CALIFORNIA ACADEMY OF APPELLATE LAWYERS

Via TrueFiling

December 27, 2018

Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, California 94102-4797

Re: *Hamilton v. Yates*, Case No. S252914
Amicus Letter of California Academy of Appellate Lawyers in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The California Academy of Appellate Lawyers (the Academy) submits this letter as amicus curiae in support of the petition for review of appellant Paul C. Hamilton. The Academy urges the Court to resolve the longstanding uncertainty over whether, in addition to its other, undisputed requisites, the collateral order doctrine allows immediate appellate review only of orders that direct the payment of money or the performance of an act. The split in appellate authority on the point has persisted for decades, wasting the resources of the courts and litigants. The issue is ripe for review, and this case presents an appropriate vehicle for resolving it.

The Academy is a nonprofit association of experienced appellate practitioners whose mission is to promote and encourage sound appellate procedures that ensure proper and effective representation of appellate litigants, efficient administration of justice at the appellate level, and improvements in laws affecting appellate litigation. The split of

authority on the issue presented here impedes these goals, and merits this Court's attention. The Academy takes no position on the merits of the case,[1] but urges the Court to resolve the nearly 70 years of uncertainty on the point presented.

RELEVANT FACTS

Hamilton sued, alleging excessive force by prison guards. The trial court dismissed his case, which the Court of Appeal initially affirmed, but this Court remanded for reconsideration on Hamilton's pro per petition for review. (*Hamilton v. Yates* (July 27, 2016, S226450).) On remand, Hamilton moved for appointment of counsel, which the trial court denied. Hamilton immediately appealed this finding as a collateral order, but the Court of Appeal found no appellate jurisdiction because the order denying him counsel (and, likely, any meaningful opportunity for relief) did not compel him to pay money or to perform an act.

THE COLLATERAL ORDER DOCTRINE

Appellate jurisdiction in California is founded on the one final judgment rule, codified by Code of Civil Procedure section 904.1. Generally, "an appeal lies only from a *final judgment* that *terminates* the trial court proceedings by *completely disposing of the matter in controversy."* (Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 2:21, p. 2-20, citing *Griset v. Fair Political Practices Com*. (2001) 25 Cal.4th 688, 697 (*Griset*).) The collateral order doctrine, a common law exception to the one final judgment rule, allows immediate appeal of final orders collateral to the merits of the case.

The collateral order doctrine has a deep history in our case law. *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116 (*Sjoberg*) was its first formal statement. That case articulated three requisites of a collateral order subject to interlocutory appeal:

- a judgment or order that is final;

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[1] Robert Cooper, counsel for Hamilton, is an Academy member but is not a member of its Amicus Curiae Committee. He played no role in either the Committee's deliberations regarding whether to provide amicus support in this case or the preparation of this letter.

- the matter disposed of is collateral to the general subject of the litigation; and
- the order directs the payment of money by appellant or the performance of an act by or against him.

(*Id.* at p. 119.) Seven years later, however, *Meehan v. Hopps* (1955) 45 Cal.2d 213 (*Meehan*), implicitly modified the *Sjoberg* test, generating decades of confusion for courts and litigants alike. In *Meehan*, this Court applied the collateral order doctrine to an appeal from an order disqualifying counsel. *Meehan* entirely ignored *Sjoberg*'s third requirement—that an order direct payment of money or performance of an act.

Courts and litigants have struggled to reconcile *Sjoberg* and *Meehan*. Many decisions ignore the conflicting interpretations, following *Sjoberg* as though *Meehan* had not been decided as it was. (E.g., *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368.) Other courts and scholars claim to harmonize *Sjoberg* and *Meehan*, stating the latter was decided on other grounds. (E.g., *Efron v. Kalmanovitz* (1960) 185 Cal.App.2d 149; Lukens, *The Collateral Order Doctrine in California* (1963) 15 Hastings L.J. 105.) There is, however, consensus on one point: "This requirement has been the subject of some confusion in California." (Lukens, at p. 106.) Courts have repeatedly felt the need to address this split of authority. (E.g., *Ponce-Bran v. Trustees of Cal. State University* (1996) 48 Cal.App.4th 1656, 1661, fn. 3 ["We will not hazard to harmonize *Sjoberg* and *Meehan . . . we leave it for the Supreme Court to extend the rule beyond the context of disqualifications"* (emphasis added)].)

Despite *Meehan*, a consensus appeared to be forming in favor of *Sjoberg*. *Muller v. Fresno Community Hospital & Medical Center* (2009) 172 Cal.App.4th 887 (*Muller*), however, impedes the trend. There, notwithstanding certain courts' confidence in *Sjoberg*, the Second District explained that many cases find collateral orders appealable despite the absence of an order to pay money or to perform an act. (*Id.* at p. 902.) *Muller* sides with *Meehan*, concluding that "supposed limitations of a payment of money and the performance of an act are in actuality indications that the order in question is collateral to the main action." (*Ibid.*)

This issue remains unresolved some 70 years after *Sjoberg*. A leading practice guide informs its readers of the split in authority, noting majority and

minority views. (Eisenberg, Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶¶ 2:78 to 2:80, pp. 2-55 to 2-58.) Courts continue to recognize the split and find the need to take sides. (E.g., *Krikorian Premiere Theatres, LLC v. Westminster Central, LLC* (2011) 193 Cal.App.4th 1075, 1084, fn. 2 ["There is a split of authority with respect to whether the collateral order doctrine actually *is* limited to orders that direct the payment of money or the performance of an act"].) A second leading treatise also presents the issue as an apparent split. (1 Cal. Civil Appellate Practice (Cont.Ed.Bar 2018) Is the Order or Judgment Appealable?, § 3.55, pp. 3-34 to 3-34.1.) The question presented here thus reflects a split of authority on a basic issue of appellate jurisdiction and warrants resolution, at long last, by this Court.

CLARITY AS TO APPELLATE JURISDICTION IS ESSENTIAL FOR JUDICIAL EFFICIENCY

" 'The theory [of the one final judgment rule] is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case.' " (*Griset*, *supra*, 25 Cal.4th at p. 697.) The collateral order doctrine is one of few exceptions to the rule, established by common law to aid courts in the "the expeditious completion of appellate review, when that can be accomplished without implicating the merits of the underlying controversy." (*Muller, supra*, 172 Cal.App.4th at p. 904.) However, a doctrine meant to promote efficient appeals has, given the split, become a burden on the courts and litigants.

When a collateral order is appealable, a litigant must appeal immediately or waive review of the order. Attorneys have every incentive to err on the side of caution and to appeal any order that *may* be an appealable collateral order. A leading practice guide, for example, recommends that "the safest approach to challenging a collateral order that does not direct the payment of money or performance of an act is to *file an immediate appeal from the order* and be prepared to litigate the question of appealability on a motion by respondent to dismiss the appeal." (Eisenberg, Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 2:80a, p. 2-58.)

Attorneys, therefore, feel compelled to appeal orders that may well be found unappealable, wasting the time of courts and lawyers. This wasteful litigation will cease if this Court clarifies the collateral order doctrine.

THE CASE IS AN APPROPRIATE VEHICLE

This case is a good vehicle to resolve the question presented. First, the appealed order meets the *Meehan* standard, but not the *Sjoberg* test:

- it is final (Hamilton will not get counsel in this case unless the order is set aside on appeal);
- it is collateral to the merits (it does not touch on his excessive force claim, merely who should advocate it); but
- it does not order the payment of money or the performance of an act (Hamilton may proceed in pro per and, given his incarceration, likely lacks the means to do otherwise).

Given the posture of the case, the record is relatively small and there are no procedural hurdles to resolution of the question presented. The case is litigated by able attorneys on each side. Mr. Cooper is a preeminent appellate attorney at a reputable firm and an experienced advocate in this Court. The Attorney General's office is plainly qualified to litigate effectively.

CONCLUSION

The Academy urges this Court to grant review to resolve the split of authority and clarify appellate jurisdiction under the collateral order doctrine.

Respectfully submitted,

CALIFORNIA ACADEMY OF APPELLATE LAWYERS AMICUS CURIAE COMMITTEE
John A. Taylor, Jr., Chair (No. 129333)
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cc: See attached Proof of Service

PROOF OF SERVICE

Hamilton v. Yates
Case No. S252914

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On December 27, 2018, I served true copies of the following document(s) described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 27, 2018, at Burbank, California.

Raeann Diamond

SERVICE LIST

Hamilton v. Yates
Case No. S252914

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