CTQ-2013-00010
USCOA Docket No. 12-4916-bk

Court of Appeals

STATE OF NEW YORK

IN THE MATTER OF: COUDERT BROTHERS LLP,

Debtor.

DEVELOPMENT SPECIALISTS, INC.,

Respondent-Appellant.

(*caption continued on inside cover*)

ON QUESTIONS CERTIFIED BY THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT
(USCOA DOCKET NO. 12-4916-BK)

BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

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April 25, 2014

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Defendants,

—and—

K&L GATES LLP, MORRISON & FOERSTER LLP,

Appellants-Respondents.

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Appellants-Respondents.

DISCLOSURE STATEMENT

Amicus the American Bar Association ("ABA") has no corporate parents, subsidiaries or affiliates. Its organizational components are described on the ABA's website at http:// www.americanbar.org/about_the_aba/governance_policies.html (last visited April 24, 2014).

RELATED LITIGATION

This case presents the same certified questions as in *Geron, as Chapter 7 Trustee of the Estate of Thelen LLP v. Seyfarth Shaw LLP*, 736 F.3d 213, 225 (2d Cir. 2013). This Court accepted certification of *Geron* on December 12, 2103, and it has been docketed as CTQ-2013-00009. 22 N.Y.3d 1017 (2013).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

OTHER AUTHORITIES:

QUESTIONS PRESENTED

The Second Circuit certified two questions to this Court:

I. Under New York law, is a client matter that is billed on an hourly basis the property of a law firm, such that, upon dissolution and in related bankruptcy proceedings, the law firm is entitled to the profit earned on such matters as the "unfinished business" of the firm?

II. If so, how does New York law define a "client matter" for purposes of the unfinished business doctrine and what proportion of the profit derived from an ongoing hourly matter may the new law firm retain?

INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") respectfully submits this brief in support of neither party, but rather in support of the client's right to choose its counsel. In response to the first Certified Question, the ABA asserts that the contention that an unfinished hourly rate client matter of a dissolved law firm is property of the dissolved firm conflicts directly with the long-standing principle that the client has the right to control its relationship with its attorney, and to select and retain or change counsel at any time. The dissolution of a client's prior law firm provides no basis to override this fundamental and deeply held principle. Should the Court reach the second Certified Question, the ABA asserts that, with respect to hourly rate matters, the unfinished business rule should not be interpreted to entitle a dissolved law firm to any of the profits earned by the client's current law firm because such an interpretation would impinge upon the client's access to the counsel of its choice.

The American Bar Association ("ABA") is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states and other

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to this brief's preparation and submission.

jurisdictions, and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices. They also include judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[2] In the State of New York alone, as of August 2013, the ABA's membership included 36,391 lawyer members, 3,465 law student members, 768 associate members, and 66 secondary and post-secondary non-law school student members.

Since its founding in 1878, the ABA has worked to promote the competence, ethical conduct and professionalism of lawyers as they balance their responsibilities to their clients, to the legal system, and to their own interests in making a living.[3] One of the ABA's guiding principles, which led to the ABA's adoption of its first CANONS OF PROFESSIONAL ETHICS in 1908, which are now the ABA MODEL RULES OF PROFESSIONAL CONDUCT, has been its intensive discourse and analysis of the standards and policies that should govern attorneys in their endeavors.[4] Protection of clients' unfettered right to choose their counsel and to

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

[3] *See, e.g.*, ABA Mission and Association Goals, *available at* http://www.americanbar.org/about_the_aba/aba-mission-goals.html (last visited April 24, 2014).

[4] The ABA Model Rules are available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/

(continued...)

terminate that relationship remains enshrined in the ABA Model Rules as a core principle.

In the present case, of course, the New York Rules of Professional Conduct apply. The New York Rules and their counterparts in the ABA Model Rules that are pertinent to this case, as well as New York's case law concerning the attorney-client relationship, the ABA submits support the conclusion that a client matter that is billed on an hourly basis belongs to the client and is not property of a law firm. The ABA therefore respectfully asserts that an interpretation of the unfinished business rule that gives a dissolved law firm a right to profits earned on an hourly fee matter by a client's current choice of counsel would impair the client's well-established right to terminate any firm's representation at any time, and thus would be contrary to client autonomy.

SUMMARY OF ARGUMENT

The ABA urges the Court to first address an even more fundamental question than those certified to it. The Certified Questions ask whether, under the unfinished business rule, an hourly fee client matter is the property of a dissolved

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model_rules_of_professional_conduct_table_of_contents.html. They have been continuously amended and updated through the efforts of ABA members, national, state and local bar organizations, academicians, practicing lawyers, and the judiciary. A Model Rule becomes ABA policy only after it is approved by the ABA House of Delegates, which is composed of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members, and the Attorney General of the United States, among others. See ABA General Information, available at http://www.americanbar.org/groups/leadership/delegates.html (last visited April 24, 2014).

law firm, and if so, to what extent. However, the ABA asks that the Court first address whether a client's hourly fee matter is the property of any firm. The answer to this precursor question requires consideration of both the fundamental principle that the client has the absolute right to choose, retain and discharge its counsel, and the strong New York policy against restrictions on client choice. The long-standing principle of client autonomy is deeply embedded in both the New York Rules and their counterparts in the ABA Model Rules. When focused on the client's rights in its matter, the ABA asserts, a firm should have no property interest—whether the firm is dissolved or ongoing—in the profits resulting from an hourly fee matter after the client has moved that matter to a newly retained law firm or lawyer.

The district court adopted a contrary view in *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 480 B.R. 145 (S.D.N.Y. 2012) (the "*Coudert* district court decision"). The *Coudert* district court held that "the Client Matters were Coudert assets on the Dissolution Date," which included "any profits they earned while winding the Client Matters up at the [other law] Firms" that later finished that hourly rate work. *Id.* at 154. In this regard, the court likened a partner who continued to work on an ongoing hourly rate matter at a new firm after Coudert dissolved to a partner who would "walk out of his firm's office carrying a Jackson Pollack painting he ripped off the wall of the reception area." *Id.* at 157.

But under the rules governing the attorney-client relationship, a more apt analogy would have Jackson Pollack retrieving his own painting that had been temporarily entrusted to the law firm, and then moving it to a new law office. Attorneys do not buy client matters from clients, nor do attorneys own them. Clients own and control their client matters, just as they, and not their lawyers, own and have the right to possession of all files and work product relating to their matters.

The ABA asserts that the Coudert district court's holding that the Coudert bankruptcy estate owned all future profits on the client's matter to the matter's end, without regard to the client's post-dissolution choice of counsel, would undermine client choice and effectively endorse the type of restrictive arrangements that New York law has rejected in the past. In contrast, the district court in *Geron v. Robinson & Cole LLP,* 476 B.R. 732, 742-43 (S.D.N.Y. 2012) (the "*Thelen* district court decision") properly concluded that "recognizing a property right in unfinished hourly fee matters conflicts with New York's strong public policy in favor of client autonomy and attorney mobility."[5]

[5] In the *Thelen* case, the district court addressed an issue materially identical to the questions presented here—that is, whether unfinished hourly fee client matters are an asset of the dissolved firm. The Second Circuit certified the same questions in the *Thelen* case as in the instant case. This Court accepted certification of *In re Thelen LLP* on December 12, 2103, and it has been docketed as CTQ-2013-00009.

ARGUMENT

POINT 1

NEW YORK LAW REFLECTS A STRONG PUBLIC POLICY FAVORING CLIENT CHOICE OF COUNSEL AND A CLIENT'S RIGHT TO DISCHARGE ITS COUNSEL AT WILL.

A. New York Law Protects Client Choice By Prohibiting Lawyers From Entering Into Partnership Agreements That Impose Financial Restrictions On The Right Of A Lawyer To Practice.

Although the New York Rules "lack the force of law, . . . New York courts interpret other laws to harmonize with them where possible." *Geron*, 476 B.R. at 740 (citation omitted). Both the New York Rule 5.6(a) and its counterpart in ABA Model Rule 5.6(a) protect and promote client choice by establishing that lawyers may not enter into a "partnership . . . agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement."[6] Both New York Rule 5.6(a) and its counterpart in ABA Model Rule 5.6(a) protect and promote client choice by establishing that lawyers may not enter into a "partnership . . . agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement

[6] The retirement benefit exception applies "only to lawyers who are in fact retiring and thereby terminating or winding down their legal careers." ABA Formal Op. 06-444.

concerning benefits upon retirement."[7] As stated in N.Y. Ethics Opp. 858 (2011), "The main purposes of Rule 5.6(a)(1) are to protect the ability of clients to choose their counsel freely and to protect the ability of counsel to choose their clients freely." *See also* Annotated Model Rules of Prof'l Conduct 5.6 (6th ed. 2007) ("Restrictive covenants involving lawyers are said to diminish the pool of legal talent available to the public."); ABA Model Rule 5.6, cmt. 1 ("An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."). Restrictive covenants involving lawyers are thus "regulated much more closely than similar agreements involving other professionals, to which courts usually apply a common-law reasonableness test." N.Y. Ethics Op. 858. As stated in ABA Formal Opinion 06-444 at 6, the ABA Rule and its comments "express a strong disapproval of restrictive covenants in lawyer agreements."

This Court has held that financial disincentives for taking a firm's clients violate New York Rule 5.6. *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375, 380 (1993) (refusing to enforce law firm's requirement that outgoing partners pay the firm to continue representing their clients, on grounds that such a

[7] The retirement benefit exception applies "only to lawyers who are in fact retiring and thereby terminating or winding down their legal careers." ABA Formal Op. 06-444.

"forfeiture of income" would discourage partners "from serving clients who might wish to be represented by that lawyer") (citation omitted).[8]

And in *Cohen v. Lord, Day & Lord*, this Court refused to enforce provisions of a law firm's partnership agreement that required outgoing partners to forfeit uncollected legal fees if the partners later practiced law in competition with the firm. 75 N.Y.2d 95, 97 (1989). Reasoning that such a loss of income would "functionally and realistically discourage" outgoing partners from representing those clients who were in need of their services, this Court determined that such a restriction was contrary to New York Rule 5.6's precursor, DR 2-108(A) of the New York Code of Professional Responsibility, the purpose of which was "to ensure that the public has the choice of counsel." *Id.* at 98.

The ABA suggests that, for all practical purposes, the unfinished business rule advocated by the Coudert plan administrator, would work just this kind of forfeiture of fees for the dissolving firm's former partners and their new firms—and in fact, would extend this penalty to the former partners of a firm that is no

[8] *See also* ABA Formal Op.94- 381 at 1 ("A prohibition in a retainer or employment agreement on counsel for a corporation representing anyone against the corporation in the future is an impermissible restriction on the right to practice which may not be demanded or accepted by a lawyer without violating Model Rule 5.6(a)"); *Dwyer v. Jung*, 336 A.2d 498, 501 (N.J. Super. Ct. Ch. Div. 1975), *aff'd*, 348 A.2d 208 (N.J. Super. Ct. App. Div. 1975) (holding that a provision in agreement designating clients with whom each partner could do business if partnership terminated was void as against public policy because it would restrict lawyer's right to choose his clients as well as restrict clients' right to choose their lawyer).

longer in business, and with which the former partners can hardly be said to be engaging in competition.

The Court has uniformly emphasized the client's right to choose counsel will take precedence over other interests, including those of attorneys and law firms. *See, e.g.*, *In re Cooperman*, 83 N.Y.2d 465, 472 (1994) (explaining that the attorney-client relationship encompasses a duty of "honoring the clients' interests over the lawyer's" and that the attorney's duties to clients "transcend those prevailing in the commercial market place"); *id.* at 471 (holding that nonrefundable retainer fee agreements violate public policy and rules of professional responsibility because they compromise "the client's absolute right to terminate the unique fiduciary attorney-client relationship"); *S & S Hotel Ventures LP v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443 (1987) (describing the right to choose counsel as a "valued right" for which "any restrictions must be carefully scrutinized") (citation omitted); *In re Abrams*, 62 N.Y.2d 183, 196 (1984) (explaining that the right to choose counsel implicates constitutional rights of association and "will not yield unless confronted with some overriding competing public interest") (citations omitted).

B. Clients Have The Right To Terminate The Attorney-Client Relationship At Will As A Matter Of Public Policy.

Both the New York Rules and the ABA Model Rules provide that 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. New York Rule 1.16, Cmt. 4; ABA Model Rule 1.16, cmt. 4; *see also Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 43-44 (1990) ("[I]t is well established that notwithstanding the terms of the agreement between them, a client has an absolute right, at any time, with or without cause, to terminate the attorney-client relationship by discharging the attorney") (citations omitted). As even the *Coudert* district court recognized, "all contracts to provide legal representation, as matter of public policy" are "terminable at will by the client." *Coudert*, 480 B.R. at 161.

C. A Law Firm May Not Share Fees With The Dissolved Firm Without Client Consent And Unless The Dissolved Firm Provides Services And Assumes Joint Responsibility For The Case.

In addition to the rules and policies protecting the client's right to select counsel of its choice and terminate the relationship at will, the New York Rules and the ABA Model Rules also provide clients some control over how their fees are shared with other firms and ensure that clients' interests are protected. New York Rule 1.5(g) and ABA Model Rule 1.5(e) require client consent for the splitting of fees. Not only must the client consent, but the division must be "in proportion to the services performed by each lawyer or [may be made only if] each lawyer assumes joint responsibility for the representation." ABA Model Rule 1.5(e); *see* New York Rule 1.5(g). The lawyer ethics rules thus provide protections

to the client where lawyers of different firms would propose to share the fees paid by the client.

D. A Client's Right To Choose Counsel Is Paramount When A Partner Departs From A Law Firm.

Policies promoting client choice also guide the lawyer ethics rules in the context of law firm partners departing their law firms. *See, e.g.*, ABA Formal Op. 99-414 (Ethical Obligations When a Lawyer Changes Firms). Though these policies are not specific to a departure due to dissolution and also do not specifically address the division of fees after the departure, they underscore the paramount importance of client choice in guiding the parties' conduct and determining the resolution of any ensuing disputes. "The departing lawyer and the responsible members of her firm who remain must take reasonable measures to assure that the withdrawal is accomplished without material adverse effect on the interests of clients with active matters upon which the lawyer currently is working." *Id.* at 1. To meet that responsibility, the lawyer and the firm must provide prompt notice to the client. The lawyer must also notify the client of the client's alternatives and "must make clear that the client has the ultimate right to decide who will complete or continue the matters." *Id.* at 5. And, the law firm "must not take actions that frustrate the departing lawyer's current clients' right to choose their counsel under Rule 1.16(a) and Comment [4] by denying access to the clients' files or otherwise." *Id.* at 7 n.15.

Professor Hillman, the author of a leading treatise on lawyer mobility, has analyzed the relationship between the general rules relating to partner departures and the unfinished business rule. Recognizing the client's choice of new counsel upon an attorney's departure provides an opportunity to cut short the "winding up" of "unfinished business" of the dissolved firm, Professor Hillman states, "[P]artnership law provides strong incentives to utilize the withdrawal of a partner as a means of forcing a choice on the part of the client and abbreviating what might otherwise be an extended period for winding up the business of the law partnership." Robert W. Hillman, *Hillman on Lawyer Mobility: The Law and Ethics of Partner Withdrawals and Law Firm Breakups* § 4.11.4, at 4:155-56 (2d ed. Supp. 2008) ("Hillman").

E. Client Matters Are Not Property Of A Law Firm Or Lawyer.

Finally, New York Rule 1.17 and its counterpart ABA Model Rule 1.17 relate to the sale of a law practice. Comment [1] to New York Rule 1.17 expressly states that "[c]lients are not commodities that can be purchased and sold at will." *Id.* at cmt. 1. The rule requires that clients be given 90 days notice prior to the proposed sale of a law practice and they must be permitted to choose whether to allow their files to be transferred to the buyer of the law practice. Comment 9 to New York Rule 1.17 emphasizes that "[a]ll elements of client autonomy, including

the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice."

In sum, under New York law and the New York rules, clients have a right to choose counsel, financial disincentives on lawyers to accept client matters are strongly disfavored, clients have an absolute right to discharge their counsel at will, and "clients are not commodities that can be bought and sold at will."

POINT 2

CONSISTENT WITH PUBLIC POLICY FAVORING CLIENT CHOICE, AN HOURLY RATE MATTER SHOULD NOT BE VIEWED AS THE DISSOLVED FIRM'S UNFINISHED BUSINESS ONCE THE CLIENT CHOOSES NEW COUNSEL.

In this case, the plan administrator asserts that, pursuant to the unfinished business rule, a client's new counsel, if a former member of the dissolved firm, must pay to the dissolved firm all of the profits earned while working on the client's hourly rate matter if it is deemed to have been "unfinished business" of the dissolved firm on the date of dissolution. Under this view, the chosen counsel cannot earn a profit on the matter no matter how long the matter continues; no matter how many attorneys work on the matter; no matter which attorneys work on the matter.[9]

[9] In adopting the plan administrator's view, the *Coudert* district court cited *Stem v. Warren*, 227 N.Y. 538, 546-47 (1920) and *Scholastic, Inc. v. Harris*, 259 F.3d 73, 85 (2d Cir. 2001). However, neither case involved the attorney-client relationship in which the policies favoring client choice and autonomy were implicated.

This approach is contrary to the public policy underlying New York Rule 5.6(a)(1), ABA Model Rule 5.6(a) and the *Cohen* and *Denburg* cases. It would, in effect, impose the very type of post-partnership restriction in which an attorney cannot participate consistent with these Rules. The practical import is similar to that of a restrictive covenant, under which a former partner would not be able to provide services to the client on the client's "unfinished" hourly fee matter at a new firm selected by the client, unless the profit on that work is turned over to the partner's former firm. This is no less a "forfeiture of income" than those found to violate New York's rules of professional responsibility relied upon by this Court in *Cohen* and *Denburg*. *See also* New York Rule 5.6; ABA Model Rule 5.6 (2011), and the above discussion.

As in *Cohen* and *Denburg*, applying such a doctrine to hourly fee matters would require partners of a dissolved firm to choose between continuing to serve clients but forfeiting all profits they might earn for the duration of the matters, on the one hand, or serving other clients and retaining any profits realized from their services on the other. Further, the inability to earn a profit on the matter stands as a strong financial disincentive for the new firm to agree to take on the matter for the client. Both financial disincentives constrict a lawyer's right to represent a client at his or her new firm, which, in turn, impermissibly restricts the freedom of the client to choose a lawyer. Requiring departing attorneys and their new law

firms to make these choices poses the real risk of "diminish[ing] the pool of legal talent available to the public," Annotations to ABA Model Rule 5.6, by discouraging those attorneys and their new firms from agreeing to represent the clients who seek their services.

The Second Circuit recognized this concern in its decision in *Thelen* certifying the questions to this Court:

> [U]nyielding application of the unfinished business doctrine might have unintended consequences. For example, the doctrine may discourage other law firms from accepting lawyers and client engagements from a dissolved law firm for fear that a substantial portion of the resulting profits may be turned over to the dissolved law firm or its creditors. An untoward disruption in client services might result.

Geron, 736 F.3d at 223.

Application of the unfinished business rule in this manner also conflicts with the client's right to end the representation. That right does not diminish upon dissolution; if anything, it becomes even more important. Before dissolution, clients have an unfettered right to discharge a law firm and the client's termination would cut off the law firm's rights to any future profits realized from work on the matter. The same should be true during and after dissolution. *See* Hillman § 4.11.4, at 4:155-4:156 ("When client choice is informed, unequivocal, and intended to relieve a lawyer from what would otherwise be winding-up responsibilities, it is anomalous to conclude that winding up continues for purposes

of allocating income"). Consistent with the New York and ABA Model Rules governing withdrawal and termination of the attorney-client relationship, once the attorney-client relationship has ended on an hourly fee matter, the dissolved firm's interest should be limited to the work it has already performed. Accordingly, the ABA asserts that, when a client moves its hourly fee matter to a new firm, that decision should terminate the dissolved firm's unfinished business as to that matter and convert it into new business to be handled by the lawyer or law firm selected by the client.

Some courts have expressed a view that it is of no concern to the client how the fees it pays to its lawyer are shared. *See, e.g.*, *Jewel v. Boxer*, 156 Cal. App. 3d 171, 178 (1984) ("Once 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."); *Ellerby v. Spiezer*, 485 N.E.2d 413, 416 (Ill. App. Ct. 1985) (holding that the right of a client to choose counsel "is distinct from and does not conflict with the rights and duties of the partners between themselves with respect to profits from the unfinished partnership business").

The view, however, is contrary to the principles of client choice and autonomy reflected in New York Rules 1.5 (fee sharing), 1.16 (client's right to discharge lawyer), 1.17 (sale of law practice) and 5.6 (restrictive lawyer covenants) and the nature of attorney-client relationships. *See also* ABA Model Rules 1.5(e)

(fee sharing); 1.16(b)(3) (client's right to discharge lawyer); 1.17 (sale of law practice); 5.6(a) (restrictive lawyer covenants). As Professor Hillman has observed, "[b]y concluding that the partnership continues during the winding-up phase, these [*Jewel* and *Ellerby*] opinions are able to elude ethics restrictions on fee splitting when lawyers are not members of the same firm." Hillman, § 4.11.4 at 4:156 n.40. Any rule imposing a financial disincentive on the client's current choice of counsel to take on or continue the matter, the ABA asserts, would conflict with the client's right to choose that counsel.

Dissolution does not alter the bedrock ethics principles discussed above and it certainly cannot create a property interest where there was none to begin with. Yet the *Coudert* district court decision concluded that, *simply because it dissolved*, Coudert somehow acquired the right to a stream of profits from its former clients' hourly rate matters. This decision is contrary to the interests of clients and in conflict with the ethical rules and public policies protecting and promoting client choice. In the end, it is the client who owns its matters, not the law firm.

CONCLUSION

For the reasons set out above, *amicus curiae* the American Bar Association respectfully requests that, in answering the Certified Questions, the Court conclude that in law firm dissolutions, the unfinished business rule does not apply to hourly rate client matters where it would conflict with New York's long-standing principles supporting client autonomy and against restrictions on the client's absolute right to choose, retain and discharge its counsel.

Dated: April 25, 2014

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STATE OF NEW YORK)
COUNTY OF NEW YORK) SS: **AFFIDAVIT OF SERVICE**

Daniel Vinci, being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on the 25th day of April 2014 deponent served 3 copies of the within

Brief for The American Bar Association as *Amicus Curiae*

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Case Name: In Re Coudert Brothers
CTQ-2013-00010