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Covering Your Assets: The Unfinished Business Rule and Bankrupt Law Firms

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COVERING YOUR ASSETS: THE UNFINISHED BUSINESS RULE AND BANKRUPT LAW FIRMS

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INTRODUCTION

Dewey & LeBoeuf, once one of the largest firms in the world, employed more than 1,300 lawyers in twelve countries.[1] A prime example of the prototypical American law firm, Dewey & LeBoeuf attracted some of the best lawyers in the country with its prestige and promises of multi-million dollar bonuses.[2] However, in what is called "the largest law firm failure in U.S. history," Dewey & LeBoeuf filed Chapter 11 bankruptcy on May 28, 2012.[3] As one former federal judge put it, "'[t]his is a very sad day for the legal profession, . . . Dewey is a fabled firm with a lot of great lawyers and a demise of this magnitude is unprecedented.'"[4]

Just two months earlier, amidst speculation and inconsistencies in news reports, the *American Lawyer* announced that it would revise its 2010 and 2011 financial reports for Dewey & LeBoeuf's revenue and profitability.[5] By then, many of Dewey & LeBoeuf's partners already

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1. Linda Sandler & Sophia Pearson, *After Dewey & LeBoeuf, It's Lawyers v. Lawyers*, BLOOMBERG BUSINESSWEEK, May 31, 2012, http://www.businessweek.com/articles/2012-05-31/after-dewey-and-leboeuf-its-lawyers-v-dot-lawyers. For a general discussion of law firm failures and speculated causes, see Peter Lattman, *Dewey & LeBoeuf Files for Bankruptcy*, N.Y. TIMES, May 28, 2012, http://dealbook.nytimes.com/2012/05/28/dewey-leboeuf-files-for-bankruptcy (commenting that many observers of the Dewey & LeBoeuf bankruptcy, and of other large firm failures, attribute the collapse to the trend of firms "discard[ing] the traditional notions of partnership—loyalty, collegiality, a sense of equality—and instead transform[ing] themselves into bottom-line, profit-maximizing businesses").

2. Lattman, *supra* note 1 (attributing the Dewey failure to rapid growth, aggressive hiring, excessive salaries, and a large gap between salaries of senior and junior partners).

3. Brian Baxter, *Demise of Dewey Eclipses Deaths of Smaller Firms*, AM. L. DAILY, Sept. 13, 2012, http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202571092557&Demise_of_Dewey_eclipses_deaths_of_smaller_firms&slreturn=20120813092324; Lattman, *supra* note 1.

4. Lattman, *supra* note 1. Dewey & LeBoeuf was not the only mega-firm to file bankruptcy in recent years. *See, e.g.*, Jay Adkisson, *Howrey: When the Sinking Ship Seeks the Cheese Back From the Fleeing Rats*, FORBES, Aug. 1, 2012, http://www.forbes.com/sites/jayadkisson/2012/08/01/howrey-when-the-sinking-ship-seeks-the-cheese-back-from-the-fleeing-rats (discussing the bankruptcy of Howrey, a firm with more than 500 attorneys in sixteen offices); Leigh Jones, *Federal Judge Leaves Heller Litigation in Bankruptcy Court*, THOMSON REUTERS NEWS & INSIGHT, Dec. 14, 2011, http://newsandinsight.thomsonreuters.com/Bankruptcy/News/2011/12_-_December/Federal_judge_leaves_Heller_litigation_in_bankruptcy_court (discussing the bankruptcy of Heller Ehrman, a firm of more than 500 attorneys); Nate Raymond, *Thelen Loses Clawback Case Against Seyfarth*, THOMSON REUTERS NEWS & INSIGHT, Sept. 4, 2012, http://newsandinsight.thomsonreuters.com/California/News/2012/09_-_September/Thelen_loses_clawback_case_against_Seyfarth (discussing the bankruptcy of Thelen, a firm of more than 400 attorneys).

5. Peter Lattman, *Prosecutors Scrutinize Ex-Head of Dewey*, N.Y. TIMES, Apr. 27, 2012, http://dealbook.nytimes.com/2012/04/27/new-york-prosecutors-examining-former-dewey-chairman.

left the firm, and the firm announced cuts to attorneys' rank and administrative staff, reorganized its management structure, and relocated from New York to London.[6] Almost immediately after the *American Lawyer* made its announcement, another twenty-three partners left, bringing the total number of departures to sixty-seven since the beginning of the year.[7] In late April, Dewey & LeBoeuf informed its partners that the Manhattan District Attorney's Office was investigating the firm for financial misconduct of its chairman, Steven Davis.[8] Over the next five days, Dewey & LeBoeuf desperately tried to keep the firm afloat by entering merger discussions with two law firms to no avail.[9] With more than one third of Dewey & LeBoeuf's partners gone, the firm announced that it would close its doors and file for bankruptcy.[10] On March 6, 2014, Steven Davis and others were indicted on more than 100 counts, including grand larceny, falsifying business records, and securities fraud.[11]

Unfortunately, as is the case with many businesses, Dewey &

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6. *Key Events for Dewey*, WALL ST. J., http://online.wsj.com/article/SB1000142405270230407 0304577394163080970888.html (last visited Nov. 3, 2013) (providing a timeline of Dewey & LeBoeuf's 2012 failure).

7. *Id.*

8. *Id.*; Lattman, *supra* note 5.

9. *Key Events for Dewey*, *supra* note 6. In addition to the merger discussions, Dewey & LeBoeuf planned to put the executive floor of its headquarters up for lease, hoping to bring in millions each year. *Id.*

10. *Id.* In the weeks leading up to this announcement, two associates reported their health coverage lapsed for lack of payment, though the firm denied lack of payment and said there was a simple routing issue that would soon be corrected. *Id.* Additionally, partners were told they would not receive paychecks unless they submitted all outstanding client bills and time sheets. *Id.*

11. Concluding their two-year investigation, New York City officials further complicated troubles for the Dewey & LeBoeuf estate, charging Davis and his top lieutenants with over 106 counts for alleged criminal activity dating back to 2008. Jennifer Smith & Ashby Jones, *Fallen Law Firm's Leaders Are Charged With Fraud*, WALL ST. J., http://online.wsj.com/news/articles/SB10001424052702304554004 579423082266343204?mg=r eno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2FSB10001 424052702304554004579423082266343204.html (lasted visited Mar. 6, 2014). The defunct firm's litigation woes also extend to civil suits filed by ex-partners and include allegations of third-party assistance in concealing the fraud. Jennifer Smith, *Dewey's Former Leaders Sued*, WALL ST. J., June 13, 2012, at B2, *available at* http://online.wsj.com/article/SB1000142405270230341040457746496249 24 31118.html (discussing a lawsuit filed by a former partner against the firm alleging it ran a Ponzi scheme with money invested by partners); Casey Sullivan, *Ex-Dewey Partner: Citibank Schemed with Firm to Hide its Woes*, THOMSON REUTERS NEWS & INSIGHT, Aug. 31, 2012, http://newsandinsight.thomson reuters.com/Legal/News/2012/08_-_August/Ex-Dewey_partner__Citibank_schemed_with_firm_to _hide_its_woes (discussing counterclaim for fraudulent inducement filed against Citibank by former Dewey partner sued for defaulting on a loan).

LeBoeuf was unable to recover from the 2008 financial crisis, and by the time it filed bankruptcy, Dewey & LeBoeuf owed more than $300 million to banks and other creditors and had more than $200 million in outstanding client billings, with at least $60 million in unfinished work taken to new firms.[12] When Dewey & LeBoeuf and its creditors reached a settlement deal to avoid potential clawback claims, it seemed as though the troubles were behind the deflated firm and its partners, pending court approval.[13] The deal involved a $71 million payout from more than 400 partners' profits to the estate in exchange for immunity from future lawsuits.[14] However, the partners, and even their future employers, will still be liable for any "unfinished business" of the firm, irrespective of any settlement deal.[15]

When a law firm files bankruptcy or voluntarily dissolves, the partners are subject to the unfinished business rule.[16] This rule makes it possible for a partner's future fees derived from the dissolved firm's "unfinished business" to be taken back as property of the estate—even if the partner completes the business while employed at a new firm.[17]

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12. *See* Lattman, *supra* note 5 (noting that Dewey & LeBoeuf was unable to cope with financial difficulties stemming from mismanagement with the economic recession in the backdrop); *Key Events for Dewey*, *supra* note 6; Martha Neil, *Dewey & LeBoeuf Estate Seeks $103.6M Clawback from Bankrupt Firm's Former Partners*, A.B.A. J., July 11, 2012, http://www.abajournal.com/news/article/dewey_leboeuf_estate_seeks_103.6m_clawback_from_bankrupt_firms_former_partn (summarizing Dewey & LeBoeuf's debts).

13. *See* Casey Sullivan, *Judge Approves $71.5 mln Dewey Settlement*, NAT'L LEGAL NEWS FROM REUTERS, Oct. 10, 2012.

The trustee in a bankruptcy has a number of tools at his disposal to bring property back into the estate. Certain clawback provisions in the Bankruptcy Code allow a trustee to reclaim property acquired post-petition and treat that property as though it was acquired pre-petition, so it may be included in the amount available to creditors. WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE 3D DICTIONARY OF BANKRUPTCY TERMS § C55 (2013) (citing 11 U.S.C. § 541(a) (2012)). The purpose of these clawback or avoidance actions is to prevent the debtor from manipulating the bankruptcy filing date to avoid paying certain creditors. *Id.* In addition to post-petition options, the trustee has a number of avoidance powers to reclaim pre-petition transfers. *See* 11 U.S.C. §§ 544, 547, 548.

14. Sullivan, *supra* note 13. Dewey originally hoped to raise $90.4 million from the $432 million it paid to 670 partners in 2011 and 2012 in its settlement. Alanna Byrne, *Dewey Asks Court to Approve $70 Million Clawback Settlement*, INSIDE COUNCIL FROM WSJ AND REUTERS, Aug. 30, 2012, *available at* http://www.insidecounsel.com/2012/08/30/dewey-asks-court-to-approve-70-million-clawback-se. The settlement would involve the trustee and the former partners, whereby the trustee would not pursue its clawback and avoidance powers in exchange for an agreed upon amount. *Id.*

15. *See* Sullivan, *supra* note 13 (discussing the Dewey & LeBoeuf settlement deal and noting that the trustee may still pursue unfinished business claims).

16. Jewel v. Boxer, 203 Cal. Rptr. 13, 18 (Ct. App. 1984).

17. Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (*In re* Coudert Bros. LLP), 477

As one court described it, unfinished business is "any business covered by retainer agreements between the firm and its clients for the performance of partnership services that existed at the time of dissolution."[18] Stated another way, when a partnership dissolves, the client matters do not automatically dissolve with it.[19] Attorneys go their separate ways, each taking a piece of the partnership with them in the form of clients, and to the extent that a partner works on a client matter that was "unfinished" at the time of dissolution, that partner must account to his fellow partners, or the estate, for that amount.[20]

Despite its decades-long history, two parts of the law are entirely unsettled with courts, some even within the same district reaching opposite conclusions.[21] The first unanswered question asks what types of client billing qualify as "unfinished" for purposes of applying the rule, and more specifically, whether hourly fees should be included in that calculation.[22] Some courts argue that including hourly fees will improperly impede the attorney-client relationship by treating the client as nothing more than property of the estate.[23] Other courts argue that hourly fees should be included because one could not distinguish

B.R. 318, 329 (S.D.N.Y. 2012) ("Partnership property remains partnership property, dissolution notwithstanding, and a former partner of the dissolved firm must account for any benefit he derives from his use of a partnership asset, even if he is not among the 'winding up partners' charged with winding up the firm's affairs.").

18. *In re* Brobeck, Phleger & Harrison LLP, 408 B.R. 318, 333 (Bankr. N.D. Cal. 2009) (citing Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180 (Ct. App. 1983)) ("[W]hat constitutes unfinished business must be determined on the date of dissolution of the partnership, not based on events occurring thereafter." (citing Rothman v. Dolin, 24 Cal. Rptr. 2d 571 (Ct. App. 1993))).

19. *See* Amanda A. Main, *Applying the Unfinished Business Rule to Dissolved Law Partnerships*, L.A. LAW., Mar. 2010, at 10 (discussing the origin of the unfinished business rule and its application in both voluntary dissolutions and bankruptcies).

20. *See id.* Obligations under the unfinished business rule can be waived, however, with express partnership agreements. *Id.* For a discussion of these so-called "*Jewel* waivers," see *infra* note 47.

21. *Compare* Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 742–43 (S.D.N.Y. 2012), *with In re Coudert Bros.*, 477 B.R. at 330–31.

22. *See* Joan C. Rogers, *New York*, *California Law Differ on Who Gets Defunct Firm's Fees in Pending Hourly Cases*, BLOOMBERG BNA, Sept. 12, 2012, http://www.bna.com/new-york-california-n1717986 9614 (summarizing a recent case in the Southern District of New York rejecting the inclusion of hourly fees in unfinished business claims).

23. An integral principle in the practice of law is that the client has an absolute right to hire or discharge an attorney. *See* Echlin v. Sup. Ct. of San Mateo Cnty., 90 P.2d 63, 65 (Cal. 1939). To consider the hourly-billed client's business as firm property, the client's autonomy will be reduced to nothing more than an interest in property. *See* discussion *infra* Part III.B–C.

hourly from contingency fees, which are included.[24] The second question asks what level of compensation attorneys should be entitled to receive for their services.[25]

Part I of this Note explains the foundation for the unfinished business rule through the Uniform Partnership Act, fiduciary duties, and *Jewel v. Boxer*, the seminal case interpreting the unfinished business rule in law firm dissolutions.[26] Part II addresses the recent split among courts regarding whether hourly cases should be included as part of the rule.[27] Part III proposes hourly fees be excluded from the unfinished business rule given the inclusion's detrimental effect on public policy.[28]

I. AN ATTORNEY'S BAGGAGE: THE INCOMPLETE HISTORY OF THE UNFINISHED BUSINESS RULE

Lawyers seem to universally view the unfinished business rule as both impactful and burdensome.[29] Some have called the rule an "imperfect rule [that] law firms have to live with," while others have gone much further, comparing its application in modern practice to

24. *Compare In re Thelen*, 476 B.R. at 743 (distinguishing hourly from contingency fees), *with In re Coudert Bros.*, 477 B.R. at 331 (finding no meaningful distinction between types of fees). Contingency fee rates are based on a set percentage of the damage award in the case. *Lawyers and Legal Fees*, ST. B. GA., http://www.gabar.org/newsandpublications/consumerpamphlets/fees.cfm (last visited Nov. 3, 2013). This type of arrangement is most common in personal injury cases. *Id.* Hourly fee rates are set based on the amount of time expended by a particular attorney. *Id.*

25. Valerie P. Morrison & Dylan G. Trache, Jewel v. Boxer*: The Unfinished Business of Bankrupt Law Firms*, 31 AM. BANKR. INST. J. 28, Apr. 2012, at 92 ("The case law provides little guidance to assist parties in determining the amount of profit recoverable in *Jewel* actions.").

26. *See* discussion *infra* Part I.

27. *See* discussion *infra* Part II.

28. *See* discussion *infra* Part III. This Proposal assumes the parties have not entered into a partnership agreement to the contrary. This Note proposes changes to the default standards and does not advocate for a rule limiting partners' ability to contract for specific aspects of the unfinished business rule.

29. *See* Paul R. Hage & Patrick R. Mohan, *You Can't Take Them with You:* Coudert Brothers *and the Application of the Unfinished-Business Rule to Dissolved Law Firms*, 31 AM. BANKR. INST. J., Aug. 2012, at 14, 73 (discussing *In re Coudert Bros.*, where the court allowed the unfinished business rule to apply to both former partners *and* their new law firms); Morrison & Trache, *supra* note 25, at 92–93 (noting that law firms need to keep in mind the possibility of litigation to reclaim profits from unfinished business); Joan C. Rogers, *Law Firms Must Pay Back Profits Earned on Dissolved Law Firm's Hourly-Fee Cases*, BLOOMBERG BNA, June 6, 2012, http://www.bna.com/law-firms-pay-n12884909901 (discussing arguments against the unfinished business rule in law firms).

"'watching an accident in slow motion.'"[30] Not only can departing partners face litigation from creditors and the trustee seeking to claw back any profits from the bankrupt firm's unfinished business, a partner's future employer can face the same liability if it receives profits through the unfinished business of the bankrupt firm.[31] For that reason, it is important, if not vital, for law firms to beware of the rule and put clear partnership agreements in place.[32]

A. The Birth of the Unfinished Business Rule: Partnership Acts and Fiduciary Duties

The unfinished business rule developed through a long, and often unmentioned road, with its origin in fiduciary duties owed through partnership law.[33] Partners owe fiduciary duties not only to each other, but also to the partnership as a whole.[34] The rationale for these duties encourages, if not requires, implementation of rules that "circumscribe the exercise of the partners' managerial discretion."[35]

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30. *See* Rogers, *supra* note 29.

31. *See* Hage & Mohan, *supra* note 29, at 72–73; Morrison & Trache, *supra* note 25, at 92–93.

32. Morrison & Trache, *supra* note 25, at 91 (encouraging law firms to amend partnership agreements to clarify all rights and obligations pursuant to the firm's unfinished business in the event of dissolution and in order to avoid future litigation to recover the unfinished business of the firm).

33. J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 16:20 (2011) ("The *right* to wind up partnership affairs carries with it a *duty* to do so, and a partner who is engaged in winding up the partnership continues to have fiduciary duties to the partnership and his or her copartners." (footnotes omitted)). A fiduciary duty is defined as "[a] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary . . . to the beneficiary . . . ; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person." BLACK'S LAW DICTIONARY 581 (9th ed. 2009).

34. LESLIE D. CORWIN, LAW FIRM PARTNERSHIP AGREEMENTS § 1.03 (2013); *see also* D.C. CODE § 29-604.04 (West, WestlawNext through Oct. 16, 2013); IDAHO CODE ANN. § 53-3-404 (West, WestlawNext through 2013 First Reg. Sess. of 62d Leg.); MD. CODE ANN., CORPS. & ASS'NS § 9A-404 (West, WestlawNext through 2013 Reg. Sess. of Gen. Assem.); MICH. COMP. LAWS ANN. § 449.21 (West, WestlawNext through P.A.2013, No. 277 of 2013 Reg. Sess., 97th Leg.); NEB. REV. STAT. ANN. § 67-424 (West, WestlawNext through 2013 Reg. Sess.); N.M. STAT. ANN. § 54-1A-404 (West, WestlawNext through First Reg. Sess. of 51st Leg.); N.Y. P'SHIP LAW § 43 (West, WestlawNext through L.2013, ch. 157); O.C.G.A. § 14-8-21 (2003 & 2013 Supp.); TENN. CODE ANN. § 61-1-404 (West, WestlawNext through 2013 First. Reg. Sess.); WASH REV. CODE ANN. § 25.05.165 (West, WestlawNext through 2013 legislation); UNIF. P'SHIP ACT § 21 (1914).

35. Michael Haynes, Comment, *Partners Owe to One Another a Duty of the Finest Loyalty . . . . or Do They? An Analysis of the Extent to Which Partners May Limit Their Duty of Loyalty to One Another*, 37 TEX. TECH L. REV. 433, 437 (2005) (quoting ALAN R. BROMBERG & LARRY E. RIBSTEIN, 2 BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.07(a)(1) (2004)) (internal quotations omitted). In the absence of fiduciary duties among partners, one partner could utilize and exploit the assets of the partnership with no

In the majority of states, the Uniform Partnership Act (UPA), or its successor, the Revised Uniform Partnership Act (RUPA),[36] governs partnerships.[37] The UPA does not explicitly provide any duty of care in the partnership context; in fact, it says almost nothing about what specific duties partners owe to one another.[38] According to the Uniform Law Commission,

> [t]he 1914 Act has very little to say about a partner's responsibilities to the other partners. A partner is a fiduciary who "must account to the partnership for any benefit, and hold as a trustee for it any profit derived by him without the consent of the other partners . . . " There is a full duty of disclosure between partners, but the 1914 Act is otherwise silent on the fiduciary responsibilities of each partner to the other partners.[39]

In stark contrast, the RUPA explicitly provides for both a duty of care and a duty of loyalty to fellow partners and the partnership.[40]

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accountability. *Id.*

36. REVISED UNIF. P'SHIP ACT § 101 (1997). The Revised Uniform Partnership Act has been enacted in thirty-seven states, the District of Columbia, and the U.S. Virgin Islands. *Legislative Fact Sheet—Partnership Act*, UNIF. L. COMM'N, http://uniformlaws.org/LegislativeFactSheet.aspx?title=Partnership Act (last visited Nov. 3, 2013) ("Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, U.S. Virgin Islands, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming").

37. Russell C. Smith, Comment, *How the Uniform Partnership Act Determines Ultimate Liability for a Claim Against a General Partnership and Provides for the Settling of Accounts Between Partners*, 17 CAMPBELL L. REV. 333, 359 (1995) (listing all states that have passed a version of the Uniform Partnership Act and noting that Louisiana is the only state that has not passed the UPA). However, the UPA can vary widely from state to state. *Compare id.* (noting that some states have made minor changes such as using gender neutral terms and distinguishing limited liability partnerships), *with* CALLISON & SULLIVAN, *supra* note 33, § 1:1 n.4 (emphasizing that Georgia's version of the law, enacted in 1984, is vastly different from the model UPA).

38. REVISED UNIF. P'SHIP ACT § 404 cmt. 3; *see also* CORWIN, *supra* note 34, at § 1.03.

39. *Partnership Act Summary*, UNIF. L. COMM'N, http://uniformlaws.org/ActSummary.aspx?title= Partnership Act (quoting the Uniform Partnership Act (1914)) (last visited Nov. 3, 2013). The Uniform Law Commission is a "non-profit unincorporated association, comprised of state commissions on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands." *About the ULC*, UNIF. L. COMM'N, http://uniformlaws.org/Narrative.aspx?title=About the ULC (last visited Nov. 3, 2013).

40. REVISED UNIF. P'SHIP ACT § 404(a) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c).").

Further, RUPA does not allow parties to waive these duties of loyalty and care, even with partnership agreements to the contrary.[41] The duty of care, in the context of law firm dissolutions, refers to a duty owed "to the partnership and the other partners in the conduct and winding up of the partnership business" and requires partners to refrain "from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law."[42]

More relevant within the context of the unfinished business rule is the duty of loyalty, which is the primary justification for the rule.[43] This duty is generally defined as "[a] person's duty not to engage in self-dealing or otherwise use his or her position to further personal interests rather than those of the beneficiary."[44] As one court noted, there is, and should be, a "reasonable balance" between a partner's right to pursue "his own business after dissolution . . . and his duty of loyalty to his ex-copartners."[45]

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41. *Id.* § 404 cmt. 1.

42. *Id.* § 404(c).

43. As part of the duty of loyalty, each partner owes to his fellow partners a duty to "*wind[] up*" the unfinished business of the firm. *Id.* § 802 (emphasis added). Only when partners complete all unfinished matters can this duty expire. *Id*; *see also* CALLISON & SULLIVAN, *supra* note 33, § 16:20; Christopher C. Wang, Comment, *Breaking Up Is Hard to Do: Allocating Fees From the Unfinished Business of a Professional Corporation*, 64 U. CHI. L. REV. 1367, 1368–69 (1997).

The duty of loyalty is defined as follows:

> A partner's duty of loyalty to the partnership and the other partners is limited to the following:
>
> (1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and w*inding up of the partnership business* or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;
>
> (2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and
>
> (3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

REVISED UNIF. P'SHIP ACT § 404(b) (emphasis added).

44. BLACK'S LAW DICTIONARY 581 (9th ed. 2009).

45. Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180, 192 (Ct. App. 1983) ("The partner may take for his own account new business even when emanating from clients of the dissolved partnership and the partner is entitled to the reasonable value of the services in completing the partnership business, but he may not seize for his own account the business which was in existence during the term of the partnership.").

B. When One Door Closes Another Door Opens . . . But It Will Cost You: Jewel v. Boxer

Jewel v. Boxer is the preeminent case interpreting the unfinished business rule in a law firm context.[46] In *Jewel*, four partners voluntarily dissolved their partnership but with no written partnership agreement in place, leaving the UPA to govern the dissolution.[47] When two partners brought suit for an accounting, the court recognized the UPA imposes a duty to "wind up" all unfinished business before a partnership may dissolve.[48] For that reason, partners must share all profits and costs incurred resulting from the firm's unfinished business.[49] The court noted the dual purpose of the unfinished business rule: (1) to stop partners from competing with one another over the most profitable cases and (2) to prevent partners from fighting over partnership property.[50] Relying on UPA language, the court held that partners are not entitled to extra compensation for completing the unfinished business of the firm.[51] Until all unfinished business of the firm was complete, each partner must account to his fellow partners for any profits.[52] Additionally, the court ruled that all profits must be allocated based on each partner's interest in the partnership, rather than

46. Jewel v. Boxer, 203 Cal. Rptr. 13, 15 (Ct. App. 1984). *Jewel* did not involve the bankruptcy of a law firm but rather the voluntary dissolution of a partnership; in relatively few cases have the courts interpreted *Jewel* in the bankruptcy context. *See, e.g.*, *In re* Heller Ehrman LLP, No. 08-32514DM, 2011 WL 4542512 (Bankr. N.D. Cal. Sept. 28, 2011); *In re* Labrum & Doak, LLP, 227 B.R. 391 (Bankr. E.D. Pa. 1998).

47. *Jewel*, 203 Cal. Rptr. at 15. Despite the fact that a partnership cannot waive the fiduciary duty among partners, the *Jewel* court stated, "*absent a contrary agreement*, any income generated through the winding up of unfinished business is allocated to the former partners according to their respective interests in the partnership." *Id.* at 16 (emphasis added). Courts have interpreted this to mean that partners can put a "*Jewel* waiver" in their agreements; however, these waivers must be put in place well before bankruptcy to avoid a fraudulent transfer claim. *See In re* Brobeck, Phleger & Harrison LLP, 408 B.R. 318, 348 (Bankr. N.D. Cal. 2009) (ruling that although the *Jewel* waiver was legally valid it was technically a transfer of assets while insolvent, and accordingly, could be challenged as a fraudulent transfer); Hage & Mohan, *supra* note 29, at 15. For a discussion of *In re Brobeck* and the fraudulent transfer implications, see Main, *supra* note 19.

48. *Jewel*, 203 Cal. Rptr. at 19.

49. *Id.* (recognizing that the burden of unfinished business cannot "fall on one former partner or one group of former partners, unless the former partners agree otherwise").

50. *Id.* at 18.

51. *Id.* at 17 (ruling that the UPA "unequivocally prohibits" any additional compensation for completion of unfinished business of the firm).

52. *Id.*

on a quantum meruit basis.[53]

Despite a compelling argument to the contrary, the court went on to rule that the client's right to choose counsel remained untouched because the unfinished business rule applied only to fees allocated after the client made the choice.[54] The partners' argument was simple: "[F]ees . . . earned by the partner chosen by the client are not subject to division in accordance with the partnership agreement" because that would nullify the client's chosen counsel if it were forced to pay attorneys he did not choose.[55]

Jewel did not specifically address the rule within a bankruptcy context or determine what types of future payments applied to the unfinished business rule.[56] Thus, the question remained: what else could be included as property of the estate?[57] The Bankruptcy Code defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case."[58] Although contingency fees unquestionably are included in this definition, it is uncertain whether hourly fees should be included as well.[59]

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53. *Id.* at 16–17 (reasoning that, as property of the partnership and not of the individual partners, profits from the unfinished business of the firm could not be divided based on the amount of work done by each partner, but rather must adhere to each partner's respective partnership interests). The court relied heavily on precedent in reaching its decision, summarizing *Resnick v. Kaplan*, where the court held that "'in the absence of any provision in the partnership document, . . . the aggregate of the fees collected should be allocated according to the percentages specified in the [partnership] agreement for the distribution of profits and losses.'" *Id.* at 17 (quoting Resnick v. Kaplan, 434 A.2d 582, 587 (Md. Ct. Spec. App. 1981)).

54. *Jewel*, 203 Cal. Rptr. at 17. Two of the *Jewel* partners argued that "forcing them to share future profits infringed upon their clients' absolute right to select the attorney of their choice." Main, *supra* note 19, at 12. The court, however, was unreceptive. *Jewel*, 203 Cal. Rptr. at 17–18 (citing Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180 (Ct. App. 1983) and *Resnick*, 434 A.3d at 588) ("[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.").

55. *Jewel*, 203 Cal. Rptr. at 17 (quoting *Resnick*, 434 A.3d at 588) (internal quotations omitted).

56. *Id.* at 15.

57. *See* Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 736 (S.D.N.Y. 2012) (addressing whether hourly fees are included in the unfinished business rule).

58. 11 U.S.C. § 541(a)(1) (2012).

59. *See* Arthur J. Ciampi, *Claims for Unfinished Business Should be Avoided*, N.Y. L.J., July 27, 2012, *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202564502246&thepage=1 (noting that the unfinished business rule has frequently applied to contingent fee cases).

Although early cases seemed to signal that hourly fees would apply, there has been a recent movement rejecting this approach. *See, e.g.*, *In re Thelen*, 476 B.R. at 743 (excluding hourly fees from property of the estate); Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP, 950 N.Y.S.2d 611, at *6

In addition to whether hourly fees constitute property of the estate, courts struggle with how to calculate "profits" for the purposes of the unfinished business rule.[60] A primary distinction between the original and revised versions of the UPA is the level of compensation afforded to attorneys after the profits are deemed property of the estate.[61] Under the UPA, attorneys must adhere to the no compensation rule, which leaves them without any additional compensation for their services while completing the unfinished business of the firm.[62] Despite this rule, and likely due to the inherent unfairness it brings, many courts applying the original version of the UPA have allowed for out-of-pocket expenses, the partner's profit share, and any overhead costs associated with completing the business.[63] Like the UPA's modifications, the RUPA entitles partners to reasonable compensation in winding up the firm's unfinished business, though it remains unclear what constitutes reasonable compensation.[64] In applying the modified UPA or RUPA, judges are reluctant to take on the "thorny task" of calculating profits, highlighting the desperate need for a more uniform system to avoid infinite litigation issues.[65]

(Sup. Ct. 2011) (unpublished table decision) (recognizing a distinction between contingent fees, which are traditionally included in the unfinished business rule, and hourly fees, which it ruled should not be included). *But see, e.g.*, Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (*In re* Coudert Bros. LLP), 477 B.R. 318, 344 (S.D.N.Y. May 24, 2012) (hourly fees constitute property of the estate); *In re* Labrum & Doak, LLP, 227 B.R. 391, 405 (Bankr. E.D. Pa. 1998) ("[H]ourly-fee cases pending at the time of dissolution constitute the Debtor's 'unfinished businesses.'").

60. *In re Coudert Bros.,* 477 B.R. at 349–50.

61. *See In re Thelen*, 476 B.R. at 744 (emphasizing that the RUPA has, in favor of a reasonable compensation standard, abolished the UPA standard of no compensation that was heavily relied upon in *Jewel*).

62. Main, *supra* note 19, at 11.

63. Morrison & Trache, *supra* note 25, at 92.

64. REVISED UNIF. P'SHIP ACT § 404(g) (1997); *see also* Morrison & Trache, *supra* note 25, at 92. As one court noted, precedent has allowed for attorneys to deduct "an amount attributable to the 'efforts, skill, and diligence' expended" while completing the unfinished business. Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (*In re* Coudert Bros. LLP), No. 11 civ. 5994(CM), 2012 WL 2952929, at *7 (S.D.N.Y. July 18, 2012). That same judge, however, granted an interlocutory appeal on the issue of how best to calculate profits using such an ambiguous standard, noting the extensive investigation necessary to complete the analysis. *Id.*

65. *See In re Coudert Bros.*, 477 B.R. at 349–50 ("Resolving those issues raises new questions that go far beyond the bounds of this opinion . . . [.]").

II. HOURLY FEES AND THE UNFINISHED BUSINESS RULE: AN ATTEMPT AT FAIRNESS OR A NEVER ENDING DUTY?

Although it once seemed that the unfinished business rule would apply universally, a split developed with some courts taking a new position—hourly fees have no place in the unfinished business rule.[66] Those courts favoring the majority rule, which includes hourly fees as unfinished business, do so because, to them, there is no meaningful way to distinguish between the two types of fees.[67] These courts believe *Jewel*'s failure to explicitly distinguish between hourly and contingency fee cases suggests the court's intention for the rule to apply universally.[68] Two recent decisions have suggested otherwise.[69] In these cases, courts found ways to differentiate between the hourly and contingency fees, emphasizing the severe implications of inclusion, suggesting the need to limit the rule to contingency fees alone.[70] Recognizing the strong arguments on both sides, the Second Circuit Court of Appeals recently certified the question to the New

66. *Compare id.* at 344 (including hourly fees in the unfinished business rule), *and In re* Labrum & Doak, LLP, 227 B.R. 391, 396 (Bankr. E.D. Pa. 1998) (same), *and* Rothman v. Dolin, 24 Cal. Rptr. 2d 571, 573 (Ct. App. 1993) (same), *with In re Thelen*, 476 B.R. at 741 (ruling that hourly fees are not included in the unfinished business rule), *and* Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP, No. 150178/10, 2011 WL 7574999, at *7 (N.Y. Sup. Ct. Sept. 13, 2011) (same).

67. *See In re Coudert Bros.*, 477 B.R. at 337 (ruling that the distinction in manner of compensation should make no difference to the unfinished business rule) ("'The nature of the underlying contractual relationship between the dissolved partnership and its client does not alter the legal status of a dissolved partnership nor does it change the fiduciary duties each partner must honor towards another. They remain the same regardless of how an attorney agrees to be compensated by his clients.'" (quoting Robinson v. Nussbaum, 11 F. Supp. 2d 1, 6 (D.D.C. 1997))); *In re Labrum & Doak*, 227 B.R. at 396 (ruling that hourly fees are property of a bankruptcy estate); *Rothman*, 24 Cal. Rptr. 2d at 573 (ruling that the unfinished business rule includes "all matters in progress" that are incomplete upon dissolution).

68. *See, e.g.*, *Rothman*, 24 Cal. Rptr. 2d at 573 (relying on *Jewel*'s lack of clarification as to the manner of payment involved and deciding that the lack of explicit distinction cannot be construed to imply the court's intention that hourly fees should be excluded). In *Jewel*, there was no recognition of the specific type of fee arrangement involved; instead, the court stated only that Boxer and two others "handled most of the active personal injury and workers' compensation cases." Jewel v. Boxer, 203 Cal. Rptr. 13, 15 (Ct. App. 1984). The rest, as well as other kinds of cases, were handled by other attorneys in the firm. *Id.*

69. *See generally In re Thelen*, 476 B.R. at 745; *Sheresky*, 2011 WL 7574999, at *6.

70. *In re Thelen*, 476 B.R. at 735 (emphasizing that conceptualizing property of the estate to include hourly fees "collides with the essence of the attorney-client relationship"); *Sheresky*, 2011 WL 7574999, at *6 (reasoning that fees derived from contingency work could result in an amount larger than the amount of work expended by the attorney, but when hourly fees are considered, the former partner would likely be undercompensated for his efforts).

York Court of Appeals for its review.[71]

A. "Quaint" Principles in Modern Practice: Including Hourly Fees in the Unfinished Business Rule

1. Labrum & Doak, LLP

Fourteen years after *Jewel*, a bankruptcy court in the Eastern District of Pennsylvania ruled that the unfinished business rule was intended to cover both contingency and hourly fees while simultaneously recognizing the result "may appear unfair."[72] Labrum & Doak voted to dissolve in July 1997, and six months later, the firm entered an involuntary Chapter 7 bankruptcy.[73] The unsecured creditors committee brought an adversary proceeding against former partners to recover unfinished business billed on an hourly basis.[74] In deciding that hourly fees constitute property of the estate, the court relied on a mix of bankruptcy law,[75] partnership law,[76] and public policy considerations.[77]

The court said the definition of "property of the estate" should be construed broadly to include "all property interests of a debtor"

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71. *See infra* Part II.C.

72. *In re Labrum & Doak*, 227 B.R. at 410–11.

73. *Id.* at 396–97. The firm ultimately converted to a Chapter 11 on January 22, 1998. *Id.* The firm's dissolution came after several of the so-called "rainmaking" partners indicated an intention to depart. *Id.* at 396.

74. *Id.* at 395. The court previously determined that the law firm was entitled to quantum meruit compensation from former attorneys completing contingency cases after dissolution, leaving this adversary proceeding to focus entirely on hourly fees. *Id.* at 396.

75. Bankruptcy law requires two questions to be answered in this context: first, whether the fees initially belonged to the debtor, as opposed to the attorney personally, and second, whether the fees constitute assets of the bankruptcy estate. *See id.* at 409–11.

76. The court relied upon what it referred to as "two fundamental principles of general partnership law." *Id.* at 410. First, when a partnership dissolves, the existing contracts do not automatically dissolve with it. *Id.* And second, when a former partner completes existing contracts, he does so as a fiduciary working for the benefit of the partnership. *Id.* These principles, coupled with the lack of contrary intent and inability to differentiate between contingent and hourly fees, led the court to conclude that all fees, regardless of how they were billed, were to be included in the unfinished business rule. *Id.* at 410–12.

77. *Id.* at 409. ("Although the Defendants bluster about the allegedly disastrous public policy of such principles, they are unable to cite any cases from any jurisdictions regarding law firms to the contrary."). Despite what the court called a "sky will be falling" argument by the defendants, it found no record of disasters resulting in any jurisdictions that have included hourly fees in the unfinished business rule. *Id.* (internal quotations omitted).

regardless of whether that interest is "speculative."[78] Accordingly, the court concluded hourly fees have economic value and belong to the estate.[79] This interpretation of the Bankruptcy Code coupled with canons of partnership law focusing on fiduciary duties led the court to include hourly fees in the unfinished business rule, as they are an integral part of "winding up" the business of the firm.[80] The court was unreceptive to the "allegedly disastrous public policy of such principles," particularly that the client's rights would be diminished, because the rule does not contemplate overtaking cases without client consent but rather only permits claiming a portion of the proceeds from that work.[81]

2. *Coudert Brothers, LLP*

More recently, a bankruptcy court in the Southern District of New York reached the same conclusion.[82] *In re Coudert Brothers* involved a centuries-old law firm that filed for Chapter 11 bankruptcy in September 2006.[83] In thirteen separate adversary proceedings to

78. *In re Labrum & Doak*, 227 B.R. at 410. According to the court, with the passage of the Bankruptcy Code of 1978, property of the estate was expanded to include "every conceivable interest in property, future, nonpossessory, contingent, speculative, and derivative" within the reach of 11 U.S.C. § 541. *Id.*

For an example of the unfinished business rule and hourly fees outside the bankruptcy scope, see *Rothman v. Dolin*, 24 Cal. Rptr. 2d 571 (Ct. App. 1993). In *Rothman*, two attorneys voluntarily dissolved their partnership and divided up the firm's cases. *Id.* at 571. When one partner sued for unfinished business profits, the California Court of Appeals did not allow for a distinction between hourly and contingency fees, reasoning that such a decision would lead to an avoidance of contingency cases in favor of cases billed hourly. *Id.* at 572–73. The court also emphasized the potential injustice that might arise when one partner's cases are entirely contingency based and another partner's is entirely hourly based, as the former would have to continually share profits and the latter would walk away with a greater share. *Id.* at 573. The practical result, according to the court, would result in attorneys refusing contingency fees if they believe dissolution is near. *Id.*

79. *In re Labrum & Doak*, 227 B.R. at 410–11.

80. *Id.*

81. *Id.* The court relied on other case law, implicitly reasoning that, because no other courts have ruled against inclusion of hourly fees, no court should ever rule in favor of excluding hourly fees. Many of the cases cited in support of this proposition, however, do not actually relate to hourly-specific cases. *See, e.g.*, Young v. Delaney, 647 A.2d 784, 792–93 (D.C. 1994) (holding that partners do owe one another fiduciary duties in winding up the business of the firm but never distinguishing what sort of fees apply); Hurwitz v. Padden, 581 N.W.2d 359, 361 (Minn. Ct. App. 1998) (addressing "[p]ending contingency files" as assets of the firm but not specifically addressing hourly fees).

82. Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (*In re* Coudert Bros. LLP), 477 B.R. 318 (S.D.N.Y. 2012).

83. *Id.* at 324.

collect unfinished business, the bankruptcy court ruled that the doctrine applies to hourly and contingency fees alike.[84] The district court agreed, stating that "[a] departing partner is not free to walk out of his firm's office carrying a Jackson Pollack painting he ripped off the wall," which justifies applying the rule to both hourly and contingency profits as they are often the most valuable assets.[85]

The "quaint" principles of partnership law, which require departing partners to account to the partnership for profits derived from unfinished business, do not allow for a distinction between hourly and contingent fees, notwithstanding the unique structure of large law firms.[86] Large law firms today, the court explained, have various levels of partners, "client hoarding, and mercenary lateral hiring" that side step the idea of partners as co-owners in favor of a new reality inconsistent with traditional notions of partnership.[87] Even so, the court emphasized that partnerships, by their very nature, must consist of co-owners acting together to make a profit.[88] Without including hourly fees as part of the unfinished business of the firm, certain matters would not be jointly owned but rather owned by a single attorney operating in the name of the partnership.[89] Though many

84. *Id.* at 324–25. Though the judge acknowledged the issue had never been addressed at the appellate level in New York, he ruled that, if faced with the issue, the highest court "would conclude that the unfinished business rule applies both to contingency fee matters and to non-contingency (billable hours) matters." *Id.* at 325.

85. *Id.* at 329. The court went on to add that "[p]artnership property remains partnership property, dissolution notwithstanding, and a former partner of the dissolved firm must account for any benefit he derives from his use of a partnership asset, even if he is not among the 'winding up partners' charged with winding up the firm's affairs." *Id.*

86. *Id.* at 331 (ruling that partnership law would not allow for a distinction between hourly and contingency fees, even in the face of such sophisticated business models). The argument that mega-firm models should necessitate a contrary finding was unappealing to the court, which ruled that the law firms can simply alter their partnership agreements if they believe they "need an alternative set of assumptions to survive in a new marketplace." *Id.* The court even went one step further, ruling that "it is far more equitable to ask them to draft any special rules they want to follow than it is to add a gloss to the statute applicable to the far more numerous, and undoubtedly less sophisticated, partnerships the affairs of which are governed by the Partnership Law." *Id.*

87. *Id.* at 330.

88. *Id.*; *see* REVISED UNIF. P'SHIP ACT § 101(6) (1997) (defining "[p]artnership" as "an association of two or more persons to carry on as *co-owners* a business for profit" (emphasis added) (internal quotations omitted)).

89. *In re Coudert Bros.*, 477 B.R. at 331–32 (ruling that the presumption must be that the business belongs to the firm, as opposed to an individual attorney, because the business would no longer be carried out by "co-owners" but rather a group of attorneys out for themselves, sharing nothing but their office

firms utilize incentives as a means of encouraging partners to bring business into the firm, these incentives rarely, if ever, include granting that partner sole ownership of the client matter; rather, the partners receive bonuses or some sort of quantum meruit-based compensation instead.[90] Despite the fact that many attorneys view their "book of business" as a coveted personal asset, the court rejected such a notion as contrary to the goals of partnership law.[91]

There are two ends of a spectrum when it comes to unfinished business, as the court explained.[92] On one end, there are entirely finished matters that are completed before dissolution of the firm,[93] and on the other end, is entirely new business whose relation to the former partnership is merely historical.[94] In the middle is where the conflict lies—in those matters that are not finished upon dissolution but are not distinct enough to constitute entirely new business.[95] Executory contracts, as "unperformed" business, inherently constitute unfinished business as they are neither new nor completed.[96] The court ruled that unless the parties indicate a contrary intent, as a matter of law, executory contracts must be considered assets of the firm.[97]

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90. *Id.* at 331.

91. *Id.* at 330; *see also* Mark Harris, *Why More Law Firms Will Go the Way of Dewey & LeBoeuf*, FORBES, May 8, 2012, *available at* http://www.forbes.com/sites/forbesleadershipforum/2012/05/08/why-more-law-firms-will-go-the-way-of-dewey-leboeuf ("The portability of the partner's book has weakened the bonds that hold firms together and threatens the identity of the law firm as we know it." (internal quotations omitted)).

92. *In re Coudert Bros.*, 477 B.R. at 332–33.

93. *Id.* at 332 (for example—a completed merger, a lawsuit tried to verdict, or a settlement).

94. *Id.* (recognizing new business as "an entirely new contract or engagement to do a piece of work" and including in that definition retainers, even when it involves an existing client matter such as an appeal).

95. These matters, according to the court, are "presumptively treated as a partnership asset subject to distribution." *Id.*

96. An executory contract is defined as "[a] contract that remains wholly unperformed or for which there remains something still to be done on both sides, often as a component of a larger transaction and sometimes memorialized by an informal letter agreement, by a memorandum, or by oral agreement." BLACK'S LAW DICTIONARY 369 (9th ed. 2009).

97. *In re Coudert Bros.*, 477 B.R. at 333–34 (citing Stem v. Warren, 125 N.E. 811 (N.Y. 1920)). *Stem* involved an architecture partnership in the early twentieth century. *Stem*, 125 N.E. at 811. The partnership received a terminable-at-will contract to build Grand Central Station. *Id.* Before the completion of the station, one of the partners died and the partnership dissolved. *Id.* at 812–13. Upon dissolution, the partnership was paid in full for past services rendered. *Id.* at 813. Later, the contract was officially terminated and a new contract was entered into with the surviving half of the partnership. *Id.* The deceased partner's estate sued for recovery of the total contract under the unfinished business rule and prevailed.

To find intent sufficient to overcome the presumption that hourly fees are assets of the firm, the court required either a distinction between law and general partnerships or between hourly and contingent fees.[98] Silence in partnership agreements, in this court's opinion, should be construed to signify the parties' intent to include hourly fees as assets of the firm.[99] The court paid particular attention to the rulings of other UPA courts that did not find a distinction between hourly and contingent fees for the purposes of the unfinished business rule.[100]

To solidify its holding, the court ruled that public policy would not dictate a contrary result.[101] The defendant argued that new client matters are a series of "mini-contracts" with each falling under a new billing period, much like a month-to-month lease.[102] The court recognized that a firm might pursue unpaid bills from clients under this "mini-contract" theory, but ruled that a law firm's rights against the client are different from the rights of former partners with respect to

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Id. The fact that the contract was terminable at will and the estate was paid for all work up until the partner's death did not persuade the court to exclude the contract from property of the partnership. *Id.* The court ruled that the executory contract was an extremely valuable asset and the benefits belonged to the dissolved partnership. *Id.*

98. *In re Coudert Bros.*, 477 B.R. at 335–36.

99. *Id.* ("If the partners do not specify whether a particular representation is intended to be an asset of the partnership subject to distribution on dissolution, courts treat their silence as signifying an intention that it should . . . ."). The court acknowledged many other courts that have adhered to this principle, though within the contingency fee context. *See, e.g.*, Santalucia v. Sebright Transp., Inc., 232 F.3d 293, 295 (2d Cir. 2000) ("[A]bsent an agreement to the contrary, a dissolving law firm is entitled to the value of the contingent fee at the time of dissolution."); Liddle, Robinson & Shoemaker v. Shoemaker, 768 N.Y.S.2d 183, 188 (App. Div. 2003) ("Pending contingency fee cases of a dissolved partnership, absent a contrary agreement, are assets subject to distribution.").

100. *In re Coudert Bros.*, 477 B.R. at 336–37 (referencing the cases in several UPA jurisdictions ranging from Pennsylvania to California). This logic seems slightly circular: hourly and contingency fees cannot be distinguished because there is no way to distinguish between them, and yet it ignores a primary argument in favor of excluding hourly fees—that they constitute finished business.

The court stated that "[e]very court in a UPA jurisdiction that has considered the precise question posed here has concluded that billable hours matters are partnership assets in the absence of any expressed intention that they should be treated otherwise." *Id.* at 336. However, that assertion cannot be true as one New York court ruled just that way a year earlier. *See* Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP, No. 150178/10, 2011 WL 7574999, at *5–6 (N.Y. Sup. Ct. Sept. 13, 2011).

Of note, even this court said "I cannot quarrel with the proposition that contingency and billable hour matters are different in critical respects," which is perplexing considering its ruling to the contrary. *In re Coudert Bros.*, 477 B.R. at 337.

101. *In re Coudert Bros.*, 477 B.R. at 340–44.

102. *Id.* at 337–38.

each other.[103] The unfinished business rule, the court reasoned, is meant to prevent one partner from exploiting assets against another, not to enable a firm to recover clients' missed payments, and the remedies for collection are separate from any fiduciary responsibilities.[104]

The court added that all other UPA jurisdictions hearing similar cases have reached the same conclusion regarding public policy and the attorney-client relationship.[105] Although recognizing a conflict between the application of the unfinished business rule and a client's right to choose counsel, the court elected to join other courts that have set this argument aside as a non-issue.[106] In so doing, the court relied upon *Santalucia*, a Second Circuit Court of Appeals case ruling in favor of including contingency fees in the unfinished business rule.[107] The court held that the *Santalucia* ruling, which did not express concern regarding an impact on the attorney-client relationship, should apply to hourly fees as well because any deterrent to a client's right to choose would be present irrespective of the way firms bill the client.[108]

B. A Lesson in Public Policy: Excluding Hourly Fees From the Unfinished Business Rule

Contrarily, some courts have ruled that a meaningful distinction exists between hourly and contingency fees, and that the former should be excluded from the reach of the unfinished business rule.[109]

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103. *Id.* at 338. Unlike a month-to-month lease, which, according to the court, is a series of mini-contracts, the fact that bills are sent out periodically rather than upon completion of the entire matter does not render the matter "closed" upon payment of the bill. *Id.* at 339.

104. *Id.* at 338 ("The unfinished business doctrine does not exist to assure that a law firm is paid for the value of work it has performed prior to dissolution. It exists to settle accounts among partners upon dissolution of their business.").

105. *Id.* at 340; *see, e.g.*, Ellerby v. Spiezer, 485 N.E.2d 413 (Ill. App. Ct. 1985); Jewel v. Boxer, 203 Cal. Rptr. 13 (Ct. App. 1984). *But see* Welman v. Parker, 328 S.W.3d 451, 457 (Mo. Ct. App. 2010) (noting that the unfinished business rule could "unduly impinge upon the client's perceived freedom to change attorneys without cause and could have a 'chilling effect' upon the choice of that option by the client" (citing Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 58 (Mo. 1982) (en banc)).

106. *In re Coudert Bros.*, 477 B.R. at 340 (recognizing the public policy argument as the strongest offered by the defendants, but ultimately deciding to rule alongside its fellow UPA courts).

107. *Id.* at 344.

108. *Id.*

109. Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 739–40 (S.D.N.Y. 2012); Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP, No. 150178/10, 2011 WL 7574999, at *6 (N.Y.

1. *Sheresky Aronson Mayefsky & Sloan*

One case involving the voluntary dissolution of a partnership reached the conclusion that hourly fees must be excluded.[110] The court noted that, despite an inability or unwillingness to do so by previous courts, a key difference exists between hourly and contingency fees; a fee collected from a contingency case could easily result in a fee greater than the work done by a single attorney, whereas a case billed hourly could leave the attorney with substantially less than his hourly rate.[111] In the former situation, a firm could pay the attorney his normal rate and still retain a profit, while the latter lends itself to the possibility of under compensation. The partner would be required to pay the estate from his hourly rate and retain either no compensation or what a court deems reasonable compensation, depending on the jurisdiction, reducing the compensation he would receive had the dissolution never occurred—an obvious disincentive to continue representation.[112]

The court also referred to New York's disciplinary rules that prohibit dividing fees for legal services with an attorney who is not associated with a firm unless certain specific conditions are met.[113]

Sup. Ct. Sept. 13, 2011).

110. *Sheresky*, 2011 WL 7574999, at *1–3, *6. The facts between the two parties were largely disputed as to how the firm ended. *Id.* at *3. Sheresky asserted that he was the "mainstay" of the firm and personally guaranteed a new lease for the firm if it paid off his mortgage and life insurance. *Id.* at *1–2. The other partners argued that the additional monthly payments were "buyout" agreements. *Id.* at *2. Ultimately, the new partners formed a new firm without Sheresky and dissolved the former firm in August 2010. *Id.*

111. *Id.* at *6. The court ruled the inclusion of hourly fees in the unfinished business rule would run contrary to a New York rule prohibiting attorneys from dividing fees for legal services when the attorneys are not affiliated with the same firm. *Id.*

112. *Id.* To require an attorney to pay back hourly fees to the estate would seemingly contradict the rule adopted in *Kirsch v. Leventhal* that allows an attorney to deduct an amount attributable to his "efforts, skill and diligence." Kirsch v. Leventhal, 586 N.Y.S.2d 330, 333 (App. Div. 1992). The hourly fee, at least in theory, is equal to that very amount and repaying that fee to the estate would reduce the compensation due to the attorney. *Sheresky*, 2011 WL 7574999, at *6.

113. *Sheresky*, 2011 WL 7574999, at *5.

> A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
> (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
> (3) the total fee is not excessive.

N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0, r. 1.5(g) (2013). The rule does not prohibit payment to

With these considerations in mind, the court was unreceptive to a result that would broaden the scope of the unfinished business rule to include hourly fees.[114]

2. *Thelen LLP*

In what it called the "alarming phenomenon" of law firm bankruptcies, a court in the Southern District of New York reached the same conclusion, putting itself directly at odds with the *Coudert* court.[115] This court emphasized the inherent conflict between property of the estate and what it called the "essence of the attorney-client relationship" when it ruled that hourly fees should not be included in the purview of the unfinished business rule.[116] Thelen, a California law firm, voluntarily filed Chapter 7 bankruptcy in September 2009.[117] As its attorneys scattered to other firms, the estate initiated adversary proceedings against those partners and their new firms for the unfinished business of the bankrupt firm.[118]

One such adversary proceeding was governed by New York law, despite a partnership agreement and choice of laws provision to the contrary.[119] The court recognized that, although it was well-settled that

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an attorney formerly affiliated with the firm if a separation or retirement agreement is in place. *Id.* § 1200.0, r. 1.5(h).

114. *Sheresky*, 2011 WL 7574999, at *7.

115. Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 735 (S.D.N.Y. 2012). The court, sua sponte, granted interlocutory appeal on the issue of whether hourly fees are included in the unfinished business rule. *Id.* at 736.

116. *Id.* at 735.

117. *Id.* at 736.

118. *Id.* at 736–37. There were two key adversary proceedings at issue in the case, both arising from unfinished business claims. The first was against Seyfarth Shaw and the second against Robinson & Cole, both law firms with former Thelen partners. *See id.* at 736–37.

119. In some choice of laws gymnastics, the court entirely circumvented a written partnership agreement with a choice of laws provision requiring California law to govern. *Id.* at 737–38. The court ruled that the fourth partnership agreement entered into by the Thelen partners constituted a fraudulent transfer because it was entered into while the firm was insolvent. *Id.* The court reasoned that choice of laws provisions only govern contractual causes of action, and because fraudulent transfers are within the realm of tort law and the fraudulent transfer occurred in New York, New York law would apply. *Id.*

However, New York law only applied as to Seyfarth Shaw and California law applied to Robinson & Cole. *Id.* at 743. California has adopted the RUPA and its standard of reasonable compensation in lieu of the former UPA standard of no compensation relied upon in *Jewel*. *Id.* at 744. The court ruled, with respect to California law, that "to the extent that Robinson & Cole earned profits from former Thelen matters exceeding 'reasonable compensation,' California law dictates that those profits belong to Thelen." *Id.* at 745.

contingency fees would be included as property of the estate, only one New York court previously addressed the issue with respect to hourly fees.[120] Like the court in *Sheresky*, the *Thelen* court emphasized the financial burden and disincentive that would result if the unfinished business rule encompassed hourly fees.[121] However, the court went one step further than *Sheresky*, arguing that an expansion of the doctrine would result in an "unjust windfall" to the estate while simultaneously undercutting the public policies discussed in *Sheresky*.[122] Additionally, other New York courts held that when an attorney leaves a partnership and tries a case in its entirety, his former law firm will only be entitled for its share up until the date of dissolution, not the entire bill.[123] Because an hourly matter is completed almost entirely due to an attorney's "post-dissolution efforts, skill and diligence," the court ruled that including hourly fees in the unfinished business rule would be directly at odds with this precedent.[124]

The court also rejected the notion that executory contracts were always property of the estate, unless explicit intent dictated a contrary result, in favor of a more limited approach.[125] The court reasoned that an executory contract should only be included as property of the estate where the parties "contemplate[] that it should survive dissolution . . . ."[126] With respect to hourly fees, it would be impossible for the parties to contemplate post-dissolution survival—one cannot contemplate that a contract will remain post-dissolution without simultaneously infringing the client's right to terminate his attorney at

120. *Id.* at 739–40. Although the *Sheresky* case was not binding because it was a state court decision, its reasoning was afforded "great weight." *Id.* at 740 (internal quotations omitted) (citing *In re* Brooklyn Navy Yard Asbestos Litig., 971 F.2d 831, 850 (2d Cir. 1992)).

121. *In re Thelen*, 476 B.R. at 740.

122. *Id.* at 740 ("Unlike in the contingency fee context, applying the unfinished business doctrine to pending hourly fee matters would result in an unjust windfall for the Thelen estate, as 'compensating a former partner out of that fee would reduce the compensation of the attorneys performing the work.'" (quoting Sheresky v. Sheresky Aronson Mayefsky & Sloan, LLP, No. 150178/10, 2011 WL 7574999, at *5 (N.Y. Sup. Ct. Sept. 13, 2011)).

123. *Id.*

124. *Id.* at 740 (internal quotations omitted) (citing Shandell v. Katz, 629 N.Y.S.2d 437, 439 (App. Div. 1995)).

125. *Id.* at 741.

126. *Id.* (quoting Scholastic, Inc. v. Harris, 259 F.3d 73, 89 (2d Cir. 2001)) (internal quotations omitted).

will.[127]

Finally, the court addressed a potential unintended and "bizarre consequence[]" that could result from including hourly fees in property of the estate.[128] If hourly fees are property of the estate, the trustee could sell off clients one by one.[129] Allowing a firm to "liquidate" its clients would not only be inconsistent with a client's right to choose and terminate counsel, it would essentially terminate this right altogether.[130] Ultimately, the court primarily focused on public policy, as opposed to a strict interpretation of partnership law, to exclude hourly fees from the unfinished business rule.[131]

C. "Doctrinal Uncertainty" Continues: The Second Circuit's Decision in Thelen

The trustee in *Thelen* timely appealed the district court's ruling to exclude hourly fees from property of the estate.[132] On November 15, 2013, the Second Circuit, after holding that New York and not California law applied, addressed the application of the unfinished business rule to hourly fees.[133] The court began by briefly explaining the rule and its history relating to contingent fees, noting the "scant . . . authority" with respect to the rule's application to hourly fees.[134] Recognizing the split within the Southern District of New York specifically, the court stated that given "this doctrinal uncertainty, it is unsurprising that courts . . . have split on whether the unfinished business doctrine applies to a law firm's pending hourly fee matters."[135]

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127. *In re Thelen*, 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 has an "absolute right" to terminate the attorney-client relationship at any time and for any reason)).

128. *Id.* at 741.

129. *Id.* When the court asked the trustee if the debtor firm could sell off pending matters, he was "unable to answer definitively." *Id.*

130. *See id.*

131. *Id.* at 742–43.

132. Geron v. Seyfarth Shaw LLP (*In re* Thelen LLP), 736 F.3d 213, 218 (2d Cir. 2013), *certified question accepted sub nom.* Geron v. Seyfarth Shaw LLP (*In re* Thelen LLP), 22 N.Y.3d 1017 (2013).

133. *Id.* at 220–24.

134. *Id.* at 220–21.

135. *Id.* at 221, 225.

Ultimately, the court never reached a conclusion. Instead, it listed the arguments on both sides of the issue, certified the question to the New York Court of Appeals, and retained jurisdiction to decide the case following that decision.[136] The court emphasized the following advantages of including hourly fees as unfinished business: (1) partnership rules are simply defaults that can easily be drafted to the contrary, (2) the majority of states that have adopted the Uniform Partnership Act include hourly fees as unfinished business, and (3) a public policy concern exists in having different rules for hourly and contingent cases.[137] The different standards could create discrepancies in the fiduciary duties owed to the firm based on the type of billing involved, encouraging the view that "an individual partner's book of business is not an asset of the firm, but instead a piece of personal property to be guarded with a Cerberus-like ferociousness."[138]

The court additionally recognized the following benefits of excluding hourly fees from unfinished business: (1) the special nature of the attorney-client relationship, particularly that the client "has an unassailable right to discharge an attorney at any time, with or without cause," (2) applying the doctrine to hourly fees could discourage other law firms from accepting client matters or former attorneys from dissolved law firms, (3) the rules of professional conduct could very well forbid the unfinished business rule by prohibiting agreements that restrict lawyer mobility, and (4) hourly fees are inherently different from contingent fees, as the work on the matter is complete at the time of payment rather than ongoing.[139]

The court concluded by stating that "[g]iven the significance of these issues to members of the New York bar, we hesitate to definitively resolve them without first seeking the views of the New

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136. *Id.* at 220–24. The court certified the question as follows: "Under New York law, is a client matter that is billed on an hourly basis the property of a law firm, such that, upon dissolution and in related bankruptcy proceedings, the law firm is entitled to the profit earned on such matters as the 'unfinished business' of the firm?" *Id.* at 225.

137. *Id.* at 221–22.

138. *In re Thelen*, 736 F.3d at 222.

139. *Id.* at 222–23. With regard to the third point, the court explicitly stated "we cannot rule out the possibility that, confronted with a novel application of the rule, that court might conclude that the unfinished business rule should not apply to *any* of a law firm's cases." *Id.* at 223.

York Court of Appeals . . . ."[140] On December 12, 2013, the New York Court of Appeals accepted certification of the questions and currently awaits briefs and arguments from the parties.[141]

III. A PLEA FOR CLIENT PROTECTION: REMOVING HOURLY FEES FROM THE REACH OF THE UNFINISHED BUSINESS RULE

In modern practice, where mega-firms are common and client rights are of the utmost importance, hourly fees must be excluded from the unfinished business rule. Although it is certainly true that partnerships can avoid the unfinished business rule entirely, assuming they amend partnership agreements in time,[142] why should that be a determining factor? The majority rule, as it stands today, functions as a limitation on practice that favors the bankrupt estate at the expense of attorneys, clients, and the very foundation of the attorney-client relationship.[143] Ultimately, hourly fees should be excluded from the unfinished business rule for several reasons: (1) to avoid over-compensating the estate while under-compensating its attorneys;[144] (2) to protect a client's right to choose his attorney;[145] (3) to protect an attorney's right to mobility;[146] and (4) to avoid unintended consequences in the realm of bankruptcy law.[147]

A. Overcompensation at the Client's Expense

As the *Thelen* court aptly stated, the inclusion of hourly fees in the

140. *Id.* at 223–24.

141. Geron v. Seyfarth Shaw LLP (*In re* Thelen LLP), 22 N.Y.3d 1017 (2013).

142. *See* Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (*In re* Coudert Bros. LLP), 477 B.R. 318, 331 (S.D.N.Y. 2012) (emphasizing that law firms may provide an "alternative set of assumptions" in partnership agreements); Jewel v. Boxer, 203 Cal. Rptr. 13, 16 (Ct. App. 1984). However, law firms must be careful to not put "*Jewel* waivers" in place if the firm is insolvent to avoid fraudulent transfer claims. *See In re Thelen*, 476 B.R. at 736–37; *In re* Brobeck, Phleger & Harrison LLP, 408 B.R. 318, 336–37 (Bankr. N.D. Cal. 2009).

143. *See In re Thelen*, 476 B.R. at 735 ("The pursuit of pending hourly fee matters as assets of the estate has become a recurring feature of such bankruptcies. But this concept of law firm 'property' collides with the essence of the attorney-client relationship.").

144. *See* discussion *infra* Part III.A.

145. *See* discussion *infra* Part III.B.

146. *See* discussion *infra* Part III.C.

147. *See* discussion *infra* Part III.D.

unfinished business rule will almost certainly result in an "unjust windfall" to the bankrupt estate.[148] An important distinction must be made, however, in that most courts in UPA jurisdictions, rather than RUPA jurisdictions, have addressed the unfinished business rule and hourly fees.[149] The RUPA, which has been adopted in a majority of states, does away with the no compensation rule set forth in the UPA in favor of a more attorney-friendly reasonable compensation standard.[150]

In states that retain the antiquated UPA no compensation rule, the estate will often receive more money than it would receive absent the dissolution.[151] With respect to contingency fees, the estate will receive whatever profits exceeded the partner's compensation, and it will also tap into what the partner would have received had the firm remained intact because that partner cannot receive extra compensation under this traditional rule.[152] Hourly fees, on the other hand, are based entirely on the number of hours an attorney works. A firm remaining in business would not cut into the partner's hourly profits, and the firm should not do so simply because it ran into financial trouble. The unfinished business rule, in this respect, benefits the estate at the expense of the partner, who in all likelihood did not contribute to the firm's demise.[153] As a basic policy matter, partnership law should not allow an estate to get more than its fair share simply because it chose to dissolve or filed bankruptcy.

It would seem that the RUPA's adoption of reasonable

148. *In re Thelen*, 476 B.R. at 740.

149. *See, e.g.*, Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (*In re* Coudert Bros. LLP), 477 B.R. 318, 335–36 (S.D.N.Y. 2012); Murov v. Ades, 786 N.Y.S.2d 79 (App. Div. 2004). Notably, *Murov* only addresses contingency fee cases and does not involve calculation of hourly fees. 786 N.Y.S.2d at 79.

150. *See supra* notes 62, 67 and accompanying text.

151. *In re Thelen*, 476 B.R. at 740 ("Unlike in the contingency fee context, applying the unfinished business doctrine to pending hourly fee matters would result in an unjust windfall for the Thelen estate, as 'compensating a former partner out of that fee would reduce the compensation of the attorneys performing the work.'" (quoting Sheresky v. Sheresky Aronson Mayefsky & Sloan, 950 N.Y.S.2d 611, at *5 (Sup. Ct. 2011) (unpublished table decision))).

152. *See id.*

153. In these bankrupt mega-firms with hundreds of partners, it is unlikely that many partners played a crucial role in the financial affairs of the partnership. *See* Lattman, *supra* note 5 (discussing the investigation into the former chairman of Dewey & LeBoeuf for financial misconduct).

compensation would remedy the issue discussed above.[154] Unfortunately, the reasonable compensation standard presents a different set of issues whose uncertainty can lead to the same result as the no compensation rule.[155] Though the reasonable compensation rule provides a more equitable outcome for attorneys on a contingency basis, the same cannot be said for its result with hourly fees. With hourly fees, the attorney and his client contracted for a specified rate. To chip away from the attorney's salary after a firm dissolves and give him only what a court deems "reasonable" would place a trustee or judge in between the attorney and his client, fundamentally altering the relationship.[156]

B. Preserving the Client's Right to Choose Counsel

What makes the legal partnership special is the protected relationship of attorneys and their clients.[157] As a general rule, clients have an "absolute power to discharge an attorney, with or without cause."[158] Where hundreds, thousands, and even millions of dollars are spent on very technical topics that require a great deal of skill, it is

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154. REVISED UNIF. P'SHIP ACT § 401(h) (1997). The reasonable compensation standard seems to at least take into account the degree of work put in by an attorney.

155. Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (*In re* Coudert Bros. LLP), 477 B.R. 318, 349–50 (S.D.N.Y. 2012) (recognizing the difficulty in determining compensation where an attorney's "efforts, skill and diligence" are included, though in the context of an amended UPA jurisdiction rather than RUPA (internal quotations omitted)). This is particularly true in jurisdictions, like that of *Coudert*, which have modified the no compensation rule to include compensation for an attorney's "efforts, skill, and diligence." *Id.* at 349. Absent clearer instruction, courts will be forced to take on a "thorny task" that they hardly have the resources to complete. *Id.* at 350.

156. *See id.* at 350. In the *Coudert* decision, the judge noted her disinclination to tackle the issues as they would "go far beyond the bounds of th[e] opinion." *Id.* at 349–50. Additionally, and assuming the rates set are reasonable, there would be no hourly fees for the unfinished business rule to claim, eliminating the necessity of their inclusion in the first place.

157. *See* Echlin v. Sup. Ct. of San Mateo Cnty., 90 P.2d 63, 65 (Cal. 1939) (recognizing the client's right to choose and terminate counsel as "universal").

158. Mark H. Epstein & Brandon Wisoff, Comment, *Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice*, 73 CAL. L. REV. 1597, 1603–04 (1985). As another court put it, "[c]lients are not merchandise. Lawyers are not tradesman. They have nothing to sell but personal service. An attempt, therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status." Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989) (internal quotations omitted). As the American Bar Association wrote, "each client has the right to choose the departing lawyer or the firm, or another lawyer to represent him" in the event of dissolution. ABA Formal Op. 414 (1999).

important that the client have "complete confidence" in his attorney.[159]

Courts across the country have recognized that the unfinished business rule conflicts with clients' right to choose.[160] Any attempt to consider clients as property or "merchandise" would inevitably run afoul of the "best concepts of [] professional status."[161] The basic premise of the unfinished business rule is that client matters unfinished at the time of dissolution are "property of the estate."[162] This, however, cannot be true: "Clients are not the 'property' of the attorney or law firm who represents their interests; clients are free to discharge their attorney at any time, for whatever reason."[163]

Although *Jewel* and other courts have addressed—and dismissed—this concern, they have done so assuming that the client already made his choice and the unfinished business rule relates only to payment.[164] Although this assumption may be sound in a contingency fee scenario where the client stays with the same attorney until completion of the matter, it makes less sense in the context of hourly fees.[165] Hourly fees are in essence "mini-contracts" or puzzle pieces that make up the entirety of the relationship.[166] To say that the client has made his choice at the time of dissolution is to ignore the very real possibility that, at any time, he can take his business elsewhere. Although the

159. Epstein & Wisoff, *supra* note 158, at 1604. This point is furthered by the fact that, even where a client breaches a *contingency fee* contract with an attorney or law firm, the firm is entitled to no more than the services rendered on a quantum meruit basis. *E.g.*, Novinger v. E.I. DuPont de Nemours & Co., 809 F.2d 212, 218 (3d Cir. 1987).

160. *See, e.g.*, *In re Coudert Bros.*, 477 B.R. at 341–42; Welman v. Parker, 328 S.W.3d 451, 457 (Mo. Ct. App. 2010); Jewel v. Boxer, 203 Cal. Rptr. 13, 17 (Ct. App. 1984); Resnick v. Kaplan, 434 A.2d 582, 588 (Md. Ct. Spec. App. 1981).

161. *Cohen*, 550 N.E.2d at 411 (internal quotations omitted).

162. Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 735 (S.D.N.Y. 2012) (recognizing the relevant issue as whether the hourly client fees are "property" belonging to the firm).

163. *Welman*, 328 S.W.3d at 457.

164. *In re Coudert Bros.*, 477 B.R. at 331; *Jewel*, 203 Cal. Rptr. at 17–18.

165. Contingency fee cases, in this regard, have been extensively handled by courts. If a client elects to terminate an attorney in the middle of a contingency fee arrangement, the attorney may only recover on a quantum meruit basis. *E.g.*, Novinger v. E.I. DuPont de Nemours & Co., 809 F.2d 212, 218 (3d Cir. 1987). Contingency fee cases, by their nature, are ongoing, and clients maintain their attorneys so long as they choose or until the end of the case. Hourly fees are more complex because, as evidenced by recent case law, it is difficult to determine when they begin and end. *See generally In re Coudert Bros.*, 477 B.R. 318; *In re Thelen*, 476 B.R. 732.

166. Although this description fits well within the conceptual framework of hourly fees—that is, hourly cases are billed periodically and can easily be broken down by billing period—some courts have been unreceptive to such a characterization. *See In re Coudert Bros.*, 477 B.R. at 338–39.

client is likely unphased by accounting decisions of law firms so long as his matters are handled appropriately, those accounting measures have a chilling effect on the client's choice and the attorney's practice.[167] Including hourly fees in the unfinished business rule assumes that the client never intended to treat each billing cycle as a new matter, which is entirely inconsistent with the client's right to terminate.[168]

As courts recognize, these unfinished hourly contracts are executory.[169] Though one court stated that, to be excluded from the reach of the unfinished business rule, the parties must explicitly so intend, this argument is misplaced.[170] Though it is true that a contrary intention expressly written would be beneficial to determine the partners' intent, such an agreement does not eliminate the relevancy of the client's intent. The client is an integral part of the attorney-client relationship and if the client, who retains the power to terminate at will, does not contemplate that the contract should endure beyond dissolution, there is no reason to impose such an assumption.[171]

C. Protecting the Attorney's Right to Practice

Alongside the client's right to choose counsel is the attorney's right

167. It is difficult to imagine clients caring about where each specific dollar is going as long as the work is completed at the proper level; but the client's choice will be affected if the attorney does not wish to continue representation at the risk of reduced compensation for his work.

168. With all executory contracts, if the partners indicate a contrary intent in their partnership agreements, they will not be included as property of the estate upon dissolution of the partnership. *See, e.g.*, Dawson v. White & Case, 672 N.E.2d 589, 592 (N.Y. 1996). This assertion ignores the possibility that the client originally intended for each billing period to be a separate contract.

169. Hourly fees in the context of the unfinished business rule must be classified as "executory"; otherwise they would be considered new or completed business. *See supra* note 96 and accompanying text.

170. *In re Coudert Bros.*, 477 B.R. at 333.

171. Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 741–42 (S.D.N.Y. 2012). The *Thelen* court recognized that legal contracts are "categorically different" from other types of professional contracts because a distinct public policy interest is well-established in the relationship between a client and his attorney. *Id.* at 742–43. Relying on precedent, the court noted that previous case law held these contracts could be property of the estate "if an executory contract with a third party contemplates that it should survive dissolution." *Id.* at 741 (quoting Scholastic, Inc. v. Harris, 259 F.3d 73, 89 (2d Cir. 2001)) (internal quotations omitted). The parties, however, could not contemplate the continued existence of these contracts: "Thelen's hourly fee matters cannot have contemplated post-dissolution survival without infringing a client's right to terminate an attorney at will." *Id.*

to practice.[172] Although the *Coudert* court recognized that the practice of law is unique, it did not see fit to carve out an exception for law firms in the unfinished business rule, despite the fact that courts have carved out exceptions before.[173] According to the American Bar Association Model Rules of Professional Conduct:

> A lawyer shall not participate in offering or making: (a) a partnership . . . that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.[174]

Without this rule, it would be impossible to guarantee a client's right to choose.[175] If attorneys are not free to practice how they choose, the client's choice is severely limited.

Courts consistently hold that any sort of "financial disincentive for the lawyer to continue representing his clients of his former firm" prevents lawyer mobility and violates public policy.[176] A common "financial disincentive" is a restrictive covenant, which prevents attorneys from practicing law during a certain time frame or in a certain geographic area.[177] The inclusion of hourly fees should be treated in the same manner as restrictive covenants, as both constitute financial disincentives. If an attorney makes less money on hourly cases than he would otherwise, common sense dictates that he will stop taking those cases, limiting both the client's right to choose and the

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172. MODEL RULES OF PROF'L CONDUCT R. 5.6 (2012).

173. *In re Coudert Bros.*, 477 B.R. at 340. As the *Coudert* court noted, retainers are excluded from the unfinished business rule as presumptively "new business." *Id.* at 323 (internal quotations omitted). Certain partnership agreements have also been rejected because they limit attorney mobility, such as restrictive covenants. *Id.* at 341. As the *Coudert* court recognized, restrictive covenants in the practice of law violate public policy. *Id.* Given that certain matters have already been excluded from the unfinished business matter and the inclusion of hourly fees acts as a substantial financial disincentive, hourly fees should be excluded from the rule as well.

174. MODEL RULES OF PROF'L CONDUCT R. 5.6.

175. Cohen v. Lord, Day & Lord, 550 N.E.2d 410, 411 (N.Y. 1989) (noting that an attorney's right to practice is "to ensure that the public has the choice of counsel").

176. *See, e.g.*, *In re Coudert Bros.*, 477 B.R. at 341.

177. *Id.*

attorney's ability to practice freely.[178]

Beyond the attorney's choices as to what types of cases to take, the unfinished business rule's application to hourly fees could prove detrimental to the attorney's subsequent employment. It is not just former partners that are sued for unfinished business; it is their new partnerships as well.[179] At the most fundamental level, it is more difficult to calculate hourly fees than contingent fees. Contingency cases relate to a particular client matter and are entirely outcome-dependent; the firm will typically receive a percentage of whatever award is granted.[180] Rather than bother with potential liability, firms could easily forego hiring partners of dissolved firms until their liability is extinguished to avoid unfinished business claims against them.[181] A future firm will likely struggle, as courts do now, to determine what constitutes "hourly fees" and how they should be calculated.[182] It is significantly easier to disclose all pending contingency matters so that the new firm can make an informed hiring decision, but the concept of hourly fees is more esoteric. Due to the inherent difficulty in calculation and potential impact on representing clients or seeking future employment upon dissolution, the inclusion of hourly fees in the unfinished business rule is as much a financial disincentive to practice as restrictive covenants and should be treated with equal skepticism.

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178. Impermissible financial disincentives have been described as anything that "'functionally and realistically discourage[s]' a . . . partner from serving clients." Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995, 998 (N.Y. 1993) (quoting *Cohen*, 550 N.E.2d at 411); *see also* Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 149 (N.J. 1992); Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 601–02 (Iowa 1990).

179. *E.g.*, *In re Coudert Bros.*, 477 B.R. at 322; Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 736 (S.D.N.Y. 2012).

180. BLACK'S LAW DICTIONARY 362 (9th ed. 2009).

181. Firms will not face the same unknown liability with contingency cases because it is easier to disclose pending contingency matters. *See supra* note 24 (describing the difference between hourly and contingency fees). Because a contingency fee is based entirely on the final award received and is only complete when the client terminates the arrangement or the case is closed, it poses a more concrete relationship as opposed to hourly fees, which can be broken down into mere minutes with no definite beginning or end. A law firm will be able to make an informed decision as to whether it wishes to take the reduced compensation for the partner's time in contingency cases, but the same is not true of hourly cases.

182. This fact is evidenced by the amount of litigation and time expended resolving such conflicts. *E.g.*, *In re Coudert Bros.*, 477 B.R. 318; *In re Thelen*, 476 B.R. 732.

D. The Law of Unintended Consequences in Bankruptcy Court

The unfinished business rule, in the bankruptcy context, can easily infringe on a fundamental bankruptcy right—the automatic stay.[183] When any entity files for bankruptcy, perhaps the greatest advantage is the automatic stay. The stay has been described as "'closing the windows and locking the doors' to prevent any property from leaving the newly formed estate."[184] Upon filing for bankruptcy, the automatic stay prohibits creditors from taking any property from the estate, pending resolution of the case.[185] Assuming, arguendo, that hourly fees are property of the estate, clients who fire their attorneys while some of the business remains "unfinished" could feasibly be liable for violating the stay.[186]

This result, however, cannot be allowed. Inextricably tied to the client's right to choose is the client's right to terminate counsel.[187] When the *Thelen* court raised this very concern, the trustee was unable to give a definitive answer as to whether a trustee may liquidate client matters to satisfy debts of the estate or if a client could violate the automatic stay by firing an attorney from a bankrupt law firm.[188] It is, in this respect, that partnership law and bankruptcy principles come to a head. Clients must be free to hire, fire, or re-hire any attorney they please, even at the expense of creditors.[189]

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183. 11 U.S.C. § 362(a)(3) (2012) ("[A] petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate . . . .").

184. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS: TEXTS, CASES, AND PROBLEMS 131 (6th ed. 2009).

185. 11 U.S.C. § 362(a)(3) (prohibiting "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" upon filing a bankruptcy petition).

186. *In re Thelen*, 476 B.R. at 741.

187. A comment in the Model Rules of Professional Conduct states, "A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances." MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 4 (2012). Forty states and the District of Columbia have adopted the comments as "guides to interpretation." CPR Policy Implementation Committee, *State Adoption of the ABA Model Rules of Professional Conduct and Comments*, ABA (May 23, 2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf. See *supra* Part III.B for a discussion of the client's right to choose.

188. *In re Thelen*, 476 B.R. at 741.

189. Of note, the trustee already has a plethora of ways to bring money back into the estate through its various clawback and avoidance powers. *See supra* notes 13–14.

CONCLUSION

Amidst speculation of financial demise, it is all too likely the Dewey & LeBoeuf partners experienced several immediate concerns—where they will work, how they will pay their bills, and if they will have to move.[190] The unfinished business rule likely never crossed their minds. That very rule, which allows claims against former partners for profits earned while completing the unfinished business of the firm, can lead to a deterioration of savings, client relationships, and employment prospects.[191]

Although partnership law recognizes that partners, as co-owners, owe fiduciary duties to each other, a degree of practicality is desperately needed.[192] Including hourly fees in the unfinished business rule and expanding its breadth will undoubtedly lead to weakening of the attorney-client relationship, reducing the client to nothing more than a piece of property.[193] And for what reason?

Favoring creditors and the estate at the expense of the attorney and the client is hardly the preferable option, particularly when the result can have a devastating impact on future firms, former partners, and existing clients.[194] Rather than adhere to an antiquated approach that ignores the basic elements of legal practice and the culture of practice today, courts should eliminate hourly fees from the unfinished business rule to preserve the client's right to hire or fire counsel and to avoid litigation that inevitably treats a client as nothing more than a Jackson Pollack painting stripped off the wall.[195]

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190. *Key Events for Dewey*, *supra* note 6 (providing a timeline of Dewey & LeBoeuf's 2012 failure).
191. *See, e.g.*, Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP (*In re* Coudert Bros. LLP), 477 B.R. 318, 332 (S.D.N.Y. 2012) (providing a general definition of the unfinished business rule).
192. *See* discussion *supra* Part I.A.
193. *See* discussion *supra* Part III.
194. *Id.*
195. *See* Geron v. Robinson & Cole LLP (*In re* Thelen LLP), 476 B.R. 732, 741–42 (S.D.N.Y. 2012); *see also* discussion *supra* Part III.