

## WHO GETS THE JEWELS WHEN A LAW FIRM DISSOLVES? THE UNFINISHED BUSINESS DOCTRINE AND HOURLY MATTERS

*Peter W. Rogers*

**ABSTRACT**—When a law firm goes out of business, who is entitled to the earnings that the partners generate from unfinished, pending hourly matters? Most states that have addressed the issue hold that unless the partners agree otherwise, all profits from unfinished business belong not to the partners who complete the matters but, rather, to all partners of the former law firm. This so-called unfinished business doctrine has been criticized for impinging clients' choice of counsel because it creates financial disincentives that may encourage attorneys to withdraw from pending matters, given that they would need to share earnings with former partners. The law is unsettled in New York, and in 2012, two judges in the Southern District of New York examined whether the unfinished business doctrine applies to hourly matters. They arrived at different conclusions, creating a split in the district. This Note argues that the unfinished business doctrine applies to hourly matters because it does not violate public policy by improperly deterring attorneys from practicing law. Nevertheless, this Note proposes a statutory amendment for New York and certain other states that would mitigate the financial disincentives that the unfinished business doctrine creates by allowing partners to earn reasonable compensation for winding up unfinished business.

**AUTHOR**—J.D. Candidate, Northwestern University School of Law, 2014; M.S., Accounting, Babson College, 2008; B.S., Babson College, 2008. I would like to express my gratitude to Professors Allan Horwich and Robert Hillman for their guidance. I also thank the talented editors of the *Northwestern University Law Review*, especially Kelly Hollingsworth and Sam Scarcello, for their invaluable comments. Finally, I am grateful to my parents, grandmother, and sister, as well as E.C.B., for their unconditional love and support and for motivating me to do my best.

NORTHWESTERN UNIVERSITY LAW REVIEW

INTRODUCTION .....312

I. BACKGROUND ON THE UNFINISHED BUSINESS DOCTRINE .....314

    A. *Partnership Dissolution Versus Partner Withdrawal* ..... 315

    B. *How the Unfinished Business Doctrine Affects Client Choice* ..... 319

II. THE SPLIT WITHIN THE SOUTHERN DISTRICT OF NEW YORK .....322

    A. *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*..323

    B. *Geron v. Robinson & Cole LLP* ..... 328

III. APPLYING THE UNFINISHED BUSINESS DOCTRINE TO HOURLY MATTERS.....333

    A. *Why the Unfinished Business Doctrine Applies to Hourly Matters*.....333

    B. *The Difference Between Hourly and Contingent Fee Matters* ..... 336

    C. *A Proposed Statutory Solution*..... 339

CONCLUSION .....341

INTRODUCTION

Economic conditions over the past several years have forced courts and partners of law firms to face an issue that they may have never contemplated: when a law firm goes out of business, who is entitled to the earnings that the partners subsequently generate from unfinished, pending matters—and does the answer depend on whether a matter is billed on contingency or by the hour?

If a partnership agreement is silent on the issue of unfinished business, state partnership law provides the answer. However, the law, which has multi-million dollar implications,<sup>1</sup> is unsettled in New York. This is rather ironic, considering that New York is home to many of the most interesting and sophisticated legal matters, including the recent bankruptcy of one of the largest law firms, Dewey & LeBoeuf LLP.<sup>2</sup>

Most states that have addressed the issue hold that the unfinished business of a former law firm belongs to the former partnership unless the

---

<sup>1</sup> The unfinished business of Dewey & LeBoeuf LLP was valued at approximately \$60 million. Casey Sullivan & Nate Raymond, *Ex-Dewey Partners Agree to Pay at Least \$50 Million in Settlement*, REUTERS (Aug. 17, 2012, 1:09 AM), <http://www.reuters.com/article/2012/08/17/us-dewey-settle-idUSBRE87F1EE20120817>. Because the Dewey partnership agreement did not waive the partnership’s rights to unfinished business, New York partnership law controls. See Motion of the Official Committee of Unsecured Creditors for Entry of an Order Pursuant to §§ 1103(c) and 1109(b), Granting Leave, Standing and Authority to Prosecute and, if Appropriate, Settle Certain Claims on Behalf of the Debtor’s Estate, Exhibit A at 25–36, *In re Dewey & LeBoeuf LLP*, 478 B.R. 627 (Bankr. S.D.N.Y. 2012) (No. 12-12321 (MG)), ECF No. 628. Though many former Dewey partners have agreed to settlements, some settlements with Dewey’s largest earners do not resolve claims involving unfinished business. *Dewey & LeBoeuf*, 478 B.R. at 633.

<sup>2</sup> See Jennifer Smith & Ashby Jones, *Storied Law Firm Dewey Files Chapter 11*, WALL ST. J., May 29, 2012, at A1.

partners agree otherwise.<sup>3</sup> The rationale is that because partners owe fiduciary duties to one another as they wind up the firm, the partners who continue to complete the unfinished business do so for the benefit of all former partners.<sup>4</sup> *Jewel v. Boxer*,<sup>5</sup> a California appellate court opinion, is the seminal case that embraced this principle, often referred to as the unfinished business or *Jewel* doctrine. The doctrine has been criticized for impinging clients' choice of counsel because it creates financial disincentives that may encourage attorneys to withdraw from client matters, given that the attorneys would need to share earnings with former partners.<sup>6</sup> Because *Jewel* dealt with unfinished business billed on contingency, litigants have argued that the doctrine does not apply to matters billed by the hour.<sup>7</sup>

In 2012, two judges in the Southern District of New York, writing opinions for separate cases, thoroughly examined whether the doctrine applies to hourly matters.<sup>8</sup> They arrived at different conclusions, creating a split in the district. The point of contention between the two opinions primarily involves the weight each judge gave to the New York Court of Appeals' interpretation of an ethics rule prohibiting agreements that restrict an attorney's ability to practice law.<sup>9</sup> The first judge to address the issue narrowly read the Court of Appeals' interpretation and held that the unfinished business doctrine encompasses hourly matters.<sup>10</sup> The second judge gave a broader reading to the interpretation and held that the doctrine does not apply to hourly matters because such an application violates public policy.<sup>11</sup> Both judges certified their decisions for interlocutory

---

<sup>3</sup> See Official Comm. of Unsecured Creditors v. Ashdale (*In re* Labrum & Doak, LLP), 227 B.R. 391, 408–09 (Bankr. E.D. Pa. 1998) (citing jurisdictions that have adopted the unfinished business doctrine).

<sup>4</sup> See *Jewel v. Boxer*, 203 Cal. Rptr. 13, 16 (Ct. App. 1984).

<sup>5</sup> 203 Cal. Rptr. 13.

<sup>6</sup> See generally Mark H. Epstein & Brandon Wisoff, Comment, *Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice*, 73 CALIF. L. REV. 1597, 1597–619 (1985).

<sup>7</sup> See, e.g., *Geron v. Robinson & Cole LLP*, 476 B.R. 732, 738–39 (S.D.N.Y. 2012); *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 477 B.R. 318, 324 (S.D.N.Y. 2012); *Robinson v. Nussbaum*, 11 F. Supp. 2d 1, 4 (D.D.C. 1997); *Greenspan v. Orrick, Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison LLP)*, 408 B.R. 318, 333 n.20 (Bankr. N.D. Cal. 2009); *Labrum & Doak*, 227 B.R. at 407; *Rothman v. Dolin*, 24 Cal. Rptr. 2d 571, 572 (Ct. App. 1993).

<sup>8</sup> See *Geron*, 476 B.R. at 738–43; *Dev. Specialists*, 477 B.R. at 331–46.

<sup>9</sup> *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410 (N.Y. 1989).

<sup>10</sup> See *Dev. Specialists*, 477 B.R. at 340–44, 349.

<sup>11</sup> See *Geron*, 476 B.R. at 740, 742–43.

appeal to the Second Circuit,<sup>12</sup> which in turn certified questions to the New York Court of Appeals.<sup>13</sup>

This split in the Southern District of New York and the pendency of the certified questions before the New York Court of Appeals present an opportunity to explore whether the unfinished business doctrine should apply to hourly matters. This Note argues that the doctrine applies to hourly matters because it does not violate public policy by improperly deterring attorneys from practicing law. Ultimately, I propose a statutory amendment that New York and certain other states could adopt to ameliorate the negative externalities affecting client choice that the unfinished business doctrine creates.

Part I explains the difference between how fees generated from pending matters are divided among partners when law firms dissolve and wind up, as compared to when partners withdraw from law firms. It further explores how the unfinished business doctrine may infringe clients' choice of counsel and negatively affect a former partner's prospects of being admitted as a partner at another law firm. Part II discusses the two recent cases in the Southern District of New York and analyzes the main arguments of each case. Part III argues that the unfinished business doctrine applies to hourly matters but that the application of the doctrine in New York is not ideal, especially because it creates elevated financial disincentives for attorneys who continue to work on hourly client matters. Part III next proposes a solution that would reduce the financial disincentives of the unfinished business doctrine by allowing partners to earn reasonable compensation for winding up unfinished business.

## I. BACKGROUND ON THE UNFINISHED BUSINESS DOCTRINE

The law of partnerships is a creature of state law.<sup>14</sup> Partnership agreements may set forth the rights and duties among partners, but when an issue or dispute arises that the partnership agreement has not addressed—or when no partnership agreement exists—state law fills in the gaps.<sup>15</sup> Although partnership law differs state by state, each state's partnership law is largely based on the Uniform Partnership Act (UPA) or the more updated

---

<sup>12</sup> *Id.* at 745; *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, No. 11 civ. 5994 (CM), 2012 WL 2952929 (S.D.N.Y. July 18, 2012).

<sup>13</sup> *Dev. Specialists, Inc. v. K&L Gates LLP (In re Coudert Bros.)*, No. 12-4916 (L) (2d Cir. Dec. 2, 2013) (Bloomberg Law, Dockets, Req. No. 83), *certified questions accepted*, 2014 WL 113013 (N.Y. Jan. 14, 2014); *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*, 736 F.3d 213 (2d Cir.), *certified questions accepted*, 2013 WL 6499301 (N.Y. Dec. 12, 2013).

<sup>14</sup> *See* J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, *PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS* § 1:1, at 5–6 (2012).

<sup>15</sup> *See* 1 CHRISTINE HURT ET AL., *BROMBERG AND RIBSTEIN ON PARTNERSHIP* § 1.02(b), at 1:26–:27 (2013); *see also, e.g., Jewel v. Boxer*, 203 Cal. Rptr. 13, 16 (Ct. App. 1984) (applying California's partnership law because the partnership agreement was silent about how attorneys' fees from unfinished business should be allocated among partners).

version, the Revised Uniform Partnership Act (RUPA).<sup>16</sup> New York's partnership law parallels the UPA. The unfinished business doctrine is a judicial gloss on partnership law that arises when a law firm dissolves and winds up.

This Part discusses the unfinished business doctrine and how it influences the way partners divide earnings when a law firm partnership dissolves and winds up, but not when one or more partners withdraw from a partnership. It further explains how the unfinished business doctrine may negatively affect clients' choice of counsel and a former partner's prospects of becoming a partner at another firm.

### *A. Partnership Dissolution Versus Partner Withdrawal*

Two ways a partner's association with a law firm terminates are when the firm as a whole dissolves and winds up or when the partner resigns or withdraws from the firm. This section describes how partners typically divide fees from client matters when a law firm dissolves and winds up as compared to when a partner withdraws from the firm.

*1. Partnership Dissolution.*—When a law firm partnership dissolves, whether by choice or due to bankruptcy, the firm enters the winding-up phase.<sup>17</sup> Winding up typically involves “completing all of the partnership's uncompleted transactions, . . . reducing all assets to cash, and . . . distributing the proceeds, if any, to the partners.”<sup>18</sup> During this process, the partnership continues to exist until the business of the firm has been wound up.<sup>19</sup> Further, while partners wind up the partnership, they continue to owe fiduciary duties to one another because they are winding up the business for the benefit of the partnership.<sup>20</sup>

A significant question arises when a law firm partnership dissolves: are pending client matters assets of the partnership subject to winding up? Thus, if the former partners continue working on the unfinished cases, do their fiduciary duties require them to share the earnings with other partners? This question arises from vagueness in the UPA, RUPA, and many partnership agreements. The UPA and RUPA do not define what winding up entails, and law firm partnership agreements often fail to define

---

<sup>16</sup> UNIF. P'SHIP ACT (1997) [hereinafter RUPA]; UNIF. P'SHIP ACT (1914) [hereinafter UPA]. The partnership law of twelve states is based on the original UPA from 1914, while the partnership law of thirty-seven states and the District of Columbia is based on the revised version, RUPA. *See Partnership Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Partnership%20Act> (last visited Nov. 24, 2013). Louisiana is the only state whose partnership law is not based on the UPA or RUPA. *Id.*

<sup>17</sup> *See* RUPA, *supra* note 16, §§ 801–802; UPA, *supra* note 16, §§ 30–31.

<sup>18</sup> WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 227, at 369 (3d ed. 2001).

<sup>19</sup> RUPA, *supra* note 16, § 802; UPA, *supra* note 16, § 30.

<sup>20</sup> *See* GREGORY, *supra* note 18, § 227, at 369.

the parameters of winding up.<sup>21</sup> Consequently, if litigation ensues, this question is left to the court.

Courts and treatises generally interpret winding-up activities broadly.<sup>22</sup> Many courts have held that pending client matters are unfinished business of the firm—partnership assets that are subject to winding up.<sup>23</sup> *Jewel v. Boxer*,<sup>24</sup> the influential case on the unfinished business or *Jewel* doctrine, was decided by the California Court of Appeal in 1984 and is often cited uncritically and at face value for the proposition that unfinished, pending client matters are assets of the firm subject to winding up.<sup>25</sup>

*Jewel* involved a four-partner law firm that dissolved by mutual agreement.<sup>26</sup> After the firm dissolved, the former partners informed the clients they represented that the firm no longer existed.<sup>27</sup> Thereafter, the clients signed forms that substituted the former law firm with the new firms where the attorneys who previously handled their cases had become partners.<sup>28</sup> Two of the former partners filed suit, seeking to recover what they believed was their portion of the profits that the other partners generated on pending, unfinished cases.<sup>29</sup> The trial court allocated fees earned after the dissolution to the partners on a quantum meruit basis, which took into account the time the partners spent on the cases before and after the firm dissolved, and the plaintiffs appealed.<sup>30</sup> Because the law firm had no partnership agreement, both the trial and appellate courts relied on California's codification of the UPA.<sup>31</sup>

The Court of Appeal rejected the trial court's quantum meruit allocation of the fees, focusing on the plain language of the UPA.<sup>32</sup> The court recognized the UPA's so-called no-compensation rule, which prevents a partner from taking additional compensation "for acting in the

---

<sup>21</sup> See *Jewel v. Boxer*, 203 Cal. Rptr. 13, 15 (Ct. App. 1984) ("[C]ontrary to the sound legal advice they undoubtedly always gave their partnership clients, they had no written partnership agreement."); Robert W. Hillman, *Law Firm Risk Management in an Era of Breakups and Lawyer Mobility: Limitations and Opportunities*, 43 TEX. TECH L. REV. 449, 454 (2011) ("In practice, . . . law firm partnership agreements often are ill-conceived, poorly drafted, and hopelessly out of date.")

<sup>22</sup> See, e.g., GREGORY, *supra* note 18, § 227, at 368 (noting that the winding-up period ends when "all the partnership affairs have been wound up").

<sup>23</sup> See Official Comm. of Unsecured Creditors v. Ashdale (*In re Labrum & Doak, LLP*), 227 B.R. 391, 408–09 (Bankr. E.D. Pa. 1998) (citing jurisdictions that have adopted the unfinished business doctrine).

<sup>24</sup> 203 Cal. Rptr. 13.

<sup>25</sup> See *Geron v. Robinson & Cole LLP*, 476 B.R. 732, 739 n.2 (S.D.N.Y. 2012).

<sup>26</sup> 203 Cal. Rptr. at 15.

<sup>27</sup> *Id.* at 15–16.

<sup>28</sup> *Id.* at 16.

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> See *id.* at 16–17. California has since revised its partnership law to parallel RUPA. See *Partnership Act*, *supra* note 16.

<sup>32</sup> See *Jewel*, 203 Cal. Rptr. at 16–19.

partnership business,” absent an agreement to the contrary.<sup>33</sup> It explained that because a partnership continues to exist until the partners complete the unfinished partnership business, and because the partners are not entitled to additional compensation for completing unfinished business, income generated from unfinished business—less reasonable overhead expenses that do not include partners’ salaries—should be allocated among all of the former partners according to each partner’s percentage interest in the firm.<sup>34</sup> This is the unfinished business doctrine, a judicial interpretation of the duty to account that partners owe one another while they wind up a partnership.

The *Jewel* court rejected a number of arguments. First, it rejected the contention that because a client has the absolute right to discharge an attorney, the former partners are only entitled to the value of the services performed before the client discharged the former law firm.<sup>35</sup> The court reasoned that the duties partners owe one another are separate from a client’s right to discharge an attorney.<sup>36</sup> Second, the court rejected the idea that the substitution forms that the clients signed transmuted the unfinished business into new business.<sup>37</sup> Otherwise, a former partner would be permitted to breach the fiduciary duty of loyalty and take advantage of opportunities belonging to the partnership for personal gain.<sup>38</sup> Third, though the doctrine could arguably discourage attorneys from continuing to represent clients because they would only be entitled to a fraction of the income they generated, the court noted that the partners were entitled to the same share of income as if the firm had not broken apart.<sup>39</sup> The court further noted that each attorney would receive a portion of the fees that the other former partners were generating from unfinished business.<sup>40</sup> It explained that because each former partner has a duty to wind up the partnership, former partners should not face “undue hardship” in winding

---

<sup>33</sup> UPA, *supra* note 16, § 18(f). However, a partner is entitled to additional compensation for winding up the partnership after another partner’s death. *Id.* The no-compensation rule is where the UPA and RUPA diverge with respect to the unfinished business doctrine. Under RUPA, a partner is entitled to “reasonable compensation for services rendered in winding up the business of the partnership.” RUPA, *supra* note 16, § 401(h). Thus, under RUPA, a partner who completes unfinished business after a partnership dissolves is entitled to additional compensation, while a partner who completes unfinished business under the UPA is not. See Mark I. Weinstein, *The Revised Uniform Partnership Act: An Analysis of Its Impact on the Relationship of Law Firm Dissolution, Contingent Fee Cases and the No Compensation Rule*, 33 DUQ. L. REV. 857, 871–72 (1995).

<sup>34</sup> *Jewel*, 203 Cal. Rptr. at 16, 19.

<sup>35</sup> *See id.* at 17–18.

<sup>36</sup> *See id.* at 17 (“[T]he right of a client to the attorney of one’s choice and the rights and duties as between partners with respect to income from unfinished business are distinct and do not offend one another. 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.”).

<sup>37</sup> *See id.* at 18.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

up the unfinished business.<sup>41</sup> Moreover, to the extent that there is undue hardship, the court reasoned that it exists because the former partners failed to enter into an agreement that specified the allocation of earnings from unfinished business.<sup>42</sup>

The court also acknowledged policy reasons for the unfinished business doctrine, appearing concerned about the relationship among partners. It reasoned that without the doctrine, partners would compete for the most profitable cases, thinking that they would be able to keep fees from those cases should the partnership dissolve.<sup>43</sup> It might also diminish the likelihood that former partners will steal client files so that they can continue working on existing matters for personal gain after the firm dissolves.<sup>44</sup> Ultimately, the unfinished business doctrine arises out of the duties partners owe one another when a partnership winds up. The doctrine recognizes pending cases as assets of the partnership subject to winding up.

2. *Partner Withdrawal*.—In practice, the unfinished business doctrine that *Jewel* established does not apply when one or more partners withdraw from a law firm; it is usually only invoked when a law firm dissolves and subsequently winds up.<sup>45</sup> Technically, when a partner withdraws from a law firm, in New York and under the UPA, the partnership automatically dissolves and enters the winding-up phase.<sup>46</sup> However, when the withdrawing partner agrees, the remaining partners may buy out the departing partner's interest in the firm and continue the partnership.<sup>47</sup> This avoids the need for the partnership to wind up and liquidate assets, collect accounts receivable, and distribute proceeds to the partners.<sup>48</sup>

The unfinished business doctrine does not apply when a partner withdraws because the payment to the departing partner, in theory, constitutes winding up.<sup>49</sup> Thus, dissolution and winding up occur “only in

<sup>41</sup> *Id.*

<sup>42</sup> *See id.* at 19.

<sup>43</sup> *Id.* at 18. Arguably, it may be questionable whether competition for client matters among partners is always bad policy from the standpoint of a client. *But see* *Ellerby v. Spiezer*, 485 N.E.2d 413, 417 (Ill. App. Ct. 1985) (explaining how “case-chasing by attorneys” places clients “in the middle of a dispute among the partners over money”).

<sup>44</sup> *Jewel*, 203 Cal. Rptr. at 18.

<sup>45</sup> Douglas R. Richmond, *Migratory Law Partners and the Glue of Unfinished Business*, 39 N. KY. L. REV. 359, 370 (2012) (“[C]ourts tend to apply the unfinished business doctrine only when a law firm dissolves and ultimately terminates its affairs . . .”).

<sup>46</sup> *See* N.Y. P'SHIP LAW §§ 60–61, 62(1)(b) (McKinney 2006); UPA, *supra* note 16, §§ 29–30, 31(1)(b).

<sup>47</sup> 2 ALAN R. BROMBERG & LARRY E. RIBSTEIN, *BROMBERG AND RIBSTEIN ON PARTNERSHIP* § 7.11(a), at 7:154.7–.8 (2013).

<sup>48</sup> *See id.*

<sup>49</sup> *See id.* § 7.01(b), at 7:14.

the technical sense.”<sup>50</sup> Once a partner’s interest has been settled, the partner no longer owes fiduciary duties to the other partners.<sup>51</sup> The withdrawing partner may then solicit former clients and continue to work on cases that were pending when the partner withdrew, without having to share fees.<sup>52</sup> Therefore, in practice, partners only have a duty to share fees from pending client matters when a law firm dissolves and winds up.

*B. How the Unfinished Business Doctrine Affects Client Choice*

While the unfinished business doctrine may attempt to ensure the fair distribution of earnings from partnership business when partnerships wind up, the doctrine also creates negative externalities. In states with partnership law statutes that parallel the UPA, such as New York, the doctrine may impede a client’s choice of counsel. It may impose economic disincentives on a partner and the new firm that the partner joins for working on the client’s unfinished matter, thereby inducing the partner to withdraw from the case. The economic disincentives arise because the UPA requires former partners to share earnings on client matters without the right to additional compensation.<sup>53</sup>

As an illustration, assume that a law firm of five partners dissolves and that each of those partners is entitled to 20% of the firm’s profits. Under the *Jewel* doctrine, if one of those five partners joins a new law firm as a partner—and the new firm continues working on unfinished business of the former firm—the new firm would only be entitled to the former partner’s 20% stake; each of the four other former partners are entitled to their 20% share. Further, the partner who joined the new firm is only entitled to a fraction of the 20% to which the new firm is entitled. If the partner also has a 20% stake in the new firm, the partner is now only entitled to 4% of earnings from unfinished business. Thus, the partner’s interest in the matter declined from 20% to 4%, while the other partners at the new firm may only retain the remaining 16% of earnings that the firm bills.<sup>54</sup> The remaining four partners of the dissolved firm, who contribute nothing, collectively earn more than the partner and the new firm that completes the unfinished business.

---

<sup>50</sup> *Id.*

<sup>51</sup> *See id.* § 7.01(b), at 7:9–:13.

<sup>52</sup> *See Kelly v. Smith*, 611 N.E.2d 118, 119–21 (Ind. 1993) (declining to apply the unfinished business doctrine after a partner withdrew from a law firm and continued working on a pending matter of his former firm).

<sup>53</sup> *See generally* Epstein & Wisoff, *supra* note 6, at 1597–619. The economic disincentives would not be as great in states that have adopted RUPA because RUPA eliminated the no-compensation rule that exists in the UPA. *See supra* note 33. Under RUPA, partners are entitled to additional compensation for completing unfinished business. *See supra* note 33.

<sup>54</sup> The economic disincentives illustrated in this example would not exist for a partnership with an “eat-what-you-kill” profit structure, where partners are entitled to the earnings from their own client matters.

This dilution of earnings creates an opportunity cost that may make lawyers and the new firms that they join unwilling to continue representing clients with unfinished business. Professor Hillman acknowledged that the *Jewel* doctrine “may produce situations in which partners attempt to shed cases requiring substantial additional work but little in the way of economic incentives” because partners complete unfinished business without earning additional compensation.<sup>55</sup> Two commentators have referred to this economic disincentive as locking out a client from having a matter handled by the attorney of the client’s choice.<sup>56</sup> The problem becomes magnified when a former firm’s unfinished business is comprised of matters that take years to resolve because the doctrine requires partners to share fees until the matters are completed.<sup>57</sup> Therefore, if a lawsuit continues for ten years, the partners continue to owe fiduciary duties to one another—albeit only with respect to the unfinished business—and must share the fees from the suit with each other during this ten-year period.<sup>58</sup>

Although ethics rules impose some limitations on when attorneys may withdraw from representing clients, in practice, the rules may not prevent attorneys from withdrawing from pending cases after a law firm dissolves. The Model Rules of Professional Conduct allow an attorney to withdraw from representing a client if “withdrawal can be accomplished without material adverse effect on the interests of the client,” or for one of several other reasons.<sup>59</sup> The Model Rules explicitly allow an attorney to resign if continued representation would cause the attorney to face an “unreasonable financial burden,” even if withdrawal would be materially adverse to the client.<sup>60</sup> The unfinished business doctrine might create such a burden depending on an attorney’s financial situation. Further, the Model Rules

---

<sup>55</sup> ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS § 2.8.1, at 2:166 (2d ed. 2013).

<sup>56</sup> See Epstein & Wisoff, *supra* note 6, at 1599–600. *But see* Richmond, *supra* note 45, at 418 (arguing that there is no evidence that the lock-out problem exists).

<sup>57</sup> See Hillman, *supra* note 21, at 465 (“Winding up a law firm may be a protracted process that extends for several years, particularly when the business being wound up includes complex litigation or contingent fee cases.”); *see also* Redman v. Walters, 152 Cal. Rptr. 42, 44–45 (Ct. App. 1979) (illustrating how a pending case may lengthen the winding-up period of a law firm). Some courts have specified that matters that are later appealed after a law firm dissolves constitute new business not subject to the unfinished business doctrine. *See, e.g.*, Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP, 477 B.R. 318, 332 (S.D.N.Y. 2012) (citing Talley v. Lamb, 100 N.Y.S.2d 112, 117–18 (Sup. Ct. 1950)); Platt v. Henderson, 361 P.2d 73, 86 (Or. 1961).

<sup>58</sup> See HILLMAN, *supra* note 55, § 4.6.3, at 4:70-8. During the winding-up phase, partners may compete with their former partners and seek opportunities for themselves to serve clients on new matters. *See In re Silverberg*, 438 N.Y.S.2d 143, 144 (App. Div. 1981) (citing *Talley*, 100 N.Y.S.2d at 118).

<sup>59</sup> MODEL RULES OF PROF’L CONDUCT r. 1.16(b) (2013).

<sup>60</sup> *Id.* r. 1.16(b)(6); *see also* Smith v. R.J. Reynolds Tobacco Co., 630 A.2d 820, 831–32 (N.J. Super. Ct. App. Div. 1993) (holding that an attorney may withdraw from representation if a case poses an unreasonable financial burden, even if the client would suffer material adverse effects).

allow an attorney to withdraw for “good cause,” even if withdrawal would be materially adverse to the client.<sup>61</sup> A lawyer might explain to a judge, for instance, that joining a new firm would interfere with the lawyer’s ability to best represent the client when, in fact, the lawyer is merely concerned that the case is no longer profitable.<sup>62</sup> Therefore, in practice, the ethics rules may not protect clients or guard against the financial-disincentive externality that the unfinished business doctrine creates.

The unfinished business doctrine may also negatively impact a former partner’s prospects of becoming a partner at another law firm. The reason for this is that the doctrine may impose liability on a new firm that completes unfinished business that a former partner brings.<sup>63</sup> Oftentimes, the value of a newly admitted partner to a law firm is based on the partner’s existing client relationships. If a law firm would be required to disgorge earnings to a dissolved law firm, the value that a prospective partner brings to the new firm is diminished. The new firm may be unwilling to assume this liability and decide not to take on a prospective new partner for this reason.

The consequences are real and substantial for law firms that take on lateral partners who bring unfinished business. In 2010, Baker & McKenzie LLP agreed to a \$6.65 million settlement to compensate the bankruptcy estate of Coudert Brothers LLP for the profits Baker earned on unfinished business.<sup>64</sup> This was in addition to nearly \$17 million of contingency fees from unfinished business that Baker agreed to forfeit.<sup>65</sup> In 2011, Covington & Burling LLP paid a \$4 million settlement to the bankruptcy estate of

---

<sup>61</sup> MODEL RULES OF PROF’L CONDUCT r. 1.16(b)(7).

<sup>62</sup> *But see* Vollgraff v. Block, 458 N.Y.S.2d 437, 440 (Sup. Ct. 1982) (concluding that “mere dissolution of the defendants’ law partnership was ineffective to terminate the partners’ obligations as attorneys toward partnership clients”).

<sup>63</sup> *See* Joan C. Rogers, *Law Firm’s Organizational Form, Insolvency Affect Extent of Members’ Personal Liability*, 28 *Laws. Man. on Prof. Conduct (ABA/BNA)* 163, 165 (2012). One court relied on the state’s codification of Section 13 of the UPA, which imposes liability on a partnership for a partner’s wrongful acts in the ordinary course of business. *See* Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP, No. 11 civ. 5994 (CM), 2012 WL 2952929, at \*9–10 (S.D.N.Y. July 18, 2012). The court held that the partners’ breach of fiduciary duties to their dissolved law firm—bringing unfinished business to new firms—constituted a wrongful act for which the new firms were liable. *See id.* Another court held that a firm taking on a partner of a dissolved law firm could be held liable under an interference-with-contract cause of action. *See* Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180, 192–94 (Ct. App. 1983), *overruled on other grounds by* Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 869 P.2d 454 (Cal. 1994). A new firm may have to disgorge earnings from unfinished business if the dissolved firm modified its partnership agreement to waive the application of the unfinished business doctrine on the eve of bankruptcy. *See* Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re* Brobeck, Phleger & Harrison LLP), 408 B.R. 318, 338–48 (Bankr. N.D. Cal. 2009) (holding that such a waiver could constitute a fraudulent transfer made while the law firm was insolvent).

<sup>64</sup> Joyce E. Cutler, *Jewel Under Scrutiny in Bankruptcy Court as Fights over Unfinished Business Continue*, 29 *Laws. Man. on Prof. Conduct (ABA/BNA)* 22, 23 (2013).

<sup>65</sup> *Id.*

Heller Ehrman LLP.<sup>66</sup> More recently, Baker & Hostetler LLP agreed to pay \$41 million to the bankruptcy estate of Howrey LLP to settle claims involving matters that eleven former Howrey partners brought to the firm.<sup>67</sup> Additionally, Paul Hastings LLP and two former Dewey & LeBoeuf LLP partners who now practice at Paul Hastings agreed to pay close to \$1.6 million to settle unfinished business claims with the bankruptcy estate of Dewey.<sup>68</sup> Over the next few years, certain former partners of Dewey and the firms they join may be subject to unfinished business suits for tens of millions of dollars.<sup>69</sup> This potential liability that a new firm may take on might negatively affect a former partner's prospects of becoming a partner at a new firm. And if a partner is unable to become a partner at a new firm, the corollary effect is that a client's choice of counsel may be infringed if the partner does not have the wherewithal to handle the case alone.

In short, the unfinished business doctrine applies to pending cases when a law firm dissolves and winds up if the partnership agreement does not waive the doctrine. The unfinished business doctrine may impose externalities that affect a client's choice of counsel because the doctrine may create economic disincentives for a partner and the partner's new firm that continue working on unfinished business. Moreover, the doctrine may make it more difficult for a former partner to join a new law firm. One significant question remains: does it matter whether unfinished business is billed on contingency or by the hour? The next two Parts consider this very issue.

## II. THE SPLIT WITHIN THE SOUTHERN DISTRICT OF NEW YORK

Despite the fact that New York City is the largest legal market,<sup>70</sup> the state's highest court, the New York Court of Appeals, has yet to address whether or how the unfinished business doctrine applies to law firms. During 2012, in separate cases, two district judges in the Southern District of New York considered the issue of whether the doctrine applies to

---

<sup>66</sup> *Id.*

<sup>67</sup> Jacqueline Palank, *Trustee Strikes Key Deals in Winding Down Howrey*, WALL ST. J., Aug. 19, 2013, at B4.

<sup>68</sup> Martha Neil, *Paul Hastings, 2 Partners to Pay \$1.6M to Settle Dewey Unfinished Business Claim*, A.B.A. J. (Mar. 6, 2013, 12:30 PM), [http://www.abajournal.com/news/article/paul\\_hastings\\_2\\_partners\\_to\\_pay\\_1.6m\\_to\\_settle\\_dewey\\_unfinished\\_business\\_cl](http://www.abajournal.com/news/article/paul_hastings_2_partners_to_pay_1.6m_to_settle_dewey_unfinished_business_cl).

<sup>69</sup> *See supra* note 1 (explaining that Dewey's partnership agreement did not waive the application of the unfinished business doctrine, that the bankruptcy settlements with some of Dewey's largest earners did not resolve claims for unfinished business, and that Dewey's unfinished business was valued at \$60 million).

<sup>70</sup> *See* Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1225 (2011).

matters law firms bill by the hour.<sup>71</sup> This Part discusses and analyzes each case.

The first judge to address the issue held that the unfinished business doctrine applies to hourly matters,<sup>72</sup> while the second judge held that it does not.<sup>73</sup> Both judges certified their decisions for interlocutory appeal to the Court of Appeals for the Second Circuit.<sup>74</sup> The Second Circuit granted both interlocutory appeals and certified questions to the New York Court of Appeals, which the court has accepted but not yet answered.<sup>75</sup>

The New York Court of Appeals will likely reexamine *Cohen v. Lord, Day & Lord*,<sup>76</sup> one of its decisions that courts in many jurisdictions have cited.<sup>77</sup> In *Cohen*, the court held that a provision in a partnership agreement that restricted an attorney's ability to practice law and a client's choice of legal counsel was unenforceable.<sup>78</sup> The Court of Appeals will be faced with the issue of reconciling the state's prohibition of certain restrictive covenants in law firm partnership agreements with the unfinished business doctrine because the doctrine creates effects similar to restrictions on the practice of law.

#### A. Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP

In May 2012, Judge McMahon of the Southern District of New York held that the unfinished business doctrine applies to client matters that law firms bill by the hour because unfinished matters are partnership assets for which partners owe a duty to account.<sup>79</sup> The plaintiff, Development Specialists, Inc. (DSI), was the administrator of the bankruptcy estate of

---

<sup>71</sup> *Geron v. Robinson & Cole LLP*, 476 B.R. 732, 738–43 (S.D.N.Y. 2012); *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 477 B.R. 318, 331–46 (S.D.N.Y. 2012).

<sup>72</sup> *See Dev. Specialists*, 477 B.R. at 344, 349.

<sup>73</sup> *See Geron*, 476 B.R. at 743.

<sup>74</sup> *Id.* at 745; *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, No. 11 civ. 5994 (CM), 2012 WL 2952929 (S.D.N.Y. July 18, 2012).

<sup>75</sup> *Dev. Specialists, Inc. v. K&L Gates LLP (In re Coudert Bros.)*, No. 12-4916 (L) (2d Cir. Dec. 2, 2013) (Bloomberg Law, Dockets, Req. No. 83), *certified questions accepted*, 2014 WL 113013 (N.Y. Jan. 14, 2014); *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*, 736 F.3d 213 (2d Cir.), *certified questions accepted*, 2013 WL 6499301 (N.Y. Dec. 12, 2013).

<sup>76</sup> 550 N.E.2d 410 (N.Y. 1989).

<sup>77</sup> *E.g.*, *Pierce v. Hand, Arendall, Bedsole, Greaves & Johnston*, 678 So. 2d 765, 770 (Ala. 1996); *Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.*, 138 P.3d 723, 727, 732 (Ariz. 2006); *Howard v. Babcock*, 863 P.2d 150, 158, 163 (Cal. 1993); *Neuman v. Akman*, 715 A.2d 127, 131–37 (D.C. 1998); *Donnelly v. Brown, Winick, Graves, Gross, Baskerville, Schoenebaum, & Walker, P.L.C.*, 599 N.W.2d 677, 680, 682 (Iowa 1999); *Jacob v. Norris, McLaughlin & Marcus*, 588 A.2d 1287, 1292 (N.J. Super. Ct. App. Div. 1991), *rev'd*, 607 A.2d 142 (N.J. 1992).

<sup>78</sup> *See* 550 N.E.2d at 411.

<sup>79</sup> *See Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 477 B.R. 318, 326, 332 (S.D.N.Y. 2012).

Coudert Brothers LLP, a law firm that dissolved in 2005.<sup>80</sup> DSI sued ten law firms that former Coudert partners joined in an attempt to recover profits that the firms earned on Coudert's pending, uncompleted client matters.<sup>81</sup> The issue before the court was whether the hourly client matters were in fact partnership property subject to winding up.<sup>82</sup> Judge McMahon analyzed how the state's highest court would address the issue and set forth numerous arguments that I have categorized into four points below.

*1. Cases Are Partnership Property, and Partnership Property Belongs to the Partnership, Not to the Individual Partners.*—The DSI court examined the fundamental concept of a partnership. The court found that because a partnership is comprised of a group of co-owners who carry on a business, it would be contrary to partnership law to find that the firm's pending cases belong to individual partners.<sup>83</sup> It reasoned that the billing arrangement between a client and the firm should have no bearing on whether cases are assets.<sup>84</sup> The court recognized that only unfinished business—not new business from a client that partners take on after the partnership dissolves—is an asset of the partnership.<sup>85</sup> New business cannot be an asset since a law firm only has an expectation of obtaining new business.<sup>86</sup> As such, an attorney who collects fees associated with new business has no duty to share the earnings with former partners.

The court rejected the argument that because a client has the right to terminate a relationship with an attorney at will, Coudert's pending cases are not partnership assets.<sup>87</sup> It explained how executory contracts can be partnership assets, citing *Stem v. Warren*,<sup>88</sup> where the New York Court of Appeals held that a contract for architectural services was a partnership asset even though the contract was terminable at will.<sup>89</sup>

*2. Other UPA Jurisdictions Treat Hourly Matters as Assets of the Partnership.*—The court cited a handful of cases that have cursorily considered whether hourly pending cases are assets of the

---

<sup>80</sup> *Id.* at 322–23.

<sup>81</sup> *Id.* at 322.

<sup>82</sup> *See id.* at 326.

<sup>83</sup> *See id.* at 331–32 (“A law partnership not only possesses fixed assets in the form of typewriters, bookcases, etc., it possesses assets in the form of cases and legal matters.” (quoting *In re Lester*, 403 N.Y.S.2d 33, 34 (App. Div. 1978))).

<sup>84</sup> *Id.* at 332.

<sup>85</sup> *See id.*

<sup>86</sup> *Id.* However, arguably, a law firm never has more than an expectation of obtaining future business associated with unfinished business since clients can discharge their attorneys at will.

<sup>87</sup> *See id.* at 333.

<sup>88</sup> 125 N.E. 811 (N.Y. 1920).

<sup>89</sup> *See Dev. Specialists*, 477 B.R. at 333–34.

partnership and concluded that they are.<sup>90</sup> The court emphasized that New York law instructs courts to harmonize their rulings with other jurisdictions' interpretations of the UPA.<sup>91</sup>

3. *The Differences Between Contingent Fee and Hourly Billable Arrangements Are Not Meaningful.*—The law firm defendants argued that Coudert's interest—and therefore the bankruptcy trustee's interest—in hourly matters is limited to the number of hours Coudert performed before it dissolved, multiplied by the applicable hourly rate.<sup>92</sup> However, the *DSI* court found that the only difference between contingent fee and hourly matters is “when and how” a client compensates a law firm.<sup>93</sup> The court rejected the contention that hourly billing gives rise to a series of “mini-contracts” where unfinished business “becomes ‘finished business’ with the submission of each periodic invoice.”<sup>94</sup> More specifically, the court stated that hourly billable work is not like a month-to-month lease because lawyers enter into agreements to provide legal counsel generally or for specific matters.<sup>95</sup> And even though a law firm is entitled to recover the quantum meruit value of the work it has performed on contingency when a client discharges the firm, this principle operates separately from the fiduciary duties partners owe one another during dissolution.<sup>96</sup>

Further, the court distinguished the rights that law firms have against clients and the rights that partners have against one another. A law firm has a right against its clients to be paid for the work it has performed.<sup>97</sup> Partners have a duty to account to former partners all earnings from partnership assets that existed on the date of dissolution.<sup>98</sup> Unless otherwise agreed upon, all partners are entitled to a share of those earnings based on an allocation set forth in the partnership agreement.<sup>99</sup> The argument that unfinished contingent fee matters are partnership assets, whereas unfinished hourly matters are not because of differences in payment

---

<sup>90</sup> See *id.* at 336–37 (citing *Robinson v. Nussbaum*, 11 F. Supp. 2d 1, 3–6 (D.D.C. 1997); *Greenspan v. Orrick, Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison LLP)*, 408 B.R. 318, 333 n.20 (Bankr. N.D. Cal. 2009); Official Comm. of Unsecured Creditors v. *Ashdale (In re Labrum & Doak, LLP)*, 227 B.R. 391, 408 (Bankr. E.D. Pa. 1998); *Rothman v. Dolin*, 24 Cal. Rptr. 2d 571, 572–73 (Ct. App. 1993)).

<sup>91</sup> *Id.* at 336 (citing N.Y. P'SHIP LAW § 4(4) (McKinney 2006) (“This chapter shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.”)).

<sup>92</sup> See *id.* at 337.

<sup>93</sup> *Id.* at 339.

<sup>94</sup> *Id.* at 337–38.

<sup>95</sup> *Id.* at 339.

<sup>96</sup> See *id.* at 338.

<sup>97</sup> See *id.*

<sup>98</sup> *Id.*

<sup>99</sup> See *id.* at 335–36.

structure, “conflates a law firm’s rights against its clients . . . and the rights of former partners among themselves.”<sup>100</sup> In other words, the compensation structure of a client matter has no bearing on the relationship and duties among partners.<sup>101</sup>

4. *New York’s Public Policy Does Not Require Hourly Matters to Be Treated Differently than Contingent Fee Matters.*—The *DSI* court observed that the law firm defendants’ strongest argument was that the unfinished business doctrine would create a financial disincentive for an attorney to continue representing a client on an existing, unfinished matter.<sup>102</sup> Under New York law (and in most states that have addressed the issue), provisions in partnership agreements are unenforceable if they create financial disincentives for attorneys to continue representing clients.<sup>103</sup> The genesis of this prohibition in New York is Rule 5.6(a)(1) of the New York Rules of Professional Conduct, which states that “[a] lawyer shall not participate in offering or making . . . a partnership . . . agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.”<sup>104</sup>

The *DSI* court noted that the New York Court of Appeals, in relying on the state’s ethics rules, has declined to enforce restrictive provisions in law firm partnership agreements in two cases where the provisions had effects similar to the application of the unfinished business doctrine.<sup>105</sup> In *Cohen v. Lord, Day & Lord*, the partnership agreement at issue required a partner who voluntarily withdrew to forfeit his interest in accounts receivable if he competed with the firm.<sup>106</sup> The *Cohen* court acknowledged that even though the provision did not prohibit a partner from practicing law, the monetary penalty restricted the practice of law because it would discourage a withdrawing partner from continuing to represent clients.<sup>107</sup> The court noted that the purpose of the ethics rule that proscribes restrictive partnership agreements is to ensure choice of counsel.<sup>108</sup>

Similarly, in *Denburg v. Parker Chapin Flattau & Klimpl*, the Court of Appeals refused to enforce a provision in a law firm partnership agreement that required a former partner to either return a portion of profits he had previously been allocated or pay a portion of fees that his new firm

---

<sup>100</sup> *Id.* at 338.

<sup>101</sup> *See id.* at 339.

<sup>102</sup> *Id.* at 340.

<sup>103</sup> *See* *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411 (N.Y. 1989); Robert W. Hillman, *Client Choice, Contractual Restraints, and the Market for Legal Services*, 36 HOFSTRA L. REV. 65, 73 (2007).

<sup>104</sup> N.Y. RULES OF PROF’L CONDUCT r. 5.6(a)(1) (2012); *accord* MODEL RULES OF PROF’L CONDUCT r. 5.6(a) (2013).

<sup>105</sup> *See* 477 B.R. at 340–43.

<sup>106</sup> 550 N.E.2d at 410–11.

<sup>107</sup> *Id.* at 411.

<sup>108</sup> *Id.*

would bill clients of the old firm.<sup>109</sup> The New York Court of Appeals reiterated similar reasoning that it set forth in *Cohen*—that financial disincentives interfere with a client’s choice of counsel.<sup>110</sup> The *DSI* court stated that *Denburg* was the case that best supported the law firm defendants because the financial disincentive in the partnership agreement had the same effect as the unfinished business doctrine and no-compensation rule.<sup>111</sup>

However, the *DSI* court found that the holdings of *Cohen* and *Denburg* were not directly applicable to the case at hand for three reasons. First, both cases dealt with partnership withdrawal, not partnership dissolution.<sup>112</sup> When a partnership is not dissolving, the default UPA rules about winding up do not take effect.<sup>113</sup> In the case of *DSI*, however, the firm was winding up, and while a firm is winding up, partners have a duty to wind up the partnership for the benefit of the partners.<sup>114</sup>

Second, the unfinished business doctrine did not pertain to *Cohen* and *Denburg*.<sup>115</sup> *Cohen* involved a partner forfeiting compensation if he competed with the firm he left, while *Denburg* involved a clause that required the withdrawing partner to share the earnings related to new business (as opposed to unfinished business) from former clients.<sup>116</sup>

Third, the *DSI* court concluded that the financial disincentives are the same, whether unfinished business is billed by the hour or on contingency, because the amount earned must be shared with the partners of the dissolved firm.<sup>117</sup> Although the New York Court of Appeals has never addressed the issue of the unfinished business doctrine, the opinions of the Appellate Division indicate that contingent fee cases are assets of a dissolved law firm; no opinion has held that the financial-disincentive rationale of *Cohen* and *Denburg* is reason not to apply the doctrine.<sup>118</sup> Thus, the court reasoned that applying the unfinished business doctrine to pending hourly matters does not violate public policy.<sup>119</sup>

In short, the *DSI* court held that the unfinished business doctrine applies to matters billed by the hour. Of particular significance is the

---

<sup>109</sup> 624 N.E.2d 995, 997 (N.Y. 1993).

<sup>110</sup> See *id.* at 998–99.

<sup>111</sup> See *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 477 B.R. 318, 342–43 (S.D.N.Y. 2012).

<sup>112</sup> *Id.* at 343.

<sup>113</sup> *Id.*

<sup>114</sup> See *id.* at 323, 327.

<sup>115</sup> *Id.* at 343.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 343–44. But see *infra* Part III.B (discussing how financial disincentives are greater when the unfinished business doctrine is applied to hourly matters, as compared to matters billed on contingency).

<sup>118</sup> See *Dev. Specialists*, 477 B.R. at 344.

<sup>119</sup> See *id.* at 344, 349.

court's narrow reading of the ethics rule that proscribes restrictive agreements in law firm partnership agreements and its interpretation of *Cohen* and *Denburg*. In the next case discussed below, the judge interpreted the ethics rule and *Cohen* more liberally.

### B. *Geron v. Robinson & Cole LLP*

In September 2012, Judge Pauley<sup>120</sup> of the Southern District of New York held that hourly billable client matters pending on the date of a law firm's dissolution are not assets of the partnership.<sup>121</sup> *Geron* is particularly interesting because it is the first opinion to thoroughly analyze the application of the unfinished business doctrine to hourly matters and then conclude that the doctrine does not apply to hourly matters.<sup>122</sup> The plaintiff in the case was the bankruptcy trustee of Thelen LLP, a failed law firm.<sup>123</sup> The trustee sued Seyfarth Shaw LLP and Robinson & Cole LLP, two law firms that hired former Thelen partners and billed clients for pending but unfinished hourly work that Thelen began.<sup>124</sup> In October 2008, when the firm was insolvent, the partners voted to dissolve Thelen and incorporate a so-called *Jewel* waiver into their partnership agreement that waived the application of the unfinished business doctrine.<sup>125</sup> Thelen filed for bankruptcy in September 2009.<sup>126</sup> The trustee's main contention was that adding the *Jewel* waiver constituted a fraudulent transfer.<sup>127</sup> Consequently, the trustee sought to recover the value of the unfinished business that was "transferred" to the two law firm defendants.

The *Geron* court examined some of the same issues that the *DSI* court considered, ultimately giving greater deference to *Cohen*—where the New York Court of Appeals held that a provision in a partnership agreement that restricted the practice of law was unenforceable—and less deference to *Stem*—where the Court of Appeals suggested that terminable-at-will

---

<sup>120</sup> I interned for Judge Pauley during the summer of 2012. At no point was I involved with *Geron*, and I have never discussed the case or this Note with Judge Pauley.

<sup>121</sup> *Geron v. Robinson & Cole LLP*, 476 B.R. 732, 743 (S.D.N.Y. 2012).

<sup>122</sup> *Cf. id.* at 739 n.2 ("Over the last three decades, courts have cited *Jewel* reflexively and uncritically. Thus, from modest beginnings in a dispute involving a small Alameda County general practice firm, the *Jewel* doctrine has grown to ensnare some of the largest law firms in the United States.").

<sup>123</sup> *Id.* at 736.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (The *Jewel* waiver stated: "Neither the Partners nor the Partnership shall have any claim or entitlement to clients, cases or matters ongoing at the time of dissolution of the Partnership other than the entitlement for collection of amounts due for work performed by the Partners and other Partnership personnel prior to their departure from the Partnership. [This provision is] intended to expressly waive, opt out of and be in lieu of any rights any Partner or the Partnership may have to 'unfinished business' of the Partnership, as the term is defined in *Jewel v. Boxer*, . . . or as otherwise might be provided in the absence of this provision through the interpretation or application of partnership law.).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 736–37.

executory contracts are partnership assets. I have categorized the court's main arguments into five points below and critiqued its reasoning in a few instances.

1. *Recognizing a Property Interest in Unfinished Hourly Matters Violates New York's Public Policy.*—The court noted that New York has a “strong public policy in favor of client autonomy and attorney mobility.”<sup>128</sup> Reducing the compensation a former partner is entitled to when that former partner, or that former partner's new firm, completes all of the work would provide an “unjust windfall” to the bankruptcy estate.<sup>129</sup> The court found that such an unjust windfall is the equivalent of a restriction on the practice of law that violates public policy, which *Cohen* proscribes.<sup>130</sup> More specifically, the court noted that the unfinished business doctrine as applied to hourly matters “clash[es]” with New York's Rules of Professional Conduct because Rule 1.5(g) restricts a lawyer's ability to share fees with a lawyer who is not part of the same firm.<sup>131</sup> The court acknowledged that even though professional ethics rules are not the law, “New York courts interpret other laws to harmonize with them where possible.”<sup>132</sup> However, the court overlooked the comments to the ethics rule, which state that the rule “does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.”<sup>133</sup> Ultimately, the *Geron* court interpreted *Cohen* more liberally than did the *DSI* court, finding that *Cohen*'s proscription against restrictive covenants in agreements among attorneys is incompatible with the unfinished business doctrine.<sup>134</sup> The *DSI* court, on the other hand, construed *Cohen* as not restricting the application of the unfinished business doctrine.<sup>135</sup>

2. *Recognizing a Property Interest in Unfinished Hourly Matters Contravenes New York's Application of the Unfinished Business Doctrine to Contingent Fee Matters.*—The court stated that New York case law does not necessarily prescribe that 100% of earnings from unfinished contingent fee matters are partnership assets. The court referred

---

<sup>128</sup> *Id.* at 742–43.

<sup>129</sup> *Id.* at 740.

<sup>130</sup> *See id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> N.Y. RULES OF PROF'L CONDUCT r. 1.5(g) cmt. 8 (2012); accord MODEL RULES OF PROF'L CONDUCT r. 1.5 cmt. 8 (2013). Some courts have held that fee sharing among former law firm partners who later work in different firms is not a violation of ethics rules because the old partnership continues to exist until the partnership is fully wound up. *E.g.*, Official Comm. of Unsecured Creditors v. Ashdale (*In re* Labrum & Doak, LLP), 227 B.R. 391, 414 (Bankr. E.D. Pa. 1998); Ellerby v. Spiezer, 485 N.E.2d 413, 416 (Ill. App. Ct. 1985).

<sup>134</sup> The *Geron* court did not discuss the significance of *Denburg* to the holding in *Cohen*.

<sup>135</sup> *See supra* Part II.A.4.

to *Santalucia v. Sebright Transportation, Inc.*,<sup>136</sup> *Shandell v. Katz*,<sup>137</sup> and *Kirsch v. Leventhal*,<sup>138</sup> which held that unfinished contingent fee matters should be valued on the date a partnership dissolves and that any postdissolution fees earned due to a lawyer's "post-dissolution efforts, skill and diligence" need not be shared with former partners.<sup>139</sup> The *Geron* court applied this logic and reasoned that because postdissolution fees earned on hourly matters arise from a lawyer's "post-dissolution efforts, skill and diligence," pending hourly cases are not partnership assets subject to the unfinished business doctrine.<sup>140</sup>

However, the holdings in *Santalucia*, *Shandell*, and *Kirsch* are the product of the Second Circuit and Appellate Division misapplying partnership law.<sup>141</sup> Each case involved the dissolution and winding up of a law firm.<sup>142</sup> The three opinions relied on the section of New York partnership law that parallels Section 42 of the UPA, entitling a withdrawing partner or estate of a deceased partner to the value of their partnership interests if the partnership continues to operate without winding up.<sup>143</sup> The three cases sought to apply this principle to the context of dissolution and winding up by valuing pending contingent fee cases on the date the law firm dissolved. This was incorrect. Section 42 is inapplicable when a partnership dissolves and winds up; it only applies when a partnership continues to operate after a partner withdraws or dies.<sup>144</sup> Specifically, the purpose of Section 42 is to compensate an outgoing partner for the partnership's continued use of the outgoing partner's

---

<sup>136</sup> 232 F.3d 293 (2d Cir. 2000).

<sup>137</sup> 629 N.Y.S.2d 437 (App. Div. 1995).

<sup>138</sup> 586 N.Y.S.2d 330 (App. Div. 1992).

<sup>139</sup> *Geron v. Robinson & Cole LLP*, 476 B.R. 732, 740–41 (S.D.N.Y. 2012) (quoting *Santalucia*, 232 F.3d at 298; *Shandell*, 629 N.Y.S.2d at 439; *Kirsch*, 586 N.Y.S.2d at 333).

<sup>140</sup> *Id.* at 741 (quoting *Shandell*, 629 N.Y.S.2d at 439).

<sup>141</sup> See *Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 477 B.R. 318, 347–49 (S.D.N.Y. 2012) (expressing doubt that the New York Court of Appeals would follow *Santalucia*, *Shandell*, and *Kirsch* because the principle they establish "eviscerates" the no-compensation rule).

<sup>142</sup> See *Santalucia*, 232 F.3d at 295; *Shandell*, 629 N.Y.S.2d at 438; *Kirsch*, 586 N.Y.S.2d at 331.

<sup>143</sup> See *Santalucia*, 232 F.3d at 298–99 (relying on N.Y. P<sup>'</sup>SHIP LAW § 73 (McKinney 2006)); *Shandell*, 629 N.Y.S.2d at 439 (same); *Kirsch*, 586 N.Y.S.2d at 332–33 (same); UPA, *supra* note 16, § 42. Section 42 of the UPA also entitles the outgoing partner to opt for either interest on or profits from the partnership's continued use of the partner's right in the partnership property. However, Section 42 does not entitle an outgoing partner to profits from unfinished business. See *Cadwalader, Wickersham & Taft v. Beasley*, 728 So. 2d 253, 258 (Fla. Dist. Ct. App. 1998) (holding that fees "attributable to the postdissolution efforts, skill, and diligence of the remaining partners . . . should not be proportionately attributable to the use of the departing partner's right in the property of the dissolved partnership"); *BROMBERG & RIBSTEIN*, *supra* note 47, § 7.13(f), at 7:210, :212 (An outgoing partner is not entitled to a full profit share "because that share was predicated in part on the [outgoing partner's] contribution of services . . . . When profits have been elected [under Section 42], the [outgoing partner] must prove . . . what profits were attributable to the use of partnership assets as distinguished from the services of the partners.").

<sup>144</sup> See *GREGORY*, *supra* note 18, § 228, at 373; *HILLMAN*, *supra* note 55, § 4.3.6.2, at 4:39.

capital<sup>145</sup>—in other words, to prevent an outgoing partner’s capital from remaining “trapped” in the partnership.<sup>146</sup> Therefore, the three opinions were wrong to rely on New York’s codification of Section 42, and the principle that Section 42 embraces was likewise of no relevance to *Geron*.

3. *Recognizing a Property Interest in Hourly Client Matters Would Result in Bizarre Consequences.*—If unfinished hourly matters are partnership property, then they become property of the bankruptcy estate. The court indicated that such a holding is nonsensical because “[i]t would appear . . . that the Bankruptcy Code empowers a debtor law firm to sell its pending hourly fee matters to the highest bidder”<sup>147</sup> given that the Code authorizes a trustee to “use, sell, or lease” property of the estate.<sup>148</sup> This directly conflicts with a client’s right to choose legal counsel.<sup>149</sup> Moreover, the court acknowledged that recognizing hourly matters as assets of a law firm might suggest that “a client who discharges a debtor law firm and transfers his case to a new firm violates the automatic stay”<sup>150</sup> under the Bankruptcy Code, which prohibits “act[s] to obtain possession . . . or to exercise control over property of the estate.”<sup>151</sup> However, the *Geron* court’s reasoning here overlooks the reality that it is only the right to earnings associated with unfinished business that is property of the estate; the actual cases themselves are not.<sup>152</sup> When a client discharges a law firm, that law firm has a right to compensation for work performed.<sup>153</sup> It is this right to compensation that would become property of the estate.<sup>154</sup>

4. *Law Firm Partnerships Are Different from Other Types of Partnerships.*—The court explained that it is “overbroad” to interpret *Stem*, like the *DSI* court did, as standing for the rule that terminable-at-will executory contracts are partnership property.<sup>155</sup> In *Stem*, the contract between the architecture partnership and the client included a clause that contemplated that the contract would be performed

---

<sup>145</sup> BROMBERG & RIBSTEIN, *supra* note 47, § 7.13(f), at 7:214.

<sup>146</sup> HILLMAN, *supra* note 55, § 4.3.6.2, at 4:39.

<sup>147</sup> *Geron v. Robinson & Cole LLP*, 476 B.R. 732, 741 (S.D.N.Y. 2012).

<sup>148</sup> *Id.* (quoting 11 U.S.C. § 363(b)(1) (2006)).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> 11 U.S.C. § 362(a)(3) (2012).

<sup>152</sup> See *LaFond v. Sweeney*, No. 10CA2005, 2012 WL 503655, at \*10 (Colo. App. Feb. 16, 2012) (“[W]e distinguish between a pending contingent fee case as unfinished business to be completed in winding up a firm, and the fee generated by that case as property of the firm.”).

<sup>153</sup> After a client discharges an attorney who billed on contingency, the discharged attorney can generally recover a fee in quantum meruit. JACOB A. STEIN & ANDREW M. BEATO, *THE LAW OF LAW FIRMS* § 8:3, at 250–51 (2012).

<sup>154</sup> See 11 U.S.C. § 541(a)(1) (stating that a bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case”).

<sup>155</sup> *Geron*, 476 B.R. at 741.

notwithstanding the death of the partner.<sup>156</sup> Unlike a contract for architectural services, the *Geron* court reasoned that a contract for legal representation cannot contemplate survival because a client has a right to discharge an attorney at will.<sup>157</sup> And though the contract in *Stem* was terminable at will, the *Geron* court emphasized that contracts for legal services are “categorically different”<sup>158</sup> from other at-will contracts: clients place the “ultimate trust and confidence” in their legal counsel, and an “attorney’s obligations . . . transcend those prevailing in the commercial market place.”<sup>159</sup> Applying *Stem* to contracts for hourly legal fees would “undermine” the “unique” attorney–client relationship.<sup>160</sup>

5. *New York Need Not Follow Other UPA Jurisdictions.*—Finally, unlike the *DSI* court, the *Geron* court rejected the contention that New York should follow the approach of other states that embrace the UPA, even though New York partnership law instructs courts to harmonize rulings on partnership law with other UPA jurisdictions.<sup>161</sup> The court reasoned that the UPA “harmonize[s] partners’ duties regarding partnership property” but that state common law determines what constitutes partnership property.<sup>162</sup> Thus, the *Geron* court held that the hourly billable matters pending on the date a partnership dissolves do not fall within the ambit of the unfinished business doctrine.<sup>163</sup> In other words, unfinished cases billed by the hour are not partnership assets subject to winding up.

Both *DSI* and *Geron* highlight how the unfinished business doctrine may conflict with the profession’s Rules of Professional Conduct and New York’s public policy. In *DSI*, the court gave greater deference to the state’s codification of the UPA and placed a higher priority on the duties partners owe one another. In *Geron*, the court placed a higher priority on the attorney–client relationship. The New York Court of Appeals will soon wrestle with the same issues and make a decision about whether the unfinished business doctrine, as applied to hourly matters, contravenes or comports with public policy.

---

<sup>156</sup> *Stem v. Warren*, 125 N.E. 811, 812 (N.Y. 1920).

<sup>157</sup> 476 B.R. at 741–42 (citing *Demov, Morris, Levin & Shein v. Glantz*, 428 N.E.2d 387, 389 (N.Y. 1981) (holding that “a client may discharge an attorney without cause at any time”).

<sup>158</sup> *Id.* at 742.

<sup>159</sup> *Id.* (quoting *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994)).

<sup>160</sup> *Id.* (citing *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410, 411 (N.Y. 1989) (“Clients are not merchandise. Lawyers are not tradesmen. . . . An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status.”)).

<sup>161</sup> *See id.* at 742–43; *supra* note 91 and accompanying text.

<sup>162</sup> *Geron*, 476 B.R. at 742.

<sup>163</sup> *See id.* at 743.

### III. APPLYING THE UNFINISHED BUSINESS DOCTRINE TO HOURLY MATTERS

Two points of contention between *DSI* and *Geron* involve whether public policy precludes the unfinished business doctrine from applying to hourly matters and whether there are meaningful differences between hourly billable and contingent fee matters. This Part argues that the unfinished business doctrine does not contravene public policy and, therefore, applies to both matters billed by the hour and on contingency. However, there is a meaningful difference between hourly and contingent fee matters that may cause former partners to face higher financial disincentives when completing hourly billable unfinished business. This Part concludes by suggesting statutory reform to ameliorate the negative externalities of the doctrine that implicate client choice and a former partner's prospects of joining a new firm.<sup>164</sup>

#### *A. Why the Unfinished Business Doctrine Applies to Hourly Matters*

The unfinished business doctrine may infringe clients' choice of counsel because of the financial disincentives the doctrine imposes in certain instances. The effect of the doctrine may have the same impact as restrictive covenants in partnership agreements that many states prohibit, such as agreements to forfeit compensation. The impact is troubling because when it induces a partner to withdraw from a client matter, the doctrine causes harm to an existing attorney–client relationship, possibly forcing the client to find a new attorney.<sup>165</sup> The New York Court of Appeals has decided three cases that address the issue of whether agreements among lawyers that create financial disincentives are enforceable.<sup>166</sup> A close examination of the court's three opinions suggests that the unfinished business doctrine, even when applied to hourly matters, does not violate the state's public policy, which is concerned with attorneys being improperly deterred from practicing law. The opinions suggest that *Cohen* should not be read as broadly as the *Geron* court interpreted the case because the doctrine does not improperly deter competition by requiring a former partner to pay a penalty or forfeit earnings that belong to the partner.

---

<sup>164</sup> See *supra* Part I.B for a discussion of the negative externalities that the unfinished business doctrine creates.

<sup>165</sup> See Robert M. Wilcox, *Enforcing Lawyer Non-competition Agreements While Maintaining the Profession: The Role of Conflict of Interest Principles*, 84 MINN. L. REV. 915, 934 (2000) (“The client who is denied the opportunity to continue a close fiduciary relationship with the restricted lawyer not only loses a trusted confidant and counsel, but may also face the cost of educating a new attorney on the subject of the representation, a potential loss through delay in the ultimate resolution of the matter while a new lawyer takes over, and possibly the need to disclose sensitive confidences to yet another individual.”).

<sup>166</sup> *Hackett v. Milbank, Tweed, Hadley & McCloy*, 654 N.E.2d 95 (N.Y. 1995); *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995 (N.Y. 1993); *Cohen v. Lord, Day & Lord*, 550 N.E.2d 410 (N.Y. 1989).

The first case on restrictive agreements that the New York Court of Appeals decided, *Cohen v. Lord, Day & Lord*, addressed a clause in a partnership agreement that required a withdrawing partner to forfeit his interest in accounts receivable if he competed with the firm.<sup>167</sup> Relying on an ethics rule that proscribes agreements that restrict an attorney's right to practice law, the court held that the forfeiture clause was unenforceable because it discouraged partners from continuing to represent clients.<sup>168</sup> The *Geron* court relied on *Cohen* when it held that the unfinished business doctrine does not apply to hourly matters, finding that the doctrine is a restriction on the practice of law when applied to hourly matters.<sup>169</sup> Of particular importance, however, is that the *Cohen* court explicitly "caution[ed] against a categorical interpretation or application" of its holding.<sup>170</sup>

The New York Court of Appeals' second opinion on restrictive agreements, *Denburg v. Parker Chapin Flattau & Klimpl*,<sup>171</sup> further clarified the limits of the ethics rule. The agreement at issue required a former partner to pay the firm he left the greater of 12.5% of the partner's earnings in the prior two years or 12.5% of the amount the new firm billed clients of the old firm during the ensuing two years.<sup>172</sup> As in *Cohen*, the court examined the effect of the restrictive provision (as opposed to its intent) and concluded that it "improperly deter[red] competition and thus impinge[d] upon clients' choice of counsel."<sup>173</sup> The key language is *improperly deter*, suggesting that some restrictive provisions that deter are enforceable.

In both *Denburg* and *Cohen*, the litigation involved covenants that required partners to give something up that they were otherwise entitled to under partnership law and in the partnership agreements. In *Cohen*, that was a right to accounts receivable; in *Denburg*, that was a portion of the partner's prior earnings or the partner's future earnings. Thus, in both cases, the restrictive covenants did not merely *deter* competition; they *improperly deterred* competition because the agreements sought to take away something to which the partners were otherwise entitled.

A second issue that the *Denburg* court addressed further supports the logic that only restrictive agreements that improperly deter competition are unenforceable. Prior to the start of the litigation, the departing partner

---

<sup>167</sup> 550 N.E.2d at 410–11.

<sup>168</sup> *Id.* at 411. The ethics rule at issue paralleled DR 2-108 of the Model Code of Professional Responsibility. New York has since revamped its ethics rules to parallel the Model Rules of Professional Conduct. See *supra* note 104 and accompanying text for the revamped rule.

<sup>169</sup> See *supra* Part II.B.1.

<sup>170</sup> 550 N.E.2d at 413.

<sup>171</sup> 624 N.E.2d 995.

<sup>172</sup> *Id.* at 997.

<sup>173</sup> *Id.* at 999 (emphasis added).

allegedly told another partner at the firm that the partnership could retain the balance in his capital account to settle the dispute.<sup>174</sup> The departing partner contested this allegation, and the Appellate Division held that even if the partner entered into an oral settlement agreement, the settlement was unenforceable for the same reasons the restrictive covenant was: its effect deterred competition, which negatively impacted clients' choice of counsel.<sup>175</sup>

The Court of Appeals, however, disagreed and held that if there was a settlement agreement, it would be enforceable.<sup>176</sup> The court reasoned that countervailing policy reasons that favor the enforcement of settlement agreements require the settlement agreement to be enforced even though the restrictive clause was unenforceable.<sup>177</sup> Similar to the disclaimer the court made in *Cohen*, it emphasized that agreements giving rise to financial disincentives among lawyers "are not per se illegal but depend on the particular terms and circumstances."<sup>178</sup>

The New York Court of Appeals adopted similar reasoning again in its third case on the issue of financial disincentives. In *Hackett v. Milbank, Tweed, Hadley & McCloy*, the court upheld an arbitrator's award in a dispute involving a provision in a law firm partnership agreement that required withdrawing partners to forfeit supplemental payments if they left the firm and earned income in excess of \$100,000 per year.<sup>179</sup> The case arose after an arbitrator determined that the withdrawing partner was not entitled to his supplemental payments.<sup>180</sup> The withdrawing partner challenged the arbitrator's decision, and the trial court held that the provision in the partnership agreement violated public policy.<sup>181</sup>

The Court of Appeals distinguished the provision from the anticompetitive covenants in *Cohen* and *Denburg* on the grounds that the "supplemental payment provision [wa]s not inevitably anticompetitive on its face."<sup>182</sup> It explained that the \$100,000 threshold applied regardless of whether a departing partner earned that much competing with the firm or pursuing another lucrative opportunity.<sup>183</sup> Finally, the court reiterated its reasoning in *Denburg*—that "anticompetition policy may yield to other

---

<sup>174</sup> *Id.* at 997.

<sup>175</sup> *See id.* at 998.

<sup>176</sup> *See id.* at 1000–02.

<sup>177</sup> *See id.*

<sup>178</sup> *Id.* at 1002.

<sup>179</sup> *See* 654 N.E.2d 95, 97–98 (N.Y. 1995).

<sup>180</sup> *Id.* at 97.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 101.

<sup>183</sup> *See id.*

public policy concerns,” such as those favoring arbitration, which the parties already consented to and underwent.<sup>184</sup>

These three cases, when read together, suggest that restrictive covenants are anticompetitive and, therefore, unenforceable when they improperly deter competition (negatively affecting clients’ right to counsel) by requiring a partner to give something up that the partner is otherwise entitled to under the partnership agreement or under partnership law—for example, forfeiting an interest that the partner is entitled to (as in *Cohen*), or paying a penalty because the partner is competing with the firm by continuing to practice law (as in *Denburg*). Moreover, the latter two opinions suggest that *Cohen* should not be read as broadly as the *Geron* court interpreted the case. In both *Denburg* and *Hackett*, though the Court of Appeals acknowledged that clauses that improperly deter competition are unenforceable, the court recognized that the policy behind the ethics rule that proscribes restrictive agreements among attorneys may yield to countervailing policy considerations.<sup>185</sup>

The unfinished business doctrine arises out of partnership law because of policy concerns. It does not exact a penalty or require a partner to disgorge earnings that the partner is otherwise entitled to because partners wind up a partnership and complete unfinished business for the benefit of the partnership. Rather, the doctrine seeks to delineate the scope of fiduciary duties among partners when a firm is dissolving. It reduces the incentive for partners to compete for the most profitable cases, diminishes the likelihood that partners will steal client files so that they may continue working on existing client matters for personal gain, and reduces the need for judicial intervention.<sup>186</sup> Moreover, the point of the doctrine is not to deter competition, but rather to reinforce fiduciary duties among partners that restrain them from using the partnership to obtain personal gain.<sup>187</sup> Therefore, not all agreements or relationships among partners that may have a detrimental effect on client choice are per se unenforceable. Because the unfinished business doctrine is a function of partnership law that upholds fiduciary duties as a partnership winds up, the doctrine does not clash with New York law, the UPA, or RUPA, whether it is applied to matters billed by the hour or on contingency.

#### B. *The Difference Between Hourly and Contingent Fee Matters*

Though the previous section advocates that the unfinished business doctrine should apply to hourly matters in the same way that it applies to contingent fee matters, this may not be optimal for attorneys and their

---

<sup>184</sup> *Id.* at 101–02.

<sup>185</sup> *See id.*; *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995, 1000–02 (N.Y. 1993).

<sup>186</sup> *See supra* Part I.A.1.

<sup>187</sup> *See* Robert W. Hillman, *Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*, 55 WASH. & LEE L. REV. 997, 999 (1998).

clients. There are important distinctions between hourly and contingent fee matters, and these distinctions make the financial disincentives greater when the unfinished business doctrine is applied to hourly matters.

Contingent fee and hourly billable matters are inherently different. Contingency arrangements function as financing devices that allow clients to pursue their legal claims without paying out of pocket.<sup>188</sup> The arrangement is a sort of “risk-sharing joint venture” where the attorney assumes the risk that the client will recover nothing.<sup>189</sup> Consequently, contingent fee agreements compensate for this risk by awarding law firms a significant share of a settlement or judgment.<sup>190</sup>

The financial disincentives that the unfinished business doctrine creates are not as great when a client matter is billed on contingency. The reason for this is because if an attorney withdraws from a case billed on contingency, the attorney forfeits the right to all compensation associated with that matter, regardless of how much time and effort the attorney has already spent.<sup>191</sup> This makes the case appear more financially appealing *going forward*. In determining whether to continue representing a client after a law firm dissolves, the attorney will disregard the total number of hours that the attorney already worked on the matter because, unlike with hourly matters, the attorney will not be compensated for that time if the attorney withdraws. The time, effort, and costs that the attorney already expended are sunk costs. Instead, the attorney will consider whether the potential contingency fee is sufficient to justify the estimated number of hours needed to complete the matter.<sup>192</sup>

For example, assume that a contingency fee case is expected to recover \$10 million and that the attorney handling the case is entitled to

---

<sup>188</sup> Lester Brickman, *Setting the Fee when the Client Discharges a Contingent Fee Attorney*, 41 EMORY L.J. 367, 380 (1992).

<sup>189</sup> *Id.* at 379.

<sup>190</sup> *See id.* at 379–80.

<sup>191</sup> STEIN & BEATO, *supra* note 153, § 8:3, at 250. An exception to this rule applies, entitling an attorney to quantum meruit compensation, if the attorney had good cause for withdrawing. *Id.* Although Part I.B discussed how an attorney may have good cause to withdraw from unfinished business, *see supra* notes 61–62 and accompanying text, “[t]he existence of grounds for withdrawal does not always translate into an attorney’s right to be paid for work performed.” *Faro v. Romani*, 641 So. 2d 69, 71 (Fla. 1994). One court has held that even though a law firm had good cause for withdrawing when a contingent fee case became a financial burden, the law firm was not entitled to recover fees in quantum meruit because it “did not have good cause to withdraw justifying compensation.” *Bell & Marra, pllc v. Sullivan*, 6 P.3d 965, 971 (Mont. 2000). Another court held that when an attorney withdraws from a contingent fee matter but the client is not at fault, the attorney is not entitled to compensation. *See Faro*, 641 So. 2d at 71. Following this line of cases, when a partner withdraws from unfinished business billed on contingency, the partner forfeits the right to compensation associated with that matter if the client is not at fault.

<sup>192</sup> There are, of course, ethical considerations that the attorney would need to take into account before withdrawing. The ethics rules explain when an attorney may withdraw from a case. *See supra* notes 59–62 and accompanying text.

one-tenth of the 30% contingency fee because the remaining former partners of the dissolved firm are entitled to nine-tenths under the unfinished business doctrine. The attorney will consider whether it is worth the total number of *additional* hours to finish the case and earn \$300,000 (i.e., one-tenth of the total \$3 million contingency fee). Because the attorney earns nothing by withdrawing, it becomes irrelevant how much time the attorney already spent on the case. The less time needed to complete the case, the greater the incentive exists for the attorney to continue representing the client. If a case is close to the point of potential recovery, it will likely be worthwhile to expend the time to seek the fees that the attorney would otherwise forfeit.

In the hypothetical above, if the attorney only needs to work an additional 100 hours on the case, the effective hourly rate is \$3000 to the attorney and new firm completing the case (since the partner is entitled to one-tenth of the \$3 million contingency fee). The hourly rate appears high because it is irrelevant how many hours the attorney spent on the case before the partnership dissolved, considering that the attorney would otherwise forfeit the contingency fee by withdrawing. In other words, the stopwatch is reset in calculating the earnings per hour going forward for unfinished business billed on contingency. In this instance, the unfinished business doctrine imposes financial disincentives only if the attorney can work on other client matters that yield fees in excess of \$3000 per hour.

As for hourly billable matters, the stopwatch never resets; the hourly rate is a constant. If the partner with a 10% interest in a dissolved law firm bills out at \$500 per hour, the partner's new firm would only be entitled to \$50 per hour because the remaining 90% belongs to the other partners of the former firm. The disincentive is greater for hourly matters because the new firm can never earn more than \$50 per hour *going forward*. Thus, for every hour the partner spends on unfinished business, the new firm incurs an opportunity cost of \$450 since it would be entitled to that much more per hour on matters that are not unfinished business. The partner will be less inclined to continue working on hourly unfinished business if the attorney can work on other matters and bill \$500 per hour instead.

These two scenarios illustrate that a partner may face elevated financial disincentives when unfinished business cases are billed by the hour. For a contingent fee matter, the effects of sunk costs cause a firm to earn more per hour going forward. This may induce a partner to complete profitable contingent fee unfinished business. However, for hourly matters, a former partner may be incentivized to withdraw from a case because the partner would not be forfeiting the possibility of earning a large payout. *Jewel* recognized that an attorney will not be unduly burdened if other former partners also continue to work on unfinished business.<sup>193</sup> Despite

---

<sup>193</sup> See *Jewel v. Boxer*, 203 Cal. Rptr. 13, 18–19 (Ct. App. 1984).

this possibility, a free-rider problem exists where each former partner prefers working on matters that are not unfinished business but hopes that the other former partners will work on unfinished business. Therefore, even though the unfinished business doctrine should apply to matters billed by the hour and on contingency, the doctrine as it stands is not optimal.

### *C. A Proposed Statutory Solution*

Part I.B discussed how the unfinished business doctrine may negatively affect clients' choice of counsel and suggested that law firms may be wary of taking on new partners of dissolved firms because of the liability that the unfinished business doctrine imposes. The previous section argued that the unfinished business doctrine creates greater financial disincentives that further impair client choice when the doctrine is applied to hourly matters as compared to matters billed on contingency. This section proposes a solution to ameliorate the negative externalities that the unfinished business doctrine creates in New York and other UPA jurisdictions.

As compared to the majority of states, New York is behind the times; its partnership law is still based on the UPA, a century-old model statute.<sup>194</sup> RUPA, the revised act from 1997, eliminated the no-compensation rule, instead allowing a partner to earn reasonable compensation for completing unfinished business when a partnership agreement is otherwise silent on the matter.<sup>195</sup> This is a step in the right direction because when a partner—or a new firm that the partner joins—is entitled to reasonable compensation, the partner will have a greater incentive to complete a client's unfinished business, providing continuity for the client's representation. Moreover, a firm taking on a new partner will be less wary of unfinished business because the new firm will be entitled to reasonable compensation. Reasonable compensation, therefore, reduces the externalities of the unfinished business doctrine that infringe clients' choice of counsel. It benefits attorneys and law firms completing unfinished business, as well as clients, who are able to retain their choice of counsel. For default partnership law, reasonable compensation is an appropriate measure because it requires the fees that exceed reasonable compensation to be shared with partners of the former partnership. This is consistent with the principle that partners owe fiduciary duties to one another, including while they wind up the partnership for the benefit of the partners.<sup>196</sup>

Rather than revamp the entire body of New York partnership law, which would be time-consuming to say the least, the legislature could

---

<sup>194</sup> See *supra* note 16.

<sup>195</sup> RUPA, *supra* note 16, § 401(h); see also *supra* note 33 and accompanying text (comparing the difference between the UPA's no-compensation rule and RUPA's allowance for reasonable compensation).

<sup>196</sup> See *supra* note 20 and accompanying text.

simply strike out a single word in the statute, thereby allowing partners to earn reasonable compensation for completing unfinished business. The statute would read: “No partner is entitled to remuneration for acting in the partnership business, except that a ~~surviving~~ partner is entitled to reasonable compensation for his services in winding up the partnership affairs.”<sup>197</sup> By eliminating the word *surviving*, a partner is no longer limited to earning reasonable compensation for winding up the partnership when another partner dies.<sup>198</sup> Alternatively, the legislature could replace the entire sentence with the updated language from RUPA, which states: “A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.”<sup>199</sup> Either approach suffices as an effective “quick fix” to New York’s antiquated statute.

Allowing reasonable compensation will alleviate but not eliminate all negative externalities that the doctrine may impose. Because reasonable compensation is a subjective measure, what constitutes reasonable compensation and what constitutes excessive compensation may become the subject of a lawsuit. For example, a former partner or a bankruptcy trustee of a dissolved firm may sue former partners and the law firms that they join for profits earned on unfinished business that exceed reasonable compensation.<sup>200</sup> While this remains an issue that partners and the law firms they join face, alternative default law is more problematic. Entitling a partner to anything less than reasonable compensation for winding up the unfinished business of a law firm infringes clients’ choice of counsel and a former partner’s prospects of becoming a partner at another law firm. In contrast, entitling a partner to anything more than reasonable compensation vitiates the concept of a partnership by undermining the fiduciary duty that partners owe one another to wind up the firm for the benefit of the partners.

Of course, law firms could also be more diligent by updating their partnership agreements to specify how fees from unfinished business should be allocated if the firm dissolves. Adding a *Jewel* waiver while the law firm is solvent will allow law firms to circumvent the unfinished business doctrine.<sup>201</sup>

---

<sup>197</sup> Cf. N.Y. P’SHIP LAW § 40(6) (McKinney 2006); UPA, *supra* note 16, § 18(f).

<sup>198</sup> The rationale for allowing surviving partners to earn reasonable compensation is that the burden of winding up the partnership falls entirely on the surviving partners. Weinstein, *supra* note 33, at 876.

<sup>199</sup> RUPA, *supra* note 16, § 401(h).

<sup>200</sup> See, e.g., *In re Heller Ehrman LLP*, No. 08-32514DM, 2013 WL 951706, at \*5 (Bankr. N.D. Cal. Mar. 11, 2013) (explaining that bankrupt firm Heller Ehrman LLP “is challenging the right of [d]efendants to keep profits (measured after allowing reasonable compensation) for completing Heller’s unfinished business”).

<sup>201</sup> See generally HILLMAN, *supra* note 55, § 4.6.1.1, at 4:67–:69 (discussing *Jewel* waivers). See *supra* note 125 for an example of a *Jewel* waiver. However, if a *Jewel* waiver is added while a law firm is insolvent, it may be deemed a fraudulent transfer. See Greenspan v. Orrick, Herrington & Sutcliffe LLP (*In re Brobeck, Phleger & Harrison LLP*), 408 B.R. 318, 338–48 (Bankr. N.D. Cal. 2009).

As it currently stands, the judiciary is not in a position to engineer the UPA's no-compensation rule because the legislative intent of the rule is unambiguous: partners are only entitled to reasonable compensation for winding up a partnership after the death of another partner. Further, the no-compensation rule is not contrary to public policy because it does not improperly deter competition.<sup>202</sup> Thus, it is up to the legislatures of New York and other UPA jurisdictions to modernize their statutes.

#### CONCLUSION

The application of the unfinished business doctrine is controversial from the perspectives of both the client and the former partner. The doctrine may negatively affect clients' choice of counsel because it may make other matters more financially appealing to attorneys, thereby inducing an attorney to withdraw from unfinished business. From the standpoint of a former partner, the doctrine may act like a restrictive agreement that creates a financial disincentive for the partner to continue working on unfinished business. The doctrine may also impair a former partner's prospects of becoming a partner at a new firm because a firm may not wish to share earnings or assume liability for completing unfinished business that the partner brings. The externalities affecting client choice may become elevated when the doctrine is applied to hourly matters because an attorney who works on a contingent fee matter would otherwise forfeit the contingency fee if the attorney withdrew.

Despite the controversies surrounding the doctrine, it does exist for policy reasons—to ensure that partners fulfill their fiduciary duties in all dealings with the partnership, to prevent animosity among partners when a law firm begins to crumble, and to reduce the need for judicial intervention. Because of these countervailing policy considerations, the doctrine does not improperly deter competition, whether it applies to matters billed by the hour or on contingency. Thus, the unfinished business doctrine does not violate the ethics rules of the legal profession or contravene public policy. Unless partners of a law firm have agreed otherwise, the unfinished business doctrine should apply with equal force to hourly and contingent fee matters.

The New York legislature and other UPA jurisdictions should eliminate the no-compensation rule and instead allow partners to earn reasonable compensation for winding up a dissolved firm. Doing so will mitigate the negative externalities of the unfinished business doctrine.

---

<sup>202</sup> See *supra* Part III.A.

