UNFINISHED BUSINESS

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The modern mobility of lawyers carries some obvious risks for a law firm hiring laterals. But there are some risks that might not be so obvious. What if all the money earned on a case brought with the new lateral had to be paid to her old law firm even though your firm did all the real work? That could happen under the Unfinished Business Doctrine. The doctrine holds that a lawyer who takes unfinished business to a new firm must conclude the assignment for the benefit of the old firm and, possibly, without crediting the new firm for the value of the lawyer's services in concluding the work.

It is important to note that the doctrine applies to existing client matters, not to clients. There is no issue if a client follows a lawyer to a new firm, but leaves the unfinished files behind at the old firm. The problems arise from unfinished business taken from the old firm to the new firm. The nature of the unfinished business is irrelevant – the doctrine applies equally to litigation, commercial or administrative files. New matters arising at the new firm for that client are not subject to the doctrine.

Although the doctrine has been around longer, commentators tend to regard *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal.App.3d 200 (1983), and *Jewel v. Boxer*, 156 Cal.App.3d 171 (1984), as the seminal cases. *Rosenfeld* involved a California partnership that solicited and landed a big antitrust case with a lucrative contingent fee. Two young partners worked almost full time on that case for five years. As the case neared trial, the partners left, taking that case to their new firm. A year later, the case settled and the departing partners received nearly $3 million. The old firm sued, claiming the fees.

The appellate court concluded that the underlying lawsuit was unfinished business, that the departing partners breached their fiduciary duties by failing to complete the case for the benefit of the old partnership and, therefore, held all sums received in constructive trust for their former partnership.

Jewel involved a dissolved partnership that had many pending contingent fee cases. At issue was whether the old firm should share in the fees earned when the cases were concluded by former partners at their new firms. The trial court apportioned those fees under a quantum meruit analysis. The appellate court reversed, holding that the fees belonged entirely to the old firm. The

court reasoned that the departing partner was obligated to remit the entire earned fee to the old law firm, but could then expect to receive his or her proportionate share of the fees, according to that lawyer's respective share of the old firm.

The court premised its analysis on duties under the Uniform Partnership Act (UPA) and a separate common law fiduciary duty imposed on a partner not to take any action with respect to unfinished business for personal gain.

In both cases, the defendants argued that the doctrine interfered with a client's absolute right to the attorney of their choice because it created a strong disincentive for the lawyer to perform the work post split-up. The court cast that aside by noting that the partners would receive a share of the fees through their old law firm in exactly the same percentage that they would have received if the old firm had continued in business. Further, *Jewel* noted:

> [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.
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> 156 Cal.App.3d at 178

Both *Rosenfeld* and *Jewel* were partnership cases. Subsequent cases have expanded the scope and reach of the Unfinished Business Doctrine to practically every form of private law firm.[1]

The doctrine has come to the forefront with the highly publicized breakup of major international law firms. *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP* emerged from the failure of the storied Coudert Brothers law firm, a large, international law firm with roots going back to the 1850s. The firm went into formal dissolution around 2004. Its partners departed to join other major law firms around the world. They took with them their existing clients, including their ongoing matters. The administrator of the estate brought suit against 10 major law firms to recover fees generated by former Coudert Brothers partners while completing those matters.

In an exhaustive 54-page opinion, Judge McMahon of the Southern District of New York held that all of the successor law firms had to account to the estate for all profits earned completing work that started out at Coudert Brothers. This holding applied to both contingent fee cases and hourly billing matters.

Then the court noted:

> The question that naturally arises is whether the partner is entitled to deduct from the net profits 'reasonable compensation' for her post-dissolution efforts before remitting the balance to her former partners for division. The answer at common law was simple: no.
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> 2012 WL 1918705 at p. 18.

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Although this seems harsh, the underlying justification may be that the partner will be ultimately compensated from her share of the net profits finally realized by the old law firm. Of course, a bankrupt firm with many creditors may not have much left in the way of profits for its former partners.

Geron v.Robinson & Cole LLP, 1:11-cv-08967-WHP (S.D.N.Y. Sept. 4, 2012), arose from the bankruptcy of Thelen LLP. The district court declared that the concept of whether pending hourly fee matters constitute the firm's "property" collides with the essence of the attorney-client relationship, which is terminable at will.

While the Thelen firm was insolvent, it adopted an amended partnership agreement that incorporated a *Jewel* waiver of rights to any unfinished business of the partnership at the time of dissolution of the firm. Nevertheless, the trustee of the Thelen estate brought fraudulent transfer and accounting claims against both Robinson & Cole and Seyfarth Shaw LLP to recover profits from the work that former Thelen partners brought to those firms.[2]

Applying New York law to claims against Seyfarth Shaw, the district court stated that, under New York law, pending contingent fee cases of a dissolved partnership are assets of the estate, but that New York had not extended that same conclusion to pending hourly fee matters. Indeed, the district court concluded that doing so would result in an unjust windfall for the Thelen estate and reduce the compensation of the attorneys performing the work. As such, it would violate the state's public policy against restrictions on the practice of law and its rule of professional conduct on division of fees for legal services. The district court noted that, even in pending contingent fee cases, the dissolved firm is only entitled to the value of the matter at the time of dissolution, plus interest.

In contrast, the district court analyzed the claims against Robinson & Cole under California law. Although *Jewel* and the cases that followed it held that pending hourly fee matters are assets of the dissolving firm, the district court found that California's enactment of the Revised Uniform Partnership Act in 1994 eliminated the "no compensation" rule existing in the prior act and now provides that a partner may receive "reasonable compensation for services rendered in winding up the business of the partnership." *See* Cal. Corp. Code § 16401(h). Whether the amount the former Thelen partners earned while working on the matters at Robinson & Cole exceeded "reasonable compensation" required a factual analysis. *Geron* did not analyze the claim under the common law fiduciary duty that was the second prong of the *Jewel* rationale.

Geron was decided in the Southern District of New York (the same court as *Development Specialists*) less than four months later, and came to a contrary conclusion. *Geron* roundly criticizes *Development Specialists*. *Geron* distinguishes *Jewel* based on amendments to the UPA, but the Second Circuit earlier said in *Santalucia v. Sebright Transportation, Inc.,* 232 F.3d 293 (2d Cir. 2000), that the fiduciary duty at issue did not arise solely from the UPA.

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> [the UPA] ... only provides a *methodology* for the accounting of a dissolved partnership. [It] is not the *source* of the duty of a lawyer to account to his former partners. The source of the duty is the fiduciary relationship of trust and confidence that partners have from time immemorial shared with one another. *(Id.* at 300.)

A prudent lawyer contemplating a lateral hire will want to include analysis of the Unfinished Business Doctrine as applied in his or her jurisdiction as part of the due diligence review. ■

1 *Fox v. Abrams*, 210 Cal.Rptr. 260 (1985) (a California law corporation); *Sullivan, Bodney & Hammond v. Bodney*, 850 P.2d 1248 (Kan. 1991) (a professional corporation); *Vowell & Meelheim v. Erben*, 679 So.2d 637

2 A similar effort at a waiver on the eve of dissolution failed in *In re Brobeck, Phleger & Harrison LLP*, 408 B.R. 318 (Bankr. N.D. Cal. 2009).

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