

WHY *JEWEL V. BOXER* IS WRONG

By: Ronald Minkoff and Caren Lerner¹

One of the most frustrating aspects of the common law tradition is that once a judge writes something in an opinion – no matter how ill-advised or wrongheaded – it can take years, even decades, to undo the damage. Nowhere is this more true than with the troubling decision in *Jewel v. Boxer*, 156 Cal. App. 3d 171, 203 Cal. Rptr. 13 (Cal. Ct. App. 1984) (“*Jewel*”), which applied the “unfinished business” doctrine – also called the “no compensation rule” – as articulated in the Uniform Partnership Act (“UPA”) to dissolving law firm partnerships. Even worse, in an era when law firm dissolutions are becoming ubiquitous, *Jewel’s* influence appears to be deepening.

In *Jewel*, the court attempted to apply the UPA, a statute now almost 100 years old, to the realities of modern law practice. The result was not pretty. Courts following *Jewel* – and there are many – have held that partnership cases or matters that are still pending at the time a partnership dissolves are the “unfinished business” of the partnership, and thus are a partnership asset. These decisions reason that because the UPA requires that former partners not be separately compensated for completing the firm’s “unfinished business,” any profits earned from those cases belong exclusively to the dissolving firm, even profits earned by former firm partners completing the cases or matters at their successor firms. Thus, the former partners, and their new firms, get nothing for the work they contributed to bringing the case or matter to a close. This rule has been applied to both contingent and hourly matters, and allows former partners who did no work on the matters post-dissolution to profit from the efforts of those who did, all at the expense of the successor firms.

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In this article, we will show that *Jewel* did not have to come out this way. Though the decision correctly interprets the words of the UPA, it misses the opportunity to adopt a judicial gloss akin to the common law rule, one that would have treated professional service partnerships differently from other types of partnerships. We will also show that the policy reasons that the *Jewel* court cited to support its position have been dramatically undercut by the Model Rules of Professional Conduct, particularly the principles of lawyer autonomy and client choice embodied in Model Rule 5.6(a). Finally, we will point to some hopeful signs that may signal attitudes about *Jewel* and the no compensation rule are changing.

Before turning to *Jewel* itself, we will study how the no compensation rule was applied to law firms and other service partnerships at common law, and the later changes made by the UPA.

I. COMMON LAW NO COMPENSATION RULE

At common law and under the UPA, partnerships continue to exist until the winding up process is completed.² With respect to commercial partnerships, common law has long recognized that surviving partners must complete – *without compensation* – all executory contracts of the partnership that remain in effect during the winding up period.³ The rationale is that partners have a fiduciary duty to wind up and complete the unfinished business of the partnership, and that, absent an agreement to the contrary, their compensation for doing so is limited to their pre-dissolution profit distribution ratio – even if a given partner’s work on the “unfinished business” far exceeds that of her former colleagues.

In 1878, the United States Supreme Court in *Denver v. Roane* extended the common law’s no compensation rule to law firm partnerships, finding that no adjudicated cases recognize

² William Draper Lewis, *The Uniform Partnership Act*, 24 YALE L. J. 617, 627 (1915).

³ See *Denver v. Roane*, 99 U.S. 553, 558 (1878).

grounds for distinguishing professional partnerships from commercial partnerships.⁴

Nevertheless, the Supreme Court, in dictum, left open the possibility that there may be “some reason for applying a different rule to cases of winding up partnerships between lawyers and other professional men, where the profits of the firm are the result solely of professional skill and labor.”⁵

Several courts subsequently relied on this dictum to allow compensation to law firm partners who expended a disproportionate effort in winding up the affairs of their dissolved firms. In doing so, these courts seemingly drew a distinction between settling the affairs of the partnership – e.g., selling the property and receiving money due the firm, paying the firm’s debts and returning the capital contributed by each partner – and rendering “material personal services” in carrying on the unfinished business of the firm, e.g., bringing ongoing litigations or deals to completion.⁶ As the Nebraska Supreme Court stated in *Lamb v. Wilson*:

[W]hen it appears that time, skill and labor have been expended by a partner in the continuance of the partnership business, which inure to the general benefit, he ought to receive, from the profits from his skill and labor, a reasonable compensation, varying according to the nature of the business, the difficulties and results of the undertaking, and its necessity or desirability. . . . [T]his view, it seems to us to be founded upon the plainest principles of equity and justice,

⁴ 99 U.S. at 560.

⁵ *Id.*

⁶ See *Lamb v. Wilson*, 3 Neb. (Unof.) 496 (1902); *Cunningham v. Madden*, 115 W. Va. 286 (1934); *Cofer v. Hearne*, 459 S.W.2d 877 (Tex. Civ. App. 1970). Some commentators have attributed these holdings to the courts’ understanding of the fundamental differences between the work performed by commercial partnerships and service or professional partnerships. Whereas commercial partnerships typically sell “impersonal” products, the “products” of service or professional partnerships are produced by the partners’ skills and labor. See Mark H. Epstein & Brandon Wisoff, *Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice*, 73 CAL. L. REV. 1597, 1611 (1985); Laura L. Crum, *Dissolution of a Law Partnership-Goodwill, Winding up Profits, & Additional Compensation*, 6 JOURNAL OF THE LEGAL PROFESSION 277, 288-89 (1981).

especially when applied to professional partnerships among professional men, where the profits are almost wholly the result of professional skill and labor.⁷

These cases, however, predate the adoption of the UPA in the respective courts' jurisdictions.

II. THE UPA'S NO COMPENSATION RULE

The UPA codified the common law no-compensation rule with one exception. Section 18(f) of the UPA provides that “[N]o partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.”⁸ Thus, absent an agreement to the contrary, when dissolution is caused by a partner's withdrawal (rather than death), income received from completing unfinished business is partnership income that must be distributed pro rata among the partners. Under the strict terms of the UPA, the same rule applies to all partnerships, with no distinction made for those who provide professional services.

III. *JEWEL V. BOXER*

Although the UPA expressly incorporated by reference pre-UPA caselaw,⁹ courts have interpreted Section 18(f) as providing a more inviolable no-compensation rule. The *Jewel* decision is the most famous example. There, the California appellate court was asked to rule on whether former firm partners who had taken contingency cases with them to their new firm after the dissolution could be paid for the work they did at the new firm. The *Jewel* court construed Section 18(f) as “*unequivocally prohibit[ing]* extra compensation for post-dissolution services,

⁷ 3 Neb. (Unof.) 496.

⁸ Unif. Partnership Act § 18(f).

⁹ Unif. Partnership Act § 5 (“In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.”).

with a single exception for surviving partners.”¹⁰ While courts had previously denied compensation by mechanically invoking Section 18(f), the *Jewel* court went further, relying on “policy reasons” to justify its strict interpretation of this section. The *Jewel* court stated:

The Rule prevents partners from competing for the most remunerative cases during the life of the partnership in anticipation that they might retain those cases should the partnership dissolve. It also discourages former partners from scrambling to take physical possession of files and seeking personal gain by soliciting a firm’s existing clients upon dissolution.¹¹

The *Jewel* court rejected the contention that a client could transform the dissolved firm’s unfinished business into new business of the dissolving partners by agreeing to a substitution of counsel. While it recognized the special treatment afforded to client choice, the court determined that “the 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.”¹² According to the *Jewel* court, “[o]nce 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.”¹³

In addressing the issue of fairness – *e.g.*, “where a former partner obtains a highly remunerative case just before dissolution, and nearly all work is performed after dissolution,” but must share all profits with his former partners – the court made three points. *First*, all of the partners have the duty to complete unfinished business, so all will share in the resulting profits.

¹⁰ 156 Cal. App.3d at 176-77 (emphasis added). However, the *Jewel* court did permit reimbursement for reasonable overhead expenses attributable to the production of post-dissolution partnership income. *Id.* at 180.

¹¹ *Id.* at 179.

¹² *Id.* at 178.

¹³ *Id.*

If a partner does not do what she is supposed to do, she will have breached her fiduciary obligation and forfeited her rights.¹⁴ *Second*, “no former partner may take any action with respect to unfinished business which leads to purely personal gain,”¹⁵ so self-dealing will also result in the loss of a partner’s profit share. *Third*, “partners are free to include in a written partnership agreement provisions for completion of unfinished business that ensure a degree of exactness and certainty unattainable by rules of general application.”¹⁶ Thus, partners can enter into a pre-dissolution agreement that will alleviate any unfairness.¹⁷

IV. WHY *JEWEL* IS WRONG

While *Jewel* has been consistently followed by other courts throughout the country¹⁸ – indeed, some courts have followed it almost blindly¹⁹ – it is still wrong, on almost every level.

First, the *Jewel* court did not have to mechanically follow Section 18(f) of the UPA – a provision which admittedly, by its terms, requires application of the no compensation rule to law partnerships. As already noted, another provision of the UPA, Section 5, specifically adopts the

¹⁴ *Id.* at 179.

¹⁵ *Id.* The court here relied on an earlier California case, *Rosenfeld, Meyer & Susman v. Cohen*, 146 Cal. App. 3d 200, 217-18 (Cal. Ct. App. 1980), in which one of the partners threatened the others with dissolution if the partnership agreement was not changed and then, when he did not get his way, orchestrated a dissolution in order to steal the firm’s main case, which involved (in part) a contingent fee. No such misconduct had occurred in *Jewel*.

¹⁶ *Jewel*, 156 Cal. App.3d at 179-80.

¹⁷ In a bankruptcy setting, such an agreement, if entered within two years of filing of the bankruptcy petition, may be voided as a preferential payment to firm insiders. 11 U.S.C. § 548.

¹⁸ See, e.g., *Robinson v. Nussbaum*, 11 F. Supp. 2d 1 (D.D.C. 1997); *In re Brobeck, Phleger & Harrison LLP*, 408 B.R. 318 (Bankr. N.D. Cal. 2009); *Official Comm. of Unsecured Creditors v. Ashdale*, 227 B.R. 391 (Bankr. E.D. Pa. 1998).

¹⁹ See, e.g., *In re Coudert Bros LLP Law Firm Adversary Proceedings*, 447 B.R. 706, 712-13 (S.D.N.Y. 2011) (finding that the “unfinished business” doctrine applies to hourly fee cases simply because “authorities in other jurisdictions uniformly hold” that it does).

pre-existing common law by reference. The court could have relied on this to invoke the exception to the no compensation rule that some courts had applied to law firm partnerships.²⁰

Second, contrary to the *Jewel* court’s reasoning, there actually is a close connection between “the right of a client to an attorney of one’s choice and the rights and duties as between partners with respect to income from unfinished business.”²¹ That connection begins with MR 5.6(a), which prohibits a lawyer from “participat[ing] in offering or making . . . a partnership . . . agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.” In a leading case, *Cohen v. Lord Day & Lord*,²² the New York Court of Appeals applied DR 2-108 – the identical Code predecessor to MR 5.6(a) – to void a partnership agreement that required a departing partner to forfeit certain financial benefits due him if he competed with his firm after he left.²³ The court made clear that the purpose of the rule “is to ensure that the public has a choice of counsel,” and “the forfeiture-for-competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client’s choice of counsel.”²⁴ A majority of jurisdictions have followed this approach.²⁵

²⁰ See n.6 above.

²¹ *Jewel*, 156 Cal.App.3d at 178.

²² 75 N.Y.2d 95 (1989).

²³ *Id.* at 98-100.

²⁴ *Id.* at 98.

²⁵ See R. Minkoff, *Compilation of Cases Involving Restrictive Covenants Among Law Partners, Professional Lawyer* at 71-92 (ABA Center for Professional Responsibility 2007 Symposium Issue) (compiling cases from various jurisdictions) (hereafter, *Compilation*).

The *Jewel* holding also impinges on client choice, since the *successor firms* are discouraged from devoting time and resources to cases from which they will share no profits. Thus, the departing lawyers may find it more difficult to move to new firms, even if their clients want them to go there, and/or the new firms will not want to take on their old cases when they arrive. This for good reason: several bankruptcy courts have applied *Jewel* to order successor firms to surrender to the estates of bankrupt law firms the profits earned from cases deemed “unfinished business” of the bankrupt firm.²⁶ To that extent, absent a valid and enforceable provision addressing the no compensation rule,²⁷ any law firm partnership agreement in UPA jurisdictions arguably violates MR 5.6(a) since, at least in the dissolution context, it creates a “restrict[ion on] the right of a lawyer to practice after termination of the relationship.”

For similar reasons, the *Jewel* court’s concerns about partners from a crumbling firm “scrambling” for files and clients turns reality on its head. In most jurisdictions, competition for clients in a situation involving lateral partner movement or a dissolution is actually *encouraged*, insofar as that competition is not surreptitious, since it (a) allows clients their full and free choice of lawyers; and (b) fulfills the lawyer’s fiduciary obligations to ensure clients continue to be serviced.²⁸ As already noted, the *Jewel* holding, by essentially *requiring* a departing partner,

²⁶ See *In re Coudert*, 447 B.R. at 712-13 (upholding Bankruptcy Court ruling requiring law firms which completed bankrupt law firm’s “unfinished business” to return the profits to bankruptcy estate); *In re Brobeck*, 408 B.R. at 338-39 (despite attempt by bankrupt firm’s partners to circumvent *Jewel* by agreement, court finds the waiver a fraudulent conveyance and requires return of profits earned at successor firms to bankrupt estate). For an excellent discussion of this point, see K. Rosen, *More Than You Bargained For: The “Unfinished Business” Doctrine of Jewel v. Boxer*, 26 Beazley Brief 1 (Feb. 2012).

²⁷ As *In re Brobeck* shows, partnerships can enter into such a provision, known as a *Jewel* waiver, but it must survive scrutiny under both the applicable partnership statute and the Bankruptcy Code provisions prohibiting fraudulent conveyances. See 408 B.R. at 338-39.

²⁸ See, e.g., *Graubard Mollen Dannet & Horowitz v. Moskowitz*, 86 N.Y.2d 112, 118-20 (N.Y. 1995) (noting the “difficult[y] of drawing hard lines between lawyers’ fiduciary duties to

absent prior agreement, to finish cases from her former firm for the former firm's sole benefit, actually discourages client choice.

Indeed, the California Supreme Court noted this anomaly nine years after *Jewel* was decided. In *Howard v. Babcock*,²⁹ the court ruled on the same issue as in *Cohen*: whether a forfeiture for competition clause violated the California equivalent of MR 5.6(a). The court took a more restrictive view of MR 5.6(a) than *Cohen*, holding that firms may impose reasonable restrictions on laterally-moving partners in order to protect the firm's financial position.³⁰ To help show that financial disincentives in a partnership agreement will not inhibit partner movement, the court looked no further than *Jewel* and the no compensation rule:

We note too that in some respects, *the "no-compensation rule" of partnership law*, whereby departing partners are compensated for winding up the unfinished business of the partnership according to their partnership interest, *may be just as much a disincentive on the withdrawing partner to continue to represent clients of the firm as an anticompetitive penalty*, yet this is not considered to be a violation of [the California version of MR 5.6(a)].³¹

Third, even on the issue of fairness, *Jewel* gets it wrong. The *Jewel* court's halcyon vision of all the former partners working together to complete the former firm's unfinished work to their mutual profit bumps up against some unpleasant realities. One is that if the former firm's partners were able to work together smoothly and trust one another, chances are the firm would not be dissolving in the first place. Another is that the needs of the former firm will conflict with

partners and their fiduciary duty to clients,," but making clear that "departing partners [are] permitted to inform firm clients with whom they have a prior professional relationship about their impending withdrawal and new practice, and to remind the client of its freedom to retain counsel of its choice").

²⁹ 6 Cal. 4th 409 (1993).

³⁰ *Id.* at 421. *Howard* represents a minority view among the states that have ruled upon this issue. See *Compilation* at 70-75.

³¹ *Id.* at 424 n.8 (emphasis added).

those of the former partners' new firms, and common sense dictates that the latter will prevail, especially since the new firm now controls the partners' compensation. Finally, if a partner does not comply with her fiduciary obligations, the only way to remedy that is through expensive litigation or arbitration, making enforcement of those fiduciary obligations more theoretical than real.

In sum, the result in *Jewel* is unfair to almost everyone: to clients, to the lawyers who work on the cases, to the successor firms who complete them. The only ones who benefit are the former partners of the failed business who do *not* do the work, and the former firm's creditors (who get a windfall). Yet as wrong-headed as *Jewel* is, it continues to be cited and even expanded, covering not just contingency fee matters but hourly matters as well.³²

Still, there are some hopeful signs. One is the adoption of the 1997 revisions to the Uniform Partnership Act. The other is a recent New York decision that limits *Jewel*.

V. THE REVISED UNIFORM PARTNERSHIP ACT'S REJECTION OF THE NO-COMPENSATION RULE

The 1997 revisions to the UPA ("RUPA") expressly permit partners to receive reasonable compensation for services rendered in completing the unfinished business of the partnership:

A partner is not entitled to remuneration for services performed for the partnership, *except for reasonable compensation for services rendered in winding up the business of the partnership.*³³

The Uniform Law Commission's prefatory comments confirm that this revision is intended to be a substantive change in the law:

Subsection (h) continues the UPA § 18(f) rule that a partner is not entitled to remuneration for services performed except in winding up the partnership. Subsection (h) omits the reference to a "surviving" partner in UPA § 18(f). *This*

³² See n.18 above.

³³ Revised Unif. Partnership Act § 401(h) (emphasis added).

*means that any partner winding up the business is entitled to compensation, not just a surviving partner winding up after the death of another partner.*³⁴

While this change was obviously intended to alter the *Jewel* result, at least one court – perhaps not surprisingly, in California – has applied the *Jewel* reasoning under RUPA as well.³⁵ We can only hope that future courts in RUPA jurisdiction see things differently.

VI. THE *SHERESKY* DECISION

If there is any logic to *Jewel* at all, it would apply to contingency fee cases. In these cases, the firm often has made a substantial investment that remains completely unrecouped at the time of the dissolution. One can see a basis for adopting a strict rule that would require former partners to repay the profits earned on the former firm's investment rather than divert it to another firm – though of course, a *pro rata* division between the former firm and the successor would be more fair.³⁶

But however thin the *Jewel* reasoning appears when applied to contingency cases, it makes no sense at all when applied to hourly cases, where the former firm usually had been paid on an ongoing basis and there is a clear dividing line between work done by the former firm and that done by the successor. Nevertheless, courts that have addressed the issue have applied *Jewel* to hourly cases as well, relying on the strict language of the UPA.³⁷

Until now. A recent New York trial court decision, *Sheresky v. Sheresky Aronson Mayefsky & Sloan LLP*,³⁸ breaks free of that mold, and specifically distinguishes hourly from

³⁴ Revised Unif. Partnership Act § 401(h) cmt. 8 (emphasis added).

³⁵ See *In re Brobeck*, 408 B.R. at 327.

³⁶ The *Jewel* court specifically rejected such a *pro rata* division, which had been undertaken by the trial court. See *Jewel*, 156 Cal.App.3d at 175-76, 179.

³⁷ See *In re Coudert*, 447 B.R. at 712-13; *In re Brobeck*, 408 B.R. at 320-28; *Robinson*, 11 F. Supp. 2d at 4-6.

³⁸ 35 Misc.3d 1201(A) (N.Y. Sup. Ct. Sept. 13, 2011).

contingency matters in applying the no compensation rule. *Sheresky* involved the break-up of a matrimonial law firm, and the departing partner claimed an interest in the hourly fees generated on cases being handled by the firm as of the date of his departure. Unimpressed by the reasoning in the federal cases that had addressed this issue, and noting that no New York state case had applied the no compensation rule to hourly matters, the court declined to do so, for two reasons. *First*, the court noted that contingency and hourly cases are fundamentally different in this context: a contingent fee “may well result in a fee much greater than the amount of work expended by the lawyer or lawyers handling the case,” while that is not the case with hourly fees.³⁹ “To the extent that compensation for the case is based solely on the amount of hourly work performed post-dissolution,” the court ruled, “compensating a former partner out of the fee would reduce the compensation for the attorneys performing the work.”⁴⁰ *Second*, the court focused on New York’s version of MR 1.5 (division of fees), noting that it allows payment of a portion of a legal fee earned on a given case to a lawyer no longer associated with the firm only if there is an agreement to that effect, and no such agreement existed in *Sheresky*.⁴¹

For all the reasons we have explained, the *Sheresky* court reached the correct result, one which, if adopted by other courts, will result in a fair division of fees between dissolving firms and the firms which complete their work. But *Sheresky* is only one decision, and a trial court decision at that. Courts must look at *Jewel* more critically, and make the changes needed to bring the “unfinished business” doctrine into line with lawyers’ professional obligations and other realities of modern law practice.

³⁹ *Id.* at *5.

⁴⁰ *Id.*

⁴¹ *Id.* (citing New York RPC 1.5(h)).