy by 2011. The firm's Trustee now seeks to obtain millions of dollars in profits for legal work that Howrey did not provide. And he seeks to do so through a novel view of partnership law that relegates clients and their pending hourly matters to partnership property. As the Appellees explain, this view of clients and their matters is fundamentally flawed. The Court should instead follow the path marked by the high courts of California and New York, which have correctly held that "a dissolved law partnership is not entitled to profits derived from its former partners' work on unfinished hourly fee matters." *Heller Ehrman LLP v. Davis Wright Tremaine LLP*, 411 P.3d 548, 551 (Cal. 2018); *accord In re Thelen LLP*, 20 N.E.3d 264, 266-67 (N.Y. 2014).

BADC agrees with the legal arguments in the Appellees' brief. This brief focuses on the harmful practical consequences that adoption of the Trustee's radical conception of the "unfinished business rule" would have on lawyers and

their clients in the District of Columbia. The Trustee's proposed rule would adversely disrupt the attorney-client relationship and, indeed, runs headlong into the principle that clients—not law firms—own and control their legal matters.

In the District of Columbia, as elsewhere, clients have the right to select and discharge their attorneys. The Trustee's proposed rule eviscerates that right by allowing a law firm to lay claim to a client's matter (and future profits from that matter) even after the client expressly discharges that firm and engages a separate law firm to do new work on the matter. The Trustee's rule also makes it more difficult for the client's selected attorney to find new employment after leaving a firm, thereby limiting the representation choices available to the client.

The Trustee's proposed rule is also incompatible with the modern legal marketplace in which lawyers frequently move among firms to provide clients the best possible representation. Forcing law firms to remit profits to a discharged (and defunct) law firm—and thus forgo profits on work for which the firm expended labor and capital—would substantially hinder D.C. lawyers' professional autonomy. The Trustee's rule also would impose an unworkable regime on the courts, requiring courts to divine whether a matter is sufficiently "new" such that the law firm that performed the work is compensated for doing so.

Nothing in existing law requires subjecting the practice of law in the District of Columbia to such an impractical regime. Indeed, this Court has often

"eschew[ed]" rules that, like the Trustee's proposal here, "would be disruptive" and in tension with "[the] Rules of Professional Conduct." *Galloway v. Clay*, 861 A.2d 30, 35 (D.C. 2004); *see also, e.g.*, *Copeland v. D.C. Dep't of Emp't Servs.*, 3 A.3d 331, 335-36 (D.C. 2010); *Coulter v. Gerald Family Care, P.C.*, 964 A.2d 170, 187 (D.C. 2009), *disapproved on other grounds by Cormier v. D.C. Water & Sewer Auth.*, 84 A.3d 492 (D.C. 2013). There is no reason for this Court to follow any different path in answering the important questions certified to it here.

Instead, the Court should respect the time-honored principles that client matters belong to clients (not law firms), and that lawyers are paid for the work they perform, and reject the Trustee's proposed rule.

ARGUMENT

The Trustee argues that, when a client discharges one firm and decides to follow a former lawyer of that firm to another law firm, the discharged firm retains a right to any profits earned by the new firm for any additional work performed on the matter at the new firm, as long as the matter was "unfinished" at the time of the lawyer's departure. Trustee Br. 25. The Trustee claims this counter-intuitive rule is supported by "well-established case law." *Id.* at 4. But in fact, the Trustee bases his argument on little more than a string of negative inferences from inapposite cases that ultimately provide "no indication" one way or another whether the so-called "unfinished business rule" should apply in this context. *Id.* at 26. The truth

is that there is no direct support for the Trustee's position. And for good reason—the adoption of such a rule would dramatically curtail clients' ability to choose their lawyer and law firm and disrupt the modern practice of law.

I. THE TRUSTEE'S PROPOSED EXPANSION OF THE "UNFINISHED BUSINESS RULE" WILL SIGNIFICANTLY HARM CLIENTS

One thing is clear at the outset: The Trustee's proposed rule would inflict significant harm on clients. Client matters belong to clients—not law firms. Accordingly, clients have a right to their counsel of choice and the right to discharge counsel and take their matters elsewhere. The Trustee's novel expansion of the "unfinished business rule" to extend it to work on hourly matters for which Howrey was fired would dramatically curtail these rights, placing clients in the middle of a conflict between a dissolved law firm's creditors and a solvent law firm that expects to be paid for hourly work performed by its lawyers. These untenable results are reason enough to reject the Trustee's position.

A. Clients Have A Right To Select And Discharge The Legal Representatives Handling Their Matters

The Trustee describes clients and their matters as "property" that a departing partner might "take" with him or her—like a note pad or a set of the U.S. Code—from the dissolving firm and bring to the new firm. Trustee Br. 31; *see also id.* at 34 (describing client matters as "assets" subject to being "pilfer[ed]"). That view is profoundly mistaken. Clients are not firm property, and client matters ultimately

belong to the clients themselves, not the law firms they retain. Accordingly, clients have a right to decide who will handle those matters, and who will not.

It is well settled in the District of Columbia that "[c]lients are not merchandise" of a law firm. *Neuman v. Akman*, 715 A.2d 127, 131 (D.C. 1998) (citation omitted); *cf.* D.C. R. Prof'l Conduct 1.17 cmt. 1 ("Clients are not commodities that can be purchased and sold at will.").[2] Nor are their matters—clients who bring their matters to law firms always maintain the "ultimate authority to determine the purposes to be served by legal representation." D.C. R. Prof'l Conduct 1.2 cmt. 1. Clients can unilaterally limit the scope of the representation and determine when to cease the representation altogether. In short, "client matters belong to the clients, not the law firms." *Heller Ehrman*, 411 P.3d at 556.

Because clients own their matters, D.C. law protects clients' ability to choose the lawyers and law firms that will handle them. There can be no question that "[a]ttorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues." *Douglas v. United States*, 488 A.2d 121, 142 n.27 (D.C. 1985) (citation omitted). As a result, this Court has long avoided rules that "prevent or unduly hinder clients from obtaining legal representation from

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[2] This lack of ownership sets clients apart from "a trade secret developed jointly by the partnership." Trustee Br. 31.

attorneys of their own choosing." *Neuman*, 715 A.2d at 131 (citation omitted). That remains true even for attorneys "who may have formed new associations." *Id.* And subsumed within "the client's right to choose his or her counsel" is "the client's unfettered right to discharge an attorney." *In re Mance*, 980 A.2d 1196, 1203 (D.C. 2009); *see* D.C. R. Prof'l Conduct 1.16 cmt. 4 ("A client has a right to discharge a lawyer at any time, *with or without cause*, subject to liability for payment for the lawyer's services." (emphasis added)).

Clients, in other words, have ownership and authority over their own matters, including a right to choose who will represent them and who will not. This control, and the ultimately the right of clients to switch lawyers or firms, is vital to the health of the attorney-client relationship. Clients often entrust lawyers with their most sensitive and important issues. They must have the "ultimate trust and confidence" that their chosen lawyers will represent them zealously. *Mance*, 980 A.2d at 1203. This system thus demands that clients be able to take their matters from one attorney to another as they see fit, and this Court accordingly has forcefully rejected arrangements that would "substantially alter[] and economically chill[] the client's unbridled prerogative to walk away from the lawyer." *Mance*, 980 A.2d at 1204 (quoting *In re Cooperman*, 633 N.E.2d 1069, 1072 (N.Y. 1994)); *see also, e.g.*, Restatement (Third) of the Law Governing Lawyers § 32 cmt. b (2000) ("A client is not forced to entrust matters to an unwanted lawyer.").

The unilateral control that clients possess over their matters has ethical consequences for the lawyers and law firms who work on them. When a client decides to exercise the right to discharge an attorney, the discharged attorney is entitled only to fees that "have been earned in light of the scope of the representation" as dictated by the client. *Mance*, 980 A.2d at 1205. The discharged attorney must "refund[] any advance payment of fee or expense that has not been earned or incurred." D.C. R. Prof'l Conduct 1.16(d). This flows from the general rule that an attorney "cannot earn a fee for doing nothing"—rather, an attorney "earns fees only by conferring a benefit on or performing a legal service for the client." *Mance*, 980 A.2d at 1202 (citation omitted).

These principles lead to the inevitable conclusion that, after being fired by its clients, Howrey had no continuing interest in those clients' matters for work performed by a subsequent firm engaged by the client. Indeed, given Howrey's dissolution, Howrey's clients were *forced* to discharge Howrey and substitute new law firms to bring their matters to a conclusion. There is no basis for granting a law firm an indefinite claim to further hourly fees for work performed by another law firm after the initial firm that handled the matter has been discharged.

B. Giving Law Firms A Future Interest In Hourly Client Matters Would Impair Clients' Ability To Select Their Legal Representatives

As the high courts in both New York and California have already concluded, the rule advanced by the Trustee in this case—which treats continuing profits from client matters for hourly work performed by a new law firm as "unfinished business" of Howrey and subject to claw back by Howrey and its creditors—is fundamentally at odds with clients' right to choose their legal representatives. *See Heller Ehrman*, 411 P.3d at 556; *Thelen*, 20 N.E.3d at 273.

First, requiring a newly-hired law firm to remit profits to a former law firm flouts the fact that the client *discharged* the former firm. Clients may discharge law firms or lawyers for any number of reasons—*e.g.,* they may need different expertise to address a new problem or different rates to accommodate their budgets, or they may simply not like something about their current firm. *See, e.g.*, Aric Press, *Why Clients Hire and Fire Law Firms*, Am. Lawyer (Sept. 9, 2013), https://at.law.com/3xGtbM. Or, as is the case here, the client may find that their current firm is on a slide to bankruptcy or dissolution and therefore is unable to continue to represent them. Regardless of the reason, the discharged firm no longer has any entitlement to compensation for future work performed on the matter at the new firm. *See Mance*, 980 A.2d at 1202-03. Forcing clients to

continue to subsidize a firm that they have explicitly fired is totally inconsistent with clients' "unfettered right to discharge" that firm. *Id.* at 1203.

The Trustee tries to avoid this conclusion by invoking the so-called "unfinished business rule." But the necessary premise of that rule is missing here—once Howrey's clients fired Howrey and moved their matters to other firms, those matters were "finished" as far as Howrey (and its creditors) were concerned. Even the Trustee's own brief describes the "unfinished business rule" as applying to "unfinished business *remaining with the firm* on [the date of dissolution]." Trustee Br. 22 (emphasis added) (alteration in original) (quoting *Denver v. Roane*, 99 U.S. 355, 358 (1878)). But when a client discharges a firm, the client's "business," and certainly its *future* business, no longer "remain[s] with the firm."

That discharge alone distinguishes this case from *Beckman v. Farmer*, 579 A.2d 618 (D.C. 1990). There, the Court treated "pending contingent fee case[s]" as "uncompleted transactions" and "assets of the partnership" because, after dissolution of the partnership, a subset of the partners continued to "perform under" "*pre-existing contracts* between the partnership and its clients" that had been executed before dissolution. *Id.* at 636 & n.27 (emphasis added); *accord Young v. Delaney*, 647 A.2d 784, 787-88 (D.C. 1994) (applying *Beckman* where a subset of partners continued to represent a dissolved partnership's clients after dissolution). Because those "pre-existing contracts" were "*not* terminate[d] or

discharge[d]," the work "perform[ed] under such contracts" was "work performed on *partnership business*." *Beckman*, 579 A.2d at 636, 639 (emphasis added).

In other words, "continuity of a retention agreement is the touchstone" of applying the unfinished business rule. *Hogan Lovells US LLP v. Howrey LLP*, 531 B.R. 814, 823-24 (N.D. Cal. 2015). And that touchstone is missing here. The Trustee has not even alleged that the work performed by lawyers who left Howrey was performed under old retainer agreements, as opposed to *new* retainer agreements with different firms. Howrey's interest in matters it had previously handled, under old retainer agreements, necessarily ceased.

Beckman is also distinguishable in that the disputed fees there resulted from "contingent fee work," which was "distinct from" work "payable on an hourly basis." 579 A.2d at 623-24. In a contingent fee arrangement, fees are based on the ultimate "outcome of the suit," *id.* at 623, with the attorneys generally entitled to their share of "the full amount specified in the fee agreement," *In re Waller*, 524 A.2d 748, 750 (D.C. 1987) (citation omitted). In an hourly fee arrangement, by contrast, fees are based on the number of hours spent actually "conferring a benefit on or performing a legal service for the client." *Mance*, 980 A.2d at 1202 (citation omitted). In neither instance may a lawyer "earn a fee for doing nothing," *id.* at 1203 (citation omitted), which is what the Trustee proposes here.

Second, if the Trustee's position prevails in this case—such that a newly-retained law firm must disgorge its profits to the dissolved law firm merely because a partner of the dissolved firm moved to the newly-retained firm—clients will face two options: (1) jettison the lawyer that they retained at the outset of the case and start afresh with a new lawyer; or (2) try to convince their initially-retained lawyer who previously handled the matter (and that lawyer's new firm) to complete the matter without being fully compensated for doing so.

Only the second option preserves the client's choice of counsel, and it is infeasible. Few firms will find it financially sustainable to take on matters when "a substantial portion of the resulting profits may be turned over to the dissolved law firm or its creditors." *In re Thelen LLP*, 736 F.3d 213, 223 (2d Cir. 2013). This problem is compounded when the dissolved firm is insolvent—the new firm would not even be entitled to the share of the partner's profits "in accordance with [his or her] respective percentage interest[] in the former partnership," *Jewel v. Boxer*, 156 Cal. App. 3d 171, 180 (1984), because *all* of the profits would go to the dissolved firm's creditors. And even if the new firm is able to take on such matters, clients would understandably fear that they "are not getting as much attention as they deserve if the law firm is prevented from profiting from its work on them." *Thelen*, 20 N.E.3d at 273. In these circumstances, clients may feel compelled to "opt for second-choice counsel." *Heller*, 411 P.3d at 556. "In other words,

allocating fees to [the dissolved firm] alters the freedom that clients have in choosing attorneys after [that firm] stopped representing them." *Id.*

This concern is especially acute for litigation matters, which are inherently open-ended and can persist for years in a way that lawyers often cannot control. Having to complete ongoing litigation matters for the economic benefit of the creditors of a dissolved firm (and to the economic detriment of the lawyer's new firm) will make it extremely difficult for litigators to move to new firms at all. As a result, clients in extended litigation are more likely to face the undesirable consequences of the Trustee's rule—they will have to find new counsel.

II. THE TRUSTEE'S PROPOSED RULE IS INCOMPATIBLE WITH THE MODERN PRACTICE OF LAW

The Trustee's position also ignores the realities of the modern practice of law, in the District of Columbia and elsewhere, including increasing lawyer mobility. In a world where partners routinely change firms, saddling firms with the specter of an indefinite payment obligation to a lawyer's prior firm simply because a client chose to follow him or her to a new firm would have a significantly negative "impact[] on the lawyers who practice in Washington D.C." and disrupt "modern legal practice." *Diamond*, 883 F.3d at 1148.

A. Lawyer Mobility Is A Reality Of The Modern Practice Of Law

The simple fact is that "[l]ateraling between firms is the reality of law practice today and has been the reality for many years." *Hogan Lovells*, 531 B.R.

at 828. Clients select among lawyers and firms, and lawyers often move between firms to provide clients the best possible representation.

The era of lawyer mobility and lateral hiring began in the 1980s, and has increased ever since. No longer do lawyers expect "that where you start will be where you finish." MP McQueen, *The Big Law Lateral Hiring Frenzy Continues*, Am. Lawyer (Feb. 1, 2016), https://at.law.com/QUu5LC. That stands in stark contrast to the legal landscape about "a half-century ago when lawyers might reasonably expect to remain with the same firm for their entire careers." Jack P. Sahl, *Thinking About Leaving? The Ethics of Departing One Firm for Another*, 19 Prof. Lawyer, no. 1, 2008, at 2, 2. But by as early as 1987, Chief Justice Rehnquist took note of the growing trend that "[p]artners in law firms have become increasingly 'mobile,' feeling much freer than they formerly did and having much greater opportunity than they formerly did, to shift from one firm to another and take revenue-producing clients with them." Hon. William H. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 152 (1987).

Today, "many lawyers . . . move from one association to another several times in their careers." D.C. R. Prof'l Conduct 1.10 cmt. 8. Indeed, lawyer movement among firms is commonplace in the modern legal profession. *See* Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers' Career Paths*, 31 J.

Legal Prof. 199, 199-200 (2007) ("'[M]ovement by lawyers between law firms has become institutionalized, universal, and routine.' . . . Lawyer mobility is the 'hottest ticket in town,' a way of life for large law firms, and a common characteristic of the practice of law." (citations omitted)).

The statistics bear this out. "In the years since the Great Recession, lateral partner moves at big law firms have increased significantly." Geo. L. Ctr. for Study of L. Prof'n, *2017 Report On The State Of The Legal Market* 12-13 (2017). "[I]n 2007, nearly 2,500 partners moved to or from one of the 200 largest private firms in the United States," a figure reflecting a 12.5% increase from 2006. Cassandra Melton, *Model Rule 1.10: Imputation of Conflicts and Private Law Firm Screening*, Am. Bar Ass'n: Pretrial Practice & Discovery (Fall 2009), http://apps.americanbar.org/litigation/litigationnews/trial_skills/pretrial-model-rule-110.html. In 2016, that number had risen to 2,890. *See* McQueen, *supra*.

A lawyer may seek to move laterally between firms for a host of different reasons: a burgeoning specialization, an effort to meet client demands for greater resources or expertise in a particular subject area, a need for a different geographic footprint, or a desire to have fewer firm-wide conflicts. *See, e.g.*, Kenneth E. Young, *Lateral Growth Is the New Normal*, 39 Law Prac. 68, 68 (2013) (describing reasons for lateral movement). Or, as happened here, lawyers may simply need a landing spot after the dissolution of the firm at which they had

worked. *See, e.g.*, Ross Todd, *Lateral Report 2009: The Accidental Laterals*, Am. Lawyer (Feb. 2009), https://at.law.com/U51UG4 (describing efforts by lawyers formerly employed by Thelen and Heller Ehrman to lateral to new firms in the wake of each firm's dissolution). Preserving lawyer mobility helps ensure that each lawyer can practice where he or she can best meet their clients' needs.

D.C. ethics rules recognize and seek to facilitate this movement, in large part by prohibiting "agreements that expressly or impliedly restrict a lawyer's practice." D.C. Legal Ethics Comm., Ethics Op. 368 (2015) (discussing D.C. R. Prof'l Conduct 5.6(a)); *see* D.C. R. Prof'l Conduct 5.6 cmt. 1 ("An agreement restricting the right of partners or associates to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."). As this Court has recognized, prohibiting such agreements serves "as a mechanism 'to protect the ability of clients to obtain lawyers of their own choosing and to enable lawyers to advance their careers.'" *Neuman*, 715 A.2d at 131 (quoting D.C. Legal Ethics Comm., Ethics Op. 241 (1993)). And of course, arrangements "that unduly restrict the ability of lawyers to change relationships" or "form[] new associations" are at odds with this protection. *Id.* (quoting D.C. Legal Ethics Comm., Ethics Op. 181 (1987)); *see also* D.C. Legal Ethics Comm., Ethics Op. 372 (2017) ("A long line of Opinions of this Committee (most recently Opinion 368, Lawyer Employment Agreements—Restrictions on Departing

Lawyer Who Competes with Former Firm (2015)) has disapproved various restrictions on the mobility of lawyers as a matter of public policy. Underlying each of these Opinions is the intent to preserve clients' access to lawyers who, because of their background and experience, might be the best available talent to represent them.").

In addition to benefitting lawyers and clients, lawyer mobility forms an important part of running an effective and economically viable firm—an important objective for both the firm's members and its clients. From a firm's perspective, hiring laterals can fill a need, avoid the expense of training other lawyers, develop an expertise, and lead to cost savings for clients. Lawyer mobility thus enhances competition among firms and the provision of legal services, which ultimately redounds to clients' benefit. Clients served by smaller firms and organizations benefit from lawyer mobility as well. Lawyers with experiences in bigger firms, for example, can bring those experiences to smaller firms to the benefit of a different client base. *See, e.g.*, Todd, *supra* (describing lawyers moving to smaller firms after the dissolution of large firms). Likewise, lawyers from smaller firms may be able to offer benefits to their clients by moving to larger firms in a larger market, benefits such as a broader access to a variety of services and specialties.

Ultimately, the legal marketplace is dynamic—clients seek the best representation, and lawyers seek the professional circumstances that allow them to

serve those clients. It is thus imperative that the Court avoid any rule that would pose a "radical curtailment of the opportunity of lawyers to move from one practice setting to another." D.C. R. Prof'l Conduct 1.10 cmt. 8.

B. The Trustee's Proposed Rule Would Disrupt The Modern Practice Of Law In The District Of Columbia

The Trustee's proposed rule would create that exact problem. According to the Trustee, a partner's former firm is entitled to disgorge profits for subsequent work any time a partner switches firms and a client follows along.

This rule threatens to enmesh law firms in a morass of payment obligations that have nothing to do with the delivery of legal services but instead turn entirely on one lawyer leaving one firm for another. This scheme would make it "difficult," if not impossible as a practical matter, for a departing partner "to secure a position in a new law firm because any profits from their work for existing clients would" have to be disgorged to their old law firms. *Thelen*, 20 N.E.3d at 273. Not only would this stifle professional autonomy in the marketplace, it would also significantly impair client choice. *See supra* at I.B.

Compounding the problem is the indeterminacy of the Trustee's rule. Rather than hewing to simple and clear principles, the Trustee would "condemn the courts and litigants to endless speculation about when a client matter is new and when it is a carry-over of a prior engagement." *Hogan Lovells*, 531 B.R. at 822. For example: What if a small research question has exploded into a full-blown

lawsuit requiring several partners and an army of associates? What if a partner decides to increase their role in the matter after moving to the new firm? What if the client had planned to switch firms for a certain stage of the proceedings (e.g., an appeal) regardless of whether the former firm had dissolved? Further complications include calculating "profits," a term the Trustee uses throughout his brief presumably to mean earnings above cost. But how much of the bill for hourly work should be deemed "profits"? Does it matter whether the rates charged by the new firm for the partner's work are different than those previously charged by Howrey? How about differences in rates charged for work performed by associates, counsel, or staff? Is overhead excluded? If so, how is overhead allocated? And who makes these calculations—the new firm's accountant (who is presumably interested in consistency across all matters), the dissolved firm's accountant, or the court? The questions are endless.

The harmful and indeterminate consequences of the Trustee's position are bad enough. But they are especially harmful in the District of Columbia. Several of the 100 largest firms in the United States are "D.C.-founded firms" or have "a strong center of gravity in the city." Ryan Lovelace, *How DC Firms Stack Up in the Am Law 100*, Nat'l L.J. (Apr. 24, 2018), https://at.law.com/2roe2X. And the Nation's capital is naturally "a 'destination market' for law firm business." Ryan Lovelace, *DC Law Firms Cheer as K Street Gives Wall Street a Run for Its Money*,

Nat'l L.J. (Feb. 23, 2018), https://at.law.com/seyuMt. It would certainly harm these D.C.-based attorneys—and "discourage lawyers from entering the D.C. bar and practicing [here]," *Diamond*, 883 F.3d at 1148—to adopt a rule that would essentially disable firms from hiring partners from other law firms or from taking on certain matters at the risk of having to disgorge profits. That is especially so given that both California and New York, two other of the largest legal markets in the United States, have ruled the other way on the question here.

Particularly where there is no legal authority compelling the adoption of the Trustee's novel and impractical conception of the "unfinished business rule," there is no reason for this Court to adopt a rule that would have such a radical impact on the practice of law in the District of Columbia as we know it.

CONCLUSION

For the foregoing reasons, and those explained by the Appellees, the Court should answer the certified questions by holding that a dissolved law firm partnership is not entitled to profits derived from subsequent work by its former partners on unfinished hourly fee matters at their new firms.

Dated: July 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2018, I caused the foregoing Brief of *Amicus Curiae* the Bar Association of the District of Columbia in Support of Appellees to be served by electronic means through the Court's electronic filing system on counsel of record for all parties. I also caused a copy to be served, via first-class mail, on:

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