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COURT OF APPEALS

STATE OF NEW YORK

YANN GERON, AS CHAPTER 7 TRUSTEE
OF THE ESTATE OF THELEN LLP,

Plaintiff-Appellant,

-against-

No. 136

SEYFARTH SHAW LLP,

Defendant-Respondent.

IN THE MATTER OF: COUDERT BROTHERS LLP,

Debtor.

DEVELOPMENT SPECIALISTS, INC.,

Respondent-Appellants.

GEOFFROY DE FOESTRAETS, JINGZHOU TAO,

Defendants,

No. 137

-and-

K&L GATES LLP, MORRISON & FOERSTER LLP, et al.

Appellants-Respondents.

20 Eagle Street
Albany, New York 12207
June 4, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 136 and 137.

2 MR. MAGALIFF: Good afternoon; I'm Howard
3 Magaliff from Rich Michaelson, Magaliff & Moser. I
4 represent Yann Geron, the Thelen bankruptcy trustee.

5 Your Honors, this case is all about - - -

6 CHIEF JUDGE LIPPMAN: Do you want any
7 rebuttal time, counselor?

8 MR. MAGALIFF: Excuse me?

9 CHIEF JUDGE LIPPMAN: Do you want any
10 rebuttal time?

11 MR. MAGALIFF: Oh, yes. Two minutes,
12 please.

13 CHIEF JUDGE LIPPMAN: Two minutes, go
14 ahead.

15 MR. MAGALIFF: This case is all about
16 partnership law and it's about the choices that
17 lawyers and law firms make as to how they govern
18 their own relationships. And that's the crux of what
19 this is about. You see, law firms and lawyers can
20 agree in their partnership agreements as to how to
21 deal with dissolution and the allocation of post-
22 dissolution fees.

23 JUDGE PIGOTT: This isn't - - - this isn't
24 a bankruptcy case, right? It's - - - it's a
25 partnership case.

1 MR. MAGALIFF: Well - - -

2 JUDGE PIGOTT: I understand that you have a
3 trustee, but if - - - if a partner were to leave a
4 law firm tomorrow and go to your law firm, he - - -
5 he has, as I understand your argument, a duty to give
6 back to the firm he left. He has to continue to work
7 on any file that he takes with him, and he has to
8 give them - - - work for free, and he has to give
9 that money back to his - - - the - - - the firm from
10 which he's retiring, and you and your new firm have
11 to wait for him to get that done, so you can start
12 billing his time.

13 MR. MAGALIFF: No, that's not the argument.
14 The argument - - -

15 JUDGE PIGOTT: What am I missing?

16 MR. MAGALIFF: The argument that we're
17 making, Judge, applies only in the case where there
18 is a dissolution and a liquidation.

19 JUDGE PIGOTT: Why? Why would that make a
20 difference, because you - - - you keep saying that,
21 you know, well, the partnership, this is their
22 property. This is - - - this is something they've
23 gotten.

24 So if you're working on a big commercial
25 close - - - real estate closure case, and you move to

1 another firm, you got to give that money back to that
2 firm, because you're - - - you're taking their
3 property; you're taking it to this new firm, and
4 under your argument you have to work for free for the
5 new firm, because you owe that to the - - - to the
6 old firm.

7 MR. MAGALIFF: No, that's not the argument,
8 Judge. The unfinished business rule that we're
9 discussing today only comes into play on dissolution
10 and liquidation. It does - - -

11 JUDGE PIGOTT: Why would that - - - why is
12 that true? Because you talk about property - - -
13 it's like if you move and you take your desk, you
14 can't say, well, it's not a dissolution, so you can
15 take your desk. No, you got pay your partners for
16 the cost of your desk.

17 MR. MAGALIFF: Because that's what the
18 partnership law says. The partnership law says that
19 when there is a dissolution and a liquidation, the
20 former partners have a fiduciary obligation to wind
21 up the firm's business and to account back to their
22 former partners.

23 JUDGE SMITH: Maybe - - - maybe - - -

24 JUDGE ABDUS-SALAAM: Counsel, how is any -
25 - - any client matter property to the partnership?

1 MR. MAGALIFF: Well - - -

2 JUDGE ABDUS-SALAAM: The client can, at
3 will, you know, for good cause or no good cause,
4 change lawyers.

5 MR. MAGALIFF: Well, the First Department
6 in Shandell, the Second Department in Dwyer, the
7 Third Department in Kirsch, the Fourth Department in
8 Clark, all said that unfini - - - that client matters
9 are assets of a law firm. And think about this, we
10 are not saying, Judge - - -

11 JUDGE GRAFFEO: Were those contingency-fee
12 cases or hourly-fee cases?

13 MR. MAGALIFF: Clark was hourly; the other
14 three were contingency.

15 JUDGE GRAFFEO: Is there a difference
16 between the contingency fee and the hourly?

17 MR. MAGALIFF: No. Not at all. Not for
18 purposes of the unfinished business, and not for
19 purposes of allocate - - -

20 CHIEF JUDGE LIPPMAN: Why isn't there?
21 Isn't there a different theory that they're working
22 under? So in terms of unfinished business, if you're
23 doing it by - - - on a contingency basis, it's sort -
24 - - it's more of a whole of one piece of cloth. When
25 you're doing it on the hours, it's sort of variable

1 as to what's going to happen. It's sort of a lot of
2 mini contracts.

3 JUDGE GRAFFEO: It's much easy - - - it's
4 much easier to allocate what work was done with the
5 original firm and what work has been done for the
6 subsequent firm when it's on an hourly basis.

7 MR. MAGALIFF: You see, the cases that talk
8 about contingencies, when they value what the former
9 law firm versus the new law firm is supposed to keep,
10 analyze it under Section 73 of the partnership law,
11 which applies when a partner retires or dies - - -
12 retires or dies. It doesn't apply in a dissolution
13 and liquidation when forty-six - - -

14 CHIEF JUDGE LIPPMAN: No, but isn't hours
15 different, that's what we're saying? Why shouldn't
16 hours be different?

17 MR. MAGALIFF: They shouldn't be different,
18 Your Honor.

19 CHIEF JUDGE LIPPMAN: Why?

20 MR. MAGALIFF: I'm going to tell - - -

21 CHIEF JUDGE LIPPMAN: Why not? Again,
22 isn't it a different theory that one might argue that
23 it makes sense when on a contingency basis, but when
24 you're going forward, and you're doing it by the
25 hour, it's a whole different concept of why should

1 all of those extra hours, work, skill, on the part of
2 the lawyer go back to the original partnership, when
3 there was no agreement at the beginning as to
4 contingency?

5 MR. MAGALIFF: There is - - -

6 CHIEF JUDGE LIPPMAN: It's a whole
7 different - - - isn't it such a radical different in
8 theory that you could make a difference in terms of
9 the rule?

10 MR. MAGALIFF: Not at all, Your Honor. I
11 think the - - - the point of view to look at this
12 from is what were the assets of the partnership on
13 the date of dissolution and the date of liquidation?
14 The partners in their law firms can agree in their
15 partnership agreements on how to allocate post-
16 dissolution fees. And this court even said in Ederer
17 v. Gursky - - -

18 JUDGE READ: So you're saying in - - -

19 MR. MAGALIFF: - - - that this is something
20 you should do in a partnership agreement.

21 JUDGE READ: Are you saying, in effect,
22 then that what we decide affects these cases, but
23 going forward, any law firm can arrange its affairs
24 so that whatever we say - - - if we rule in your
25 favor, that they can - - - they can write their

1 partnership in agreement - - - partnership agreements
2 in such a way as to avoid that.

3 MR. MAGALIFF: Absolutely.

4 JUDGE SMITH: But shouldn't - - - but
5 shouldn't - - - isn't it important to have a default
6 rule that is the best - - - the best available? I
7 mean, I - - - you - - - whatever we do, a certain
8 number of partnerships are going to wind up with a
9 default rule.

10 And I'm - - - I'm having trouble seeing
11 what - - - what good this does anyone to say, that
12 the - - - that the ex-partner is working for his - -
13 - essentially, working for his former partners
14 instead of himself. I mean, the problem is that in
15 that situation he's not going to do it. He's - - -
16 yeah - - - and he's not a slave. You can't make him
17 do it.

18 And so he - - - so he - - - so the client's
19 going to lose his lawyer. The former partners are
20 going to get nothing. They're going to get worse
21 than nothing, because the client's probably not going
22 to pay their bill. Who is benefited?

23 MR. MAGALIFF: No, I think you're missing
24 the point. The default rule, here, Judge Smith, is
25 the partnership law.

1 JUDGE SMITH: Okay, if the partnership law
2 were - - - if the partnership law spelled it out as
3 clearly as - - - in ways that - - - that it couldn't
4 be misread, I would agree. They don't care. Or I
5 don't care whether it's good or bad; it's what the
6 law says. I mean, is that really what you're saying?

7 MR. MAGALIFF: Yes. It is what the law
8 says.

9 JUDGE SMITH: So do - - - do you have - - -
10 do you have a policy argument? Assume that we find
11 the law to be less clear than you do, is there a
12 policy argument why your rule should be preferred?

13 MR. MAGALIFF: Yes. The policy argument is
14 that if you make a different rule for lawyers who are
15 working on hourly-fee matters, than the lawyers who
16 are working on contingent fee matters, then you will
17 be establishing a different set of fiduciary
18 responsibilities.

19 JUDGE SMITH: Suppose we make the same
20 rule. Suppose we say that on the contingency-fee
21 matter, your obligation - - - the right of the former
22 partners is the value of the matter at the time the
23 partner - - - at the time of the dissolution. And in
24 the hourly-fee matters, it's exactly the same, except
25 in the hourly-fee matters, it's easier to - - - it's

1 easier to measure, because it's just the value of the
2 time that's already in the bank.

3 MR. MAGALIFF: Well, the cases do say that
4 you value the case - - - the matter - - - as of the
5 date of dissolution.

6 CHIEF JUDGE LIPPMAN: Counsel, but we're
7 talking about policy. What's fair? Why - - - why is
8 it fair to do what you're saying when - - - when it
9 just seems to be - - - it's not doing any good for
10 the new law firm. It's not doing any good for the
11 partner who's now at the new law firm. And I'm not
12 sure what - - - what good it's doing for a client.

13 What's the benefit from a policy
14 perspective of arbitrarily saying, everything going
15 forward still has to go back to the partnership? It
16 makes the new law firm not even want to hire the ex-
17 partner. Why is it this good for anybody? Isn't
18 this an anachronism in the world that we have today,
19 where we value mobility for lawyers, and you can make
20 - - - make a rule that absolutely values - - - that
21 it started with this partnership. What was theirs we
22 can give them, so they're made whole.

23 But going forward, whose interests does it
24 serve to have this rule? Other than - - - I
25 understand if your argument is the rule is the rule.

1 But I think what Judge Smith was asking you is what's
2 the policy reason why your rule is good, and for who
3 is it good?

4 MR. MAGALIFF: Your Honor, it's good for
5 partnerships across the board. The legislature has
6 determined - - -

7 CHIEF JUDGE LIPPMAN: The old partnership
8 or the new?

9 MR. MAGALIFF: This has to do with
10 fiduciary responsibilities to the old partnership.
11 The legislature has set the policy for what you do in
12 a dissolution and a liquidation. And the legislature
13 has said that the default rule is that in the absence
14 of an agreement to the contrary, all unfinished
15 matters on the date of dissolution, are assets of the
16 firm and the partners have a fiduciary responsibility
17 to wind up all matters - - -

18 JUDGE GRAFFEO: I have - - - I have - - - I
19 have a question. I have - - -

20 JUDGE RIVERA: Well, the winners - - -
21 well, the winners - - - the winners are the
22 creditors, right?

23 MR. MAGALIFF: Excuse me?

24 JUDGE RIVERA: I mean, at the end of the
25 day, the winners in your - - - in this bankruptcy

1 situation, the winners are the creditors, because
2 you're trying to get more money into the estate to
3 distribute to the creditors. So it's not really the
4 old firm that's winning. And it's not even those
5 partners that are winning, because you're in
6 bankruptcy.

7 MR. MAGALIFF: But this - - -

8 JUDGE RIVERA: It's the creditors who are
9 winning.

10 MR. MAGALIFF: But this isn't a matter of
11 winning or losing, Your Honor. This is a matter - -
12 - in the Thelen case, okay, the trustee steps into
13 the shoes of the law firm and has an asset. And the
14 asset consists of - - - on the date of dissolution -
15 - - the unfinished client matters.

16 Now, the particular way this arose in
17 Thelen is that Thelen did what all partnerships
18 should do. It adopted an unfinished business waiver.
19 But it did it at a time when the firm was insolvent.

20 JUDGE SMITH: So you say all partnerships
21 should adopt one right at the outset?

22 MR. MAGALIFF: I agree that they should.
23 They don't have to.

24 JUDGE SMITH: Because - - - because it were
25 - - - and isn't that because that without - - -

1 without - - - without a waiver of that kind, or under
2 the rule you propose, this asset that you're talking
3 about becomes devalued, because no one - - - because
4 the partner who the client wants doesn't want to work
5 on the case.

6 MR. MAGALIFF: Your Honor, the argument
7 that the appellees and the law firms are making is
8 that the client's choice is affected by how much
9 money the lawyer who represents that client will be
10 able to make at the new firm.

11 JUDGE SMITH: Well, it's certainly - - -
12 it's certainly the - - - the lawyer - - - you're not
13 saying the lawyer has to do it, are you?

14 MR. MAGALIFF: No, the lawyer has fiduciary
15 and ethical obligations to the client. But the
16 lawyer also has fiduciary - - -

17 JUDGE SMITH: But the lawyer - - - the
18 lawyer can say, you know what? This is - - - this is
19 - - - this particular case looks like it's going to
20 keep me full time for the next five years. I'd just
21 assume not work on it for ten percent of the billing.
22 He can do that, right? He can say to the client, I
23 love you, but you're going to have to find somebody
24 else; this is not profitable for me.

25 MR. MAGALIFF: Well, there are ways in

1 which a lawyer can withdraw. Absolutely, but - - -

2 JUDGE GRAFFEO: You've - - - you've been
3 talking - - -

4 MR. MAGALIFF: - - - but - - -

5 JUDGE GRAFFEO: Go ahead. I'm sorry; go
6 ahead.

7 MR. MAGALIFF: Take a look at an hourly - -
8 - at a flat-fee matter. The flat fee is paid to the
9 old firm. The firm dissolves and goes into
10 liquidation. And the lawyer moves to a new firm.
11 And the new firm says, well, we're not going to make
12 any money because the old firm got the fee. Is that
13 - - - does that impact client choice? No, it
14 doesn't.

15 What about the case where the new firm
16 charges 800 dollars an hour - - -

17 JUDGE SMITH: I'm not - - - I'm not just
18 talking - - -

19 MR. MAGALIFF: - - - and the old firm
20 charges 600 - - -

21 JUDGE SMITH: I'm not just talking about
22 impacting client choice. I'm talking about devaluing
23 the asset. Why isn't the asset worth - - - the asset
24 that you talk about, the case - - - why is it worth
25 less to everybody, except maybe the competitor out

1 there who's going to pick it up, than - - - under
2 your rule, than under the rule your adversaries
3 favor?

4 MR. MAGALIFF: I think to say that the case
5 is worth less because the lawyer makes less, devalues
6 the ethical obligation of the lawyer.

7 JUDGE READ: Well, aren't you - - -

8 JUDGE GRAFFEO: I'm - - -

9 JUDGE READ: - - - kind of asking the
10 lawyer to work for free?

11 MR. MAGALIFF: No. I'm asking the lawyer
12 to adhere to the fiduciary responsibility - - -

13 JUDGE PIGOTT: That's two different things,
14 right?

15 MR. MAGALIFF: - - - that the partnership
16 law imposes on the lawyer.

17 JUDGE PIGOTT: Are you asking him to work
18 for free? Is that - - - all that being said, are you
19 asking him to work for free?

20 MR. MAGALIFF: No.

21 JUDGE PIGOTT: All right. So you say - - -

22 MR. MAGALIFF: Well, let me rephrase that.
23 It may be that at the end of the day, the lawyer
24 works for free, because in New York, the no-
25 compensation rule governs.

1 JUDGE PIGOTT: And if that's a lawyer, he's
2 going to say, you know, Mrs. Smith, I really, you
3 know, would like to continue with your divorce, but
4 unfortunately I'm going to another firm, and they're
5 not going to accept your case, and I wish you all the
6 best in your future endeavors.

7 And I would think that would happen an
8 awful lot, because I - - - if I'm the lawyer, I got
9 to make money for this new firm, or I'm not going to
10 be there very long. And I'd really like to help Mrs.
11 Smith, but you've told me that I've got to do it for
12 free, and I'm not happy.

13 MR. MAGALIFF: You know, Judge, this is
14 part of what it means to be a lawyer in a
15 partnership. You have responsibilities to your
16 former partners. You can contract out of that.

17 JUDGE PIGOTT: You do. But you have an
18 accounts receivable up until the day that you leave,
19 and that - - - and that can stay over there. You can
20 negotiate the contingency fees and I've had enough of
21 this, where they'll say, you keep the contingency, we
22 want the quantum meruit that you - - - that you spent
23 on this case before you took this dog wherever you're
24 going. And I end up having to pay money to them on
25 the - - - on the hours. And I know that I'll

1 probably end up losing on that case, but I'm going to
2 do it.

3 But that's what lawyers do, and it's not -
4 - - I can't see the point that you're saying that
5 it's like furniture, that - - - that a client - - -
6 attorney-client relationship is like a piece of - - -

7 MR. MAGALIFF: No, this isn't about client
8 choice and the attorney-client relationship - - -

9 JUDGE GRAFFEO: Right.

10 MR. MAGALIFF: - - - because the client can
11 always terminate the lawyer.

12 JUDGE GRAFFEO: But I have a different
13 concern, because I'm worried about the stability of
14 law firms before the dissolution. If we agree with
15 you, if a law firm begins to have some financial
16 problems, isn't your rule going to result in an
17 incentive for some of those partners to jump ship
18 before the dissolution - - -

19 MR. MAGALIFF: Yes.

20 JUDGE GRAFFEO: - - - so that that way
21 they're not locked in to having future work go back
22 to the previous firm?

23 MR. MAGALIFF: Yes, but that's what creates
24 the instability.

25 JUDGE GRAFFEO: Isn't this going to

1 destabilize a lot of - - - a lot of law firms that
2 are trying to rectify their financial situation?

3 MR. MAGALIFF: The problem, Judge, is that
4 when lawyers think that they can just pick up and
5 leave with no obligation under the partnership law to
6 their former partners - - -

7 JUDGE READ: Well, your - - - your rule - -
8 - your - - -

9 MR. MAGALIFF: - - - that's what creates
10 the instability.

11 JUDGE READ: Your rule doesn't prevent
12 that. It just says - - - it's just an incentive to
13 leave earlier, or not to wait around and take a
14 chance that the firm's going to dissolve. I want to
15 get out, you know; I want to - - - the exodus is
16 going to start earlier, isn't it?

17 MR. MAGALIFF: You know, the Second Circuit
18 pointed this out in its certification order, and
19 Judge - - - Judge McMahon, in the Coudert case,
20 basically said the same thing. You may look at these
21 as quaint rules in today's environment. But the
22 partnership law doesn't distinguish between small
23 firms - - -

24 JUDGE READ: So you're not disputing what -
25 - -

1 MR. MAGALIFF: - - - and large firms.

2 JUDGE READ: You're not disputing that that
3 could ha - - - that would happen or that would be a
4 result. You're just saying we're stuck with it,
5 because that's the partnership law says.

6 MR. MAGALIFF: Right. It's a legislature
7 fix, and it's a very easy legislative fix. All they
8 need to do is strike one word from Section 46 of the
9 partnership law.

10 JUDGE READ: Adopt RUPA?

11 MR. MAGALIFF: Excuse - - -

12 JUDGE READ: Adopt RUPA?

13 MR. MAGALIFF: They could adopt RUPA, or
14 they could strike the word "surviving" and say that
15 any partner that winds up a partnership's business at
16 dissolution is entitled to reasonable compensation.

17 CHIEF JUDGE LIPPMAN: Okay, counselor,
18 okay.

19 JUDGE RIVERA: Or as you've said, the
20 partners could agree to it - - - if - - - if this
21 rule was in place, partners would understand this,
22 and they could make the choice not to organize
23 themselves in a partnership, or they could write an
24 agreement to address this problem, could they not?

25 MR. MAGALIFF: Well - - - well, yes, and

1 the rule is in place. And you have to ask yourself
2 the question, Judge, why is it that law firms do not
3 adopt unfinished business waivers? It's because when
4 the firm goes into dissolution and liquidation, the
5 firm wants to take back the profit from the matters
6 that belong to the firm, and distribute it according
7 to the partnership agreement.

8 JUDGE RIVERA: Does it - - - does it affect
9 the ability to get credit, if the creditors don't
10 think they'll be able to access the estate, if this
11 goes into bankruptcy?

12 MR. MAGALIFF: I'm sorry. I don't
13 understand that question.

14 JUDGE RIVERA: Well, I mean, as I - - - as
15 I mentioned before, it strikes me that the creditors
16 do very well, if - - - if you're able to access the
17 money.

18 MR. MAGALIFF: I don't know how well.

19 JUDGE RIVERA: The payments, right? The
20 attorneys' fees in this.

21 MR. MAGALIFF: I don't know how well the
22 creditors do, but that's almost secondary, because
23 the - - - the trustee may end up distributing no
24 money to the creditors. There may be no profit when
25 you do that analysis. The trustee may never get

1 beyond senior creditors to reach unsecured creditors.
2 But the trustee's obligation here is to collect all
3 the assets of Thelen at dissolution, and those assets
4 included the client matters that were not finished.

5 CHIEF JUDGE LIPPMAN: Okay, coun - - -

6 JUDGE RIVERA: Okay.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 JUDGE RIVERA: No, no.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MR. MAGALIFF: Thanks.

11 CHIEF JUDGE LIPPMAN: Let's - - - you'll
12 have your rebuttal time.

13 MR. MAGALIFF: Thank you.

14 CHIEF JUDGE LIPPMAN: Counselor?

15 MR. ADLER: Good afternoon, Your Honor.

16 May it please the court, my name is David Adler and I
17 represent respondent-appellant DSI. I'd like to
18 reserve three minutes, if I - - -

19 CHIEF JUDGE LIPPMAN: You can do it. Go
20 ahead.

21 MR. ADLER: Thank you, Your Honor.

22 I want to go back to the beginning and
23 start with a case that hasn't been mentioned yet,
24 which is Stem v. Warren from this court in 1920.

25 In that case, this court held that a

1 terminable, at-will contract between the partnership
2 and a third party was partnership property for which
3 there was a duty to account and required, in that
4 case, the winding-up partners to account for the
5 profits made on the completion of that contract.

6 Now, in making that ruling, this court
7 looked at two factors. One, was the partnership
8 dissolved by the death of the partner who was the
9 architect on the matter? Two, was a contract or did
10 the contract survive dissolution? Based on the
11 answers to those two questions, the court determined
12 that the winding-up partner had a duty to account.

13 The exact same set of circumstances are
14 present in Coudert - - -

15 JUDGE PIGOTT: Yeah, but do you see a
16 difference between a - - - an architectural contract
17 and a law firm with a client?

18 MR. ADLER: In - - - in the sense of - - -
19 that - - - that it may go on longer - - -

20 JUDGE PIGOTT: Well, I mean, you can kind
21 of see if you get a contract to, you know, design a
22 building, and the firm blows up, but, you know,
23 there's an asset there that you, you know, you're
24 going to pay X amount of that, as opposed to
25 representing a client in a - - - in a professional

1 relationship.

2 MR. ADLER: I would say, Your Honor, that
3 the rule is already applied in the contingency
4 contracts.

5 JUDGE PIGOTT: Well, does it apply to
6 doctors? I mean, if - - -

7 MR. ADLER: Yes.

8 JUDGE PIGOTT: - - - if - - -

9 MR. ADLER: Yes.

10 JUDGE PIGOTT: - - - if the doctor says I'm
11 not going to do any more operations, and, well, no,
12 sorry, doctor, but you are, so would you please get
13 in there and replace that heart, because you owe it
14 to your partners to do it.

15 MR. ADLER: As we said in our brief, it
16 applies to doctors; it applies to dentists - - -

17 JUDGE PIGOTT: Did you understand how silly
18 I was trying to make that, because it seems silly to
19 me.

20 MR. ADLER: But - - - but, Your Honor, the
21 point is that it applies to everyone. It applies to
22 - - -

23 CHIEF JUDGE LIPPMAN: What's good about
24 this rule for law firms?

25 MR. ADLER: I - - - I think what it does

1 is, it is - - - it is the nature of a partnership,
2 Your Honor, and the fact that partners agree amongst
3 themselves that property will be held in joint
4 ownership.

5 JUDGE GRAFFEO: How does it benefit - - -

6 CHIEF JUDGE LIPPMAN: Does it make sense in
7 the context of a law firm?

8 MR. ADLER: Yes. I think - - -

9 JUDGE GRAFFEO: How does it benefit the
10 client?

11 MR. ADLER: I - - - I think that - - -

12 JUDGE GRAFFEO: Say the departing attorney
13 - - -

14 MR. ADLER: Vis-à-vis the - - -

15 JUDGE GRAFFEO: Say the attorney who's
16 departing, she's going to do - - - she now has to do
17 a trial for this client. And she's not going to be
18 paid, because whatever proceeds come in, are going to
19 go back to the previous partnership.

20 MR. ADLER: Well - - -

21 JUDGE GRAFFEO: Is that client benefiting
22 by an attorney that's not going to be paid? Is that
23 attorney going to represent or work as hard in
24 proceeding with that litigation as they would if they
25 were being compensated?

1 MR. ADLER: I think - - -

2 JUDGE GRAFFEO: I'm trying to see where the
3 benefit to the client is. And isn't that something
4 critical in the attorney-client relationship?

5 MR. ADLER: Your Honor, I - - - I would go
6 back to the 1911 case from the Supreme Court, Consaul
7 v. Cummings, where the Supreme Court essentially
8 stated - - - and in that case, the lawyer had to work
9 for eight years and turn over fifty percent of his
10 proceeds to a partner who had long since left. And
11 the Supreme - - -

12 JUDGE GRAFFEO: I guess, I'm asking, why
13 should we continue with that view?

14 MR. ADLER: Well, because the partnership
15 law is an embodiment of those principles that at
16 common law - - -

17 CHIEF JUDGE LIPPMAN: Yeah, but does it
18 make any sense today for law firms, especially when
19 you talk about hourly pay?

20 MR. ADLER: Yes. Well, we believe that it
21 does because what it - - - what it does is it
22 requires partners to act consistent with their
23 fiduciary duties to the partnership, and the fact
24 that - - -

25 CHIEF JUDGE LIPPMAN: Yeah, but going

1 forward, everything's screwed up for everybody.

2 MR. ADLER: No, but the fact that the - - -
3 the partner has a fiduciary duty to his law firm, and
4 an ethical duty to his client - - -

5 JUDGE PIGOTT: You're putting that, though
6 - - - you're putting the partnership ahead of the
7 client.

8 MR. ADLER: I'm think I'm putting them - -
9 -

10 JUDGE PIGOTT: You're saying - - - you're
11 saying, I've got - - - I've - - - according to the
12 partnership law, I've got a - - - I've got a duty
13 over here; I can't afford to represent Mrs. Smith
14 anymore. I just can't. I'm going to lose my house.
15 So because I owe this duty, I got to get rid of her.

16 MR. ADLER: Your Honor, what I would say is
17 that the duties are equal and they are - - -

18 JUDGE PIGOTT: No, because I've got to work
19 on something else. I got to - - - I got to pay my
20 mortgage. So - - - so, I'd love to help Mrs. Smith.
21 I've had her for a client, you know, since I - - -
22 since I left law school, but I can't because you say
23 I've got to take all that money and give it to this
24 partnership that I owe this fiduciary duty to. I
25 can't give it to my bank.

1 MR. ADLER: And - - - and in a situation
2 where the partnership was not in bankruptcy, or even
3 if it is in bankruptcy depending on the extent of the
4 unfinished business claims, that partner would share
5 in the proceeds that go back to the dissolved
6 partnership. So if everyone had the duty, and
7 everyone was providing the fees back to the
8 partnership - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but if that
10 partner is going to work 1,000 hours on this case in
11 the new law firm, what is the incentive - - - you
12 know, the difference between the share that they get
13 going back to the old partnership and they have to
14 earn a living today. What's the incentive - - -
15 incentive to put in the 1,000 dollar - - - 1,000
16 hours that that case may require?

17 MR. ADLER: From - - - from the partner's
18 perspective, Your Honor?

19 CHIEF JUDGE LIPPMAN: Yeah.

20 MR. ADLER: I would say two things. First,
21 the lawyer's ethical duty - - -

22 CHIEF JUDGE LIPPMAN: I get that.

23 MR. ADLER: Okay.

24 CHIEF JUDGE LIPPMAN: What's the second
25 thing?

1 MR. ADLER: I - - - I would say that
2 normally - - - especially in hourly matters, the
3 client is generally someone who will provide you with
4 additional matters, and the fact that you may get
5 additional work from that client is a valuable asset,
6 and certainly would be a valuable asset - - -

7 CHIEF JUDGE LIPPMAN: Or would you rather
8 have a new client who you're giving 1,000 hours to,
9 and get additional work from that client, rather than
10 going backwards and hoping that, gee, maybe - - -
11 maybe this will lead to more work, once I wind up
12 this big case.

13 MR. ADLER: Well, I - - - I think that, I
14 mean, Your Honor, you can take it to the point where
15 you have a client that is not paying its bills on
16 time, and yet, you are under a duty to continue that
17 matter. And we cited in our brief - - -

18 CHIEF JUDGE LIPPMAN: Yeah, but I'm just
19 trying to fit this in to the real world today of you
20 have a rule, and I understand what you're advocating.
21 Does it make sense in the - - - in this age of modern
22 law practice, with mobility, with client choice, with
23 all the things that we encourage here in New York,
24 does this rule make sense today?

25 MR. ADLER: I think it does, and I think it

1 does because what - - -

2 CHIEF JUDGE LIPPMAN: I understand your
3 ethical argument. That I - - - that I get.

4 MR. ADLER: What I - - -

5 CHIEF JUDGE LIPPMAN: Fiduciary duty.

6 MR. ADLER: What we - - -

7 CHIEF JUDGE LIPPMAN: Does it make sense
8 from a practical point of view?

9 MR. ADLER: What we are saying is that the
10 rule applies in a dissolution and liquidation. So
11 going back to Judge Pigott's question, that first
12 hypothetical. If a partner walks out of a firm and
13 goes to another firm, he or she probably is not
14 required to account for unfinished business, because
15 what would kick in is Partnership Law 73, where
16 you're required to evaluate and determine the value
17 of his interest in the partnership as of that date,
18 okay. And that's what the New York contingency cases
19 have focused on - - -

20 JUDGE PIGOTT: So that's what applies in an
21 ongoing partnership - - -

22 MR. ADLER: Correct.

23 JUDGE PIGOTT: - - - as opposed to a - - -

24 MR. ADLER: Correct.

25 JUDGE PIGOTT: All right. And so at - - -

1 when - - - when - - - when it's a dissolution, it's a
2 different rule.

3 MR. ADLER: Correct. Correct.

4 JUDGE READ: How do you - - - that gets me
5 to something we haven't discussed. How do you define
6 a client matter?

7 MR. ADLER: We would say consistent with
8 Stem and the other cases, that it is an open matter
9 for which services need to be performed. So if - - -

10 JUDGE READ: What if you're on a retainer?
11 Like what if I've - - - what if I've been retained by
12 the Human Relations Department of a corporation, and
13 the general counsel calls me up periodically to - - -
14 when he has a problem for advice and wants me to
15 cover grievance arbitrations? And that's a sort of
16 continuing relationship I have with this client. How
17 does that fit in?

18 MR. ADLER: The matters that are pending as
19 of the dissolution date would be client matters. So
20 if you are - - - if you've been called up and you
21 have one matter for a grievance committee, that would
22 be unfinished business, but all the matters that
23 would come in thereafter would not be.

24 JUDGE RIVERA: So - - - so - - - so if - -
25 - if you're the partner who walks away in Judge

1 Read's example, whatever was pending at the time for
2 that client that was on retainer, you have to
3 complete; that you have to send the profits back to
4 the old firm, but then if that client chooses to go
5 with you and stay with you, everything else is new
6 matters?

7 MR. ADLER: Correct.

8 JUDGE RIVERA: Or new matters - - -

9 JUDGE PIGOTT: Well, unless you were paid.

10 MR. ADLER: And - - - and in a dissolution
11 and liquidation, so.

12 JUDGE RIVERA: Because they've basically
13 terminated the prior relationship under the retainer,
14 and started a new one with the new firm?

15 MR. ADLER: What - - - what - - - right. I
16 mean, in - - -

17 JUDGE PIGOTT: Well, if - - - if - - - in
18 Judge rule - - - in Judge Read's example, if the
19 retainer's paid in January for the year, you're
20 saying that - - - and let's say it broke up in
21 September, you're saying your next three months are
22 free, and then your new - - - your new retainer in
23 January, assuming the client stays with you at the
24 new firm, is okay.

25 MR. ADLER: I - - - we focus on the matters

1 in terms of what, you know, what work is to be
2 performed. I mean, and - - - and so I look at it in
3 terms of if - - - if you've been asked to appear
4 before a grievance counsel on - - - on a particular
5 client or matter - - -

6 JUDGE PIGOTT: Adjourned. It's postponed.

7 MR. ADLER: - - - that would be unfinished.
8 Okay. But the ones going forward would not be.

9 JUDGE PIGOTT: Judge, can I ask one more
10 question?

11 JUDGE RIVERA: Like you could discount that
12 money that remains.

13 MR. ADLER: I'm sorry?

14 JUDGE RIVERA: You could discount - - - as
15 Judge Pigott described, whatever the three months,
16 you could discount that money, because that's money
17 that the - - - the firm that was in dissolution got
18 ahead of time.

19 MR. ADLER: Right, I - - -

20 JUDGE RIVERA: You could discount it.

21 MR. ADLER: I - - - right.

22 JUDGE RIVERA: There are ways to kind of do
23 the calculations. But I just want to ask you, it
24 sounds to me like the heart of your argument is
25 really that those who want to enter, as lawyers, a

1 business structure that's based on the partnership
2 law, to think about these things in advance.

3 MR. ADLER: Correct. And - - - and we go
4 back to what this court has said time and time again.

5 JUDGE RIVERA: So - - - so let me just ask
6 you. So as long as we don't say - - - well, I'm
7 trying to think of a way to say this - - - that, is
8 there any way that we could say something that would
9 prohibit under the law attorneys from doing this? Or
10 if we just say attorneys cannot do this, given the
11 nature of the relationship, does that sort of end any
12 possibility for success for your argument, that they
13 cannot enter these agreements?

14 MR. ADLER: That they cannot - - -

15 JUDGE RIVERA: They cannot independently
16 decide.

17 MR. ADLER: On an unfinished business
18 waiver?

19 JUDGE RIVERA: Correct.

20 MR. ADLER: I would think that - - - well,
21 I don't understand the logic for doing that. I mean,
22 given the fact that partnership is basically like a
23 form of contract, and partners can agree on whatever
24 they so choose, and I think - - -

25 JUDGE RIVERA: But what I'm saying is what

1 if we were to decide that, given the nature of the
2 relationship and the policy concerns that you've
3 heard articulated today, that partners - - - there
4 are certain decision that lawyers cannot agree to in
5 advance, related to these profits off of client
6 matters.

7 MR. ADLER: And is Your Honor asking me if
8 - - -

9 JUDGE RIVERA: Well, it sounds - - -
10 because really what drives your argument is that
11 partners are always free to agree to something other
12 than the default rule, that's why there's some
13 rationality in the default rule.

14 MR. ADLER: Right.

15 JUDGE RIVERA: So I'm just asking if we
16 were to hold that - - -

17 MR. ADLER: So - - - so - - -

18 JUDGE RIVERA: - - - they couldn't do that
19 - - -

20 MR. ADLER: If the court were - - -

21 JUDGE RIVERA: - - - what impact does that
22 have on your argument?

23 MR. ADLER: If the court were to decide
24 that unfinished business could never - - -

25 JUDGE RIVERA: Okay.

1 MR. ADLER: - - - be agreed upon among
2 partners, I think it would have an effect on a lot of
3 cases that that - - - that his court has already
4 ruled on, one of them being Nishman v. DeMarco, where
5 the two partners who finished up the work had an
6 agreement amongst themselves to share fees, fifty-
7 fifty. And you know, we've cited Talley; we've cited
8 - - -

9 JUDGE READ: You're not asking us to do
10 that. You're not asking us for that kind of relief.

11 MR. ADLER: No. I'm not asking - - -

12 CHIEF JUDGE LIPPMAN: Okay, counselor,
13 Judge Pigott has one.

14 JUDGE PIGOTT: I'm done.

15 CHIEF JUDGE LIPPMAN: You're finished here?
16 Okay. Thank you, counsel.

17 Okay, Mr. Miller?

18 MR. MILLER: Your Honor, may it please the
19 court, Joel Miller. We're asking for two minutes for
20 rebuttal.

21 CHIEF JUDGE LIPPMAN: Yeah, go ahead. You
22 can.

23 MR. MILLER: I'm arguing the Coudert case
24 for the law firms.

25 Your Honor, there's a very clear policy

1 choice here, and the policy which should be adopted
2 is that the lawyer who does the work keeps the fee.

3 CHIEF JUDGE LIPPMAN: What about the
4 fiduciary obligation going backwards?

5 MR. MILLER: Your Honor, the fiduciary
6 obligation of the partnership law does not create
7 property. And that is the failure of the argument on
8 the other side. What the partnership law says - - -

9 JUDGE RIVERA: Haven't New court - - - New
10 York courts said that it's assets - - - client
11 matters are assets?

12 MR. MILLER: No. The contingent-fee cases
13 do use the word asset, but in those cases, the firm
14 asset is the right to be paid for the work on the
15 contingent matter, not an asset in the terms that my
16 adversary is saying, where you're fully paid, and now
17 you get paid more than being fully paid.

18 JUDGE SMITH: You - - - you would say the
19 asset in the hourly case is your receivables plus
20 your inventory of unbilled time?

21 MR. MILLER: Yes. And in each of the
22 situations here, all that time has been paid for to
23 the dissolved firm. The partnership law says you are
24 to collect the assets of the partnership. It does
25 not say what those assets are. And it certainly

1 doesn't say that unfinished client matters are
2 assets.

3 JUDGE GRAFFEO: So why not address this in
4 the partnership agreement, so you don't end up with
5 this controversy?

6 MR. MILLER: It can be done, Your Honor,
7 but I - - -

8 JUDGE GRAFFEO: And - - -

9 CHIEF JUDGE LIPPMAN: Why isn't done?

10 JUDGE GRAFFEO: And the Stem case has been
11 around since 1920, so people had to know - - -

12 MR. MILLER: Okay, you're asking two
13 different - - -

14 JUDGE GRAFFEO: - - - that there are issues
15 about unfinished business.

16 CHIEF JUDGE LIPPMAN: Answer both, go
17 ahead.

18 MR. MILLER: Okay.

19 JUDGE GRAFFEO: Not at the same time.

20 MR. MILLER: Let me address Stem.

21 CHIEF JUDGE LIPPMAN: Not at the same time.

22 MR. MILLER: I'll try not to, Your Honors.
23 Let me address Stem. Stem is a very different
24 circumstance. You have four architects that one of
25 them dies. The surviving one goes to the client and

1 says, you have the right to terminate this contract.
2 Terminate it and give it to me. That was a breach of
3 fiduciary duty. He stole from his deceased partner.

4 These cases are very different. Here,
5 Coudert determined to go out of business, and said to
6 its partners - - - the partners agreed - - - you
7 partners should go to new firms and take your
8 matters. Coudert did not want the risk.

9 CHIEF JUDGE LIPPMAN: Why don't - - - why
10 don't people make those agreements upfront? Why
11 don't partnerships make that agree - - - the
12 agreement and you wouldn't have any of these
13 problems?

14 MR. MILLER: It can be done, but when
15 Coudert was - - -

16 CHIEF JUDGE LIPPMAN: But why isn't it?
17 Why isn't it?

18 MR. MILLER: In 2005, nobody in New York
19 and around the world was thinking about these matters
20 - - -

21 CHIEF JUDGE LIPPMAN: Yeah, but why not?
22 Why - - - why wasn't that logical? You mean, it just
23 literally never came to anybody's mind?

24 MR. MILLER: It did not - - - it not - - -
25 it did not come to anybody's mind, because it is so -

1 - -

2 JUDGE GRAFFEO: There were no firms that
3 dissolved prior to 2005?

4 MR. MILLER: There were terms that - - -
5 firms that dissolved. These claims were not
6 asserted.

7 JUDGE RIVERA: There were prior cases.

8 MR. MILLER: These - - - let me explain.

9 JUDGE RIVERA: But there were prior cases
10 under the UPA where courts came out this way.

11 MR. MILLER: Where - - -

12 JUDGE RIVERA: Why wouldn't you be thinking
13 about it?

14 MR. MILLER: Where it - - - where it came
15 up is in cases recently in San Francisco in the
16 bankruptcy court. These claims are newly made - - -

17 CHIEF JUDGE LIPPMAN: Are they made - - -
18 are these - - -

19 MR. MILLER: Let me just address that,
20 because I - - -

21 CHIEF JUDGE LIPPMAN: Counsel, but are
22 these agreements made today?

23 MR. MILLER: They are in some firms.

24 CHIEF JUDGE LIPPMAN: Is it - - - is it
25 commonplace now in law firms to have these - - -

1 MR. MILLER: Okay, that - - - that I don't
2 know. The ones that have been made here have been
3 determined to be fraudulent conveyances or alleged to
4 be - - -

5 CHIEF JUDGE LIPPMAN: Now answer Judge
6 Rivera; go ahead.

7 MR. MILLER: The difference is all the
8 cases before this were partners who were fighting
9 among themselves. It was a partner suing his former
10 partners for assets that were taken by the former
11 partner. We have a very different situation here in
12 Thelen and in Coudert. These firms did not want to
13 do any business. There was nothing to wind up.

14 JUDGE SMITH: Are you saying, it's a
15 different rule then, that when a trustee is asserting
16 the claim that belonged to the firm or when the firm
17 is asserting it itself?

18 MR. MILLER: No, Your - - - first of all,
19 the other cases the firm was asserting it; partners
20 were asserting it against themselves. I'm not saying
21 it's a different rule. I'm saying there were no
22 assets to collect. Nothing to wind up. So the
23 clients - - -

24 JUDGE RIVERA: I don't know - - - well,
25 it's property or it's not property.

1 MR. MILLER: The clients hired new firms to
2 do the unfinished business. There was nothing for
3 Coudert to wind up, and Coudert did not wind up
4 anything as a result. There was no asset to be
5 collected. That is the difference, Judge Smith and
6 Judge Rivera. That's the difference. Here there was
7 nothing - - -

8 JUDGE RIVERA: Let's assume we don't agree
9 with you. Let me ask you this. So you agree that
10 partners can enter these agreements, correct?

11 MR. MILLER: The - - - the waiver of the
12 unfinished business?

13 JUDGE RIVERA: They can enter these
14 agreements?

15 MR. MILLER: Yes, of course, they can.

16 JUDGE RIVERA: Oh, absolutely, they can,
17 okay. So then how does impact on the policy
18 arguments that you argue for us to hold - - -

19 MR. MILLER: I think Judge Smith - - -

20 JUDGE RIVERA: - - - in favor of you?

21 MR. MILLER: Judge Smith said it correctly.
22 There is a default rule - - -

23 JUDGE RIVERA: Yeah.

24 MR. MILLER: - - - and the default rule
25 will apply in circumstances. And this court is being

1 asked to tell us what the default rule is - - -

2 JUDGE RIVERA: No, no, no. I'm sorry; I'm
3 not being clear. If you agree that partners can
4 enter arrangements in advance, they can - - - they
5 can enter an agreement themselves, these lawyers who
6 are partners in these business structures that are
7 partnerships, under which they make it impossible for
8 a trustee to get to the former partner's profits,
9 how, then, can you say that all those other policy
10 arguments would prohibit us from finding the same
11 thing?

12 I mean, either the policy arguments - - - I
13 guess what I'm trying to say is, either the policy
14 arguments prescribe allowing partners to do this, or
15 they don't. So if you agree the partners can agree
16 to this, it sounds to me like you're not really as
17 invested in the policy arguments that you assert.

18 MR. MILLER: We are, Your Honor, because
19 what we're saying is, under the partnership law,
20 there is no asset in client matters. So there's no
21 requirement that a partner who goes to a new firm pay
22 that profit back to the old firm. There's no asset
23 there. The client is in control. And that's what
24 the policy of this court has always been. The client
25 has the choice of what law firm to hire.

1 JUDGE GRAFFEO: Is that the majority rule
2 in the country?

3 MR. MILLER: Your Honor, I don't think
4 there is a majority rule. There are a number of
5 cases around the country. Most of them are
6 contingent-fee cases, which are not hourly cases.
7 The ones that are hourly cases, other than in the
8 bankruptcy court that I mentioned - - - the ones that
9 are hourly cases are disputes between partners, as to
10 one partner's right to - - -

11 CHIEF JUDGE LIPPMAN: Are you saying that
12 there's a different rule for the contingency and the
13 hourly?

14 MR. MILLER: I think they're harmonious,
15 Your Honor, in the following sense that I started
16 with, is that lawyers get paid for the work they did.
17 In the - - -

18 CHIEF JUDGE LIPPMAN: Okay. So you're
19 saying there's no theoretical difference?

20 MR. MILLER: There is not - - - there is
21 not a theoretical difference. In the contingent
22 matters, the dissolved firm gets paid the value on
23 the date of dissolution plus interest. You determine
24 that value by determining how much was collected less
25 the value of the effort and diligence of the partner

1 who did the work, and that is the value on the date
2 of dissolution.

3 The same thing applies here. On the date
4 of dissolution, the firm has been paid. All the fees
5 going forward - - -

6 CHIEF JUDGE LIPPMAN: Okay.

7 MR. MILLER: - - - are the result of the
8 diligence of the partner doing the work. There is
9 nothing to be paid back, because the firm has been
10 paid.

11 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
12 have your rebuttal.

13 Mr. Levinson?

14 MR. LEVINSON: Thank you, Judge. Michael
15 Levinson, representing Seyfarth Shaw.

16 Your Honors, I want to start with the issue
17 of whether or not the unfinished business rule as
18 articulated by counsel would apply to a property pre-
19 dissolution.

20 CHIEF JUDGE LIPPMAN: Property what?

21 MR. LEVINSON: Pre-dissolution.

22 CHIEF JUDGE LIPPMAN: Yeah.

23 MR. LEVINSON: Counsel's argument is that,
24 well, this only applies at liquidation or
25 dissolution. And Judge Pigott asked some questions

1 about that. Counsel directed him to Section 73. And
2 while I understand that it is not their argument, as
3 they put it, that it applies to pre-dissolution, it
4 is absolutely the effect of any affirmative answer to
5 question number one. That is because property
6 doesn't spring into existence at dissolution. It's -
7 - - property either exists or it doesn't.

8 And what - - - the key provision of the
9 partnership law that you need to focus on is Section
10 43(1), and 43(1) is what they cite extensively that
11 gives rise to what they say is the duty to account.
12 That duty to account applies throughout the entire
13 life of the partnership. It doesn't spring into
14 existence at dissolution; it applies all the time.

15 So if this court were to find that there is
16 a property interest in - - - as they define - - - in
17 unfinished business, this court would then be saying
18 that a partner couldn't leave firm A before
19 dissolution, couldn't leave a healthy vibrant firm,
20 before dissolution, and go to another firm without
21 facing the exact same claims - - -

22 JUDGE PIGOTT: Well, that's what I thought.
23 I thought if tomorrow somebody said I'm leaving firm
24 A and going to firm B, this rule would kick in.

25 MR. LEVINSON: This rule absolutely would

1 kick in. That is the - - - that is the consequence
2 of the argument and the finding that they're asking
3 the court to make.

4 CHIEF JUDGE LIPPMAN: In practice, it
5 doesn't kick in today, right?

6 MR. LEVINSON: Well, it doesn't, because
7 the trustees, at least up until this point, or other
8 law firms haven't been so bold, but there - - - you
9 know, this is a genie waiting to be let out of the
10 bottle here in New York. If this court holds that
11 this unfinished business is property, it means that
12 associates, who are not partners in the firm, who
13 don't have these same duties to account, could be
14 sued in the same situations as these firms are being
15 sued here.

16 CHIEF JUDGE LIPPMAN: So your argument is
17 it's not practical to do this rule, because you can't
18 make the distinction between pre-dissolution and
19 post-dissolution.

20 MR. LEVINSON: My argument is, not only is
21 it not practical, I think it's clearly not - - - not
22 - - - not something that the partnership law even
23 contemplated.

24 JUDGE SMITH: Well, in effect, that would -
25 - - that would negate the rule that we have against

1 noncompetes for lawyers. Wouldn't that - - - that
2 the rule effectively becomes a noncompete?

3 MR. LEVINSON: Effectively it becomes a
4 noncompete. And as far as Section 73, which counsel
5 directed the court's attention to, that has nothing
6 to do with this issue. Section 73 simply focuses on
7 what is due a partner or his or her estate when that
8 partner retires or dies. That has nothing to do with
9 this issue whatsoever.

10 So the consequence of a finding or a
11 conclusion as a matter of law that property is
12 somehow, you know, vested in these hourly matters, is
13 simply letting a - - -

14 JUDGE RIVERA: So then - - - so then what -
15 - - how would you define these profits when the firm
16 is robust and healthy? What are these profits?
17 They're - - - you're saying they're not property of
18 the firm?

19 MR. LEVINSON: I would - - - what I would
20 say is the - - -

21 JUDGE RIVERA: What are they?

22 MR. LEVINSON: Once a - - - and I think Mr.
23 Miller said this, is that once the firm bills the
24 time, meaning that they spent the time, it becomes
25 equivalent to work in process. I think that is an

1 asset. That is property. And then it sends a bill
2 out, and until the bill's paid, it's a receivable on
3 the books. It's an account receivable. And I think
4 that is assets, and that's a property.

5 But whatever happens in the future or
6 whatever might happen in the future, or whatever the
7 firm might expect to happen in the future is not
8 property.

9 CHIEF JUDGE LIPPMAN: So basically, once
10 you leave the firm, there's no profits going back to
11 the old partnership.

12 MR. LEVINSON: That's absolutely correct,
13 whether it's pre-dissolution or post.

14 JUDGE RIVERA: I'm sorry; I didn't un - - -
15 I didn't understand that, because I thought all their
16 - - - and perhaps I'm just not understanding the
17 argument, and you can help me here. I thought all
18 they were arguing is, once you get the money, you
19 have to pay the dissolved firm.

20 MR. LEVINSON: That's their argument.
21 That's not mine.

22 JUDGE RIVERA: Okay, but what I'm saying -
23 - - you're saying that once you get the money, it's
24 assets; sounds like they're saying the same thing.
25 What - - - what have I misunderstood about your

1 argument?

2 MR. LEVINSON: Well, maybe it's - - - the
3 question of who the "they" is in that question. And
4 once the former firm - - -

5 JUDGE RIVERA: Yes.

6 MR. LEVINSON: - - - gets paid, it has an
7 asset, obviously, in the money it gets paid. Until
8 it gets paid for work it's billed, it has an asset in
9 the receivable or work in process.

10 JUDGE SMITH: You're saying it doesn't
11 become an asset until the lawyer does the work?

12 MR. LEVINSON: Yes, in - - - yes, that's
13 exactly right. And I think that's true - - -

14 CHIEF JUDGE LIPPMAN: So if the lawyer does
15 the work after he or she has left, it's a different
16 case than if the work was done while they were part
17 of the partnership.

18 MR. LEVINSON: Yes, it's not done - - -
19 it's not - - -

20 JUDGE GRAFFEO: So what if it's - - -

21 CHIEF JUDGE LIPPMAN: What about fiduciary
22 obligation?

23 MR. LEVINSON: The duty - - - and they keep
24 calling it - - -

25 CHIEF JUDGE LIPPMAN: What about they keep

1 saying, there's a duty that - - - that you're a
2 lawyer; you have an ethical obligation. What's your
3 answer to that?

4 MR. LEVINSON: The client at the end of the
5 day decides, and in the situation of - - - of the - -
6 -

7 CHIEF JUDGE LIPPMAN: If the client wants
8 you to continue, you - - - he pays the new firm.

9 MR. LEVINSON: Right, the client can - - -
10 could have said to any of the former Thelen or
11 Coudert partners, we want you to stay at your desk
12 right where you are and finish this thing up. Maybe
13 there was a small matter that could have been wrapped
14 up before the actual liquidation of these law firms.

15 CHIEF JUDGE LIPPMAN: I don't want you to
16 go with what - - - whatever firm - - -

17 MR. LEVINSON: Right.

18 CHIEF JUDGE LIPPMAN: - - - and - - - and
19 take me with you; I want you to do it while you're at
20 Coudert.

21 MR. LEVINSON: But what - - - they could
22 have said that, but - - - and - - - and I think it is
23 the client's duty to finish that work. But once the
24 client says, we're taking this work to Seyfarth Shaw,
25 then the Coudert or the Thelen firm doesn't get

1 anything from that. That's the client's choice.

2 JUDGE SMITH: Under the - - -

3 JUDGE GRAFFEO: Is there a distinction with
4 the contingency fees - - -

5 MR. LEVINSON: I don't think there is.

6 JUDGE GRAFFEO: - - - under - - - under
7 your definition of client matter?

8 MR. LEVINSON: I don't think there is,
9 because I think with respect to a contingent fee,
10 it's - - - it's the same thing. The only difference
11 is, that in a contingent situation, the amount owed
12 the firm is not liquidated as of the date of
13 dissolution.

14 JUDGE GRAFFEO: I'm - - -

15 MR. LEVINSON: So in other words, the firm
16 - - -

17 JUDGE SMITH: But traditional - - - go
18 ahead.

19 MR. LEVINSON: Yeah, I was just going to
20 say - - -

21 JUDGE GRAFFEO: Okay. I just want to know
22 how you define - - -

23 MR. LEVINSON: Yeah, so - - -

24 JUDGE GRAFFEO: - - - client matter for
25 contingencies fees, if you would, please.

1 MR. LEVINSON: Well, in a contingency fee
2 situation, the - - - the firm has an interest in a
3 matter that's not yet complete. They may have billed
4 time and done things. They may have assumed the risk
5 of a difficult contingency case. They may - - - you
6 know, they had a malpractice risk. They had other
7 things involved for which they have not yet been
8 paid.

9 And they don't get paid by the nature of a
10 contingency matter until the case is either settled
11 or there's a judgment and collection on the judgment.
12 So as of dissolution in a contingency case - - -

13 JUDGE SMITH: Let me ask you, if I could -
14 - - I'm sorry.

15 MR. LEVINSON: - - - the amount owed the
16 firm is unliquidated. So I think it's perfectly
17 consistent.

18 JUDGE SMITH: Let me ask you if I could,
19 about - - - under traditional partnership law, good
20 old-fashioned, nineteenth century partnership law,
21 dis - - - a partner dies, and that death dissolves
22 the firm, right?

23 MR. LEVINSON: Yes.

24 JUDGE SMITH: And the rule for - - - the
25 traditional rule was the remaining partners - - - the

1 living partners - - - have to continue the business;
2 they have to account to the estate of the deceased
3 partner, and they don't get a nickel in compensation,
4 right?

5 MR. LEVINSON: Under the no compensation
6 rule, yes.

7 JUDGE SMITH: Yeah.

8 MR. LEVINSON: 41.

9 JUDGE SMITH: I mean, I guess - - - what
10 you're - - - are what you're saying is we got to
11 change that rule, because the world is different?
12 Because logically, a dissolution is a dissolution.

13 I mean, you - - - maybe - - - maybe the
14 problem is you got sixty-three dead partners and one
15 live one, it's a little harder. But the - - - in
16 principle, the firm is dissolved. The for - - - the
17 partners of the former dissolved firm have an
18 obligation to continue the - - - to wind up the firm
19 to continue with the matters for the benefit of their
20 former partners. Why - - - why - - - why doesn't the
21 analogy hold?

22 MR. LEVINSON: It doesn't hold because in
23 the case - - - in our cases, the clients have said
24 no, we don't want you former firms or other partners
25 to continue the matter. We're taking our work to

1 Seyfarth Shaw.

2 JUDGE SMITH: Would then - - - then - - -
3 would that have worked in the good old days? The
4 partner - - - the - - - you - - - the partners form a
5 new firm, the surviving partners. The ones who were
6 not dead form a new firm, and they say to the client,
7 hey, why don't you come with us, we don't have a dead
8 guy in us; you can pay us. That would - - - that
9 would have been okay?

10 MR. LEVINSON: Well, when you say that
11 would be okay, and that's sort of like the Stem
12 situation, my answer to that would be it's - - -
13 there - - - it doesn't create a property interest
14 suddenly. What it might create is a possible breach
15 of fiduciary duty by the partner who solicits.

16 JUDGE SMITH: Okay, so why - - - why can't
17 they just rearticulate their claim as one of a breach
18 of fiduciary duty or duty to wind up the partnership.
19 Why - - - why isn't what they're asserting simply a
20 duty to wind up the business of the dissolved
21 partnership by completing the unfinished business?

22 MR. LEVINSON: Well, I mean, the predicate
23 question I think is what is - - - is the unfinished
24 business property with respect to which that duty to
25 wind up really applies. And our position is - - -

1 JUDGE SMITH: Whether it's property or not.
2 I mean, you have a duty to wind up - - - you have a
3 duty to wind up the business, don't you?

4 MR. LEVINSON: Well, there's a - - - there
5 is - - - I think under the partnership law, there is
6 a duty to wind up the business, yes.

7 JUDGE SMITH: And why - - - why is not
8 completing the unfinished business part of that duty?

9 MR. LEVINSON: Well, because it depends
10 what you mean by unfinished business. If you're
11 talking about - - -

12 JUDGE SMITH: Traditionally, under - - -
13 under nineteenth century partnership law, wasn't it
14 perfectly clear that winding up the unfinished
15 matters, and under Stem winding up the unfinished
16 matters is part of the agreement.

17 MR. LEVINSON: Well, in all of those cases,
18 as Mr. Miller indicated, you know, no one was so bold
19 as to suggest that the winding up occurred at an ap -
20 - - at a totally different firm under a new
21 engagement contract, which is what happened here.

22 JUDGE SMITH: Well, well, maybe these
23 people were so bold as to suggest that it shouldn't
24 have happened that way.

25 MR. LEVINSON: Well, those cases involved

1 disputes among the family of existing partners. It
2 did - - - they didn't involve a third party to whom
3 the client had decided to send the business.

4 CHIEF JUDGE LIPPMAN: So was it
5 contemplated, the mobility that you have today,
6 whether you wind up going to a different firm, and it
7 was all within the context of the original
8 partnership and how you wind up?

9 MR. LEVINSON: It was all with - - - yeah,
10 and I think those cases, especially Stem, have to be
11 viewed in that context. The court made some
12 statements about what is and is not an asset. But it
13 was in the context of being as between - - -

14 CHIEF JUDGE LIPPMAN: Right.

15 MR. LEVINSON: - - - the remaining partner
16 - - -

17 CHIEF JUDGE LIPPMAN: Okay.

18 MR. LEVINSON: - - - and the partnership.

19 CHIEF JUDGE LIPPMAN: Okay, counsel.

20 MR. LEVINSON: It wasn't as between a third
21 party.

22 CHIEF JUDGE LIPPMAN: Thanks, counsel.

23 MR. LEVINSON: Thank you.

24 CHIEF JUDGE LIPPMAN: Thank you.

25 Counselor?

1 MR. DVORETZKY: Good afternoon, Your
2 Honors, may it please the court, Shay Dvoretzky,
3 representing Jones Day.

4 Let me pick up with Judge Smith's - - -

5 CHIEF JUDGE LIPPMAN: Do you want any - - -
6 do you want any - - - want any rebuttal time,
7 counselor?

8 MR. DVORETZKY: Mr. Levinson is going to
9 handle the rebuttal for all three of us.

10 CHIEF JUDGE LIPPMAN: Okay. You have five
11 minutes. Go for it. I take it back; you have eight
12 minutes.

13 MR. DVORETZKY: I've got eight minutes.

14 CHIEF JUDGE LIPPMAN: Go ahead.

15 MR. DVORETZKY: I'd like to pick up with
16 Judge Smith's question about what it means to wind up
17 business.

18 CHIEF JUDGE LIPPMAN: Go ahead.

19 MR. DVORETZKY: When a client exercises its
20 unfettered right to terminate a law firm, like
21 Coudert, that could no longer handle its business,
22 and instead to hire a new law firm like Jones Day,
23 the old firm's business at that point is wound up.
24 And there are no profits.

25 JUDGE SMITH: Well, why didn't that work in

1 Stem? Why couldn't the client exercise - - -
2 exercise its right to terminate the now dissolved
3 partnership and hire the component successor?

4 MR. DVORETZKY: I think there are four
5 factors that are critical to understanding Stem and
6 how it's different from this case. First of all, in
7 Stem, all that happened is that one partner, Mr.
8 Reed, died, thus dissolving that partnership. The
9 remaining partners all stood ready to work together
10 to continue handling the client matter.

11 In this case, by contrast, where Coudert
12 liquidated, it encouraged its clients to find new
13 homes.

14 JUDGE SMITH: Are you really saying - - -
15 are you really saying that partnership dissolutions
16 in the law firm world of today are a lot different
17 from the typical dissolutions in the time they wrote
18 the partnership law?

19 MR. DVORETZKY: No, I'm saying that the
20 dissolution that's at issue here is very different
21 from the dissolution that's at issue in Stem.

22 JUDGE SMITH: Well, but this is - - - but -
23 - - but - - - but when you read the old cases, the
24 dissolutions are all a partner died, a partner went
25 bankrupt, and the result was dissolution.

1 Today, all the - - - all the partnership
2 agreements say that the death or bankruptcy of one
3 partner doesn't dissolve the firm. What dissolves
4 the firm is that - - - is the firm can't make a
5 living anymore. And you - - - and you have not - - -
6 not one partner who's no longer there, but you have a
7 hundred.

8 And I - - - are you really saying you can't
9 have the same rules for both situations?

10 MR. DVORETZKY: I'm saying you can't have
11 the same rule where the former partnership couldn't
12 possibly handle the work. Stem was a case about a
13 breach of fiduciary duty, because two partners took
14 for themselves - - -

15 JUDGE SMITH: But dissolution - - - by
16 definition, the former partnership no longer exists;
17 it's been dissolved.

18 MR. DVORETZKY: Well, but in some - - -

19 JUDGE SMITH: It exists, but it's winding
20 up.

21 MR. DVORETZKY: It still exists for a
22 period in dissolution. But also in those cases,
23 those former partners still could have worked
24 together, and all wanted - - - or the partners who
25 sued - - - wanted to work with the others in order to

1 complete the matter. That's why in Stem what was
2 going on - - -

3 JUDGE SMITH: So you're - - - I guess, if I
4 can summarize what you're saying then, then you're
5 saying that under the partnership law, what the
6 partnership law contemplates, is where there is a
7 dissolved but still functioning partnership. And the
8 partners can practicably work together to wind up the
9 firm, but that doesn't happen in modern law school -
10 - - law firm dissolutions.

11 MR. DVORETZKY: That's one factor. I think
12 the overarching - - -

13 JUDGE SMITH: But then my question is,
14 don't we have to amend the partnership law? Can we
15 really - - - aren't you asking us judicially to amend
16 it to meet modern - - - modern situations?

17 MR. DVORETZKY: No, because the partnership
18 law only requires - - - first of all, wind up is
19 complete when the client moves to a new mat - - -
20 when a client moves to a new firm. And second of
21 all, the partnership law only requires an accounting
22 for profits from partnership business.

23 And so the question is, at what point does
24 something cease to be the partnership business of the
25 old firm, and become the partnership business of the

1 new firm. Yes?

2 CHIEF JUDGE LIPPMAN: So it's - - - it's
3 defining some of the terms in the partnership law
4 that will determine what the law - - - you can't from
5 the - - - the statute itself, there are not - - -
6 there's not a - - - a black-and-white answer? It's
7 how you interpret different terms within that
8 partnership law?

9 So we're not amending the law, you're
10 saying, we're interpreting it? Is that - - -

11 MR. DVORETZKY: I certainly don't think
12 you're amending the law. You're interpreting what it
13 means to account for partnership business.

14 CHIEF JUDGE LIPPMAN: Interpreting what it
15 means in today's world, as opposed to what it meant a
16 hundred years ago, or is it - - - is it that we're
17 amending this?

18 MR. DVORETZKY: Well, I would view it as
19 interpreting what it means in a particular fact
20 pattern that hasn't arisen before.

21 CHIEF JUDGE LIPPMAN: I see. This - - -
22 this world that we live in today, we didn't have
23 these issues under the statute previously.

24 MR. DVORETZKY: Not - - - neither Stem nor
25 any of the cases from out-of-state, that the other

1 side cites - - -

2 CHIEF JUDGE LIPPMAN: Dealt with today's
3 realities?

4 MR. DVORETZKY: - - - dealt with this case,
5 other than opinions from one bankruptcy judge in
6 California that will be reviewed by an Article 3
7 court for the first time tomorrow in a hearing in San
8 Francisco. There are no other cases that have dealt
9 with this.

10 In all of the other cases that the other
11 side cites, what happened was, an individual partner
12 or a subset of partners from the old firm tried to
13 take for themselves matters that the old firm could
14 still have handled together. And in that situation,
15 courts didn't create a property interest. What they
16 did was, they found that it was a breach of fiduciary
17 duty for the individual partners to take something
18 for themselves that still could have been done on
19 behalf of the partnership.

20 That's very different from this kind of
21 situation, where first of all - - -

22 CHIEF JUDGE LIPPMAN: These two cases are
23 different.

24 MR. DVORETZKY: These two cases are
25 different. The cases we're dealing with in

1 California are different. These - - - the modern - -
2 -

3 JUDGE GRAFFEO: So do you agree with the
4 definition of client matter that counsel gave us a
5 few minutes ago?

6 MR. DVORETZKY: I don't think you have to
7 define what a client matter is for any purpose here,
8 because the - - - the client matter - - -

9 JUDGE GRAFFEO: The Second Circuit didn't
10 ask us to do that?

11 MR. DVORETZKY: Well, the Second Circuit
12 asked you to do it, only if you also conclude that a
13 client matter is property of the law firm, so that
14 the firm is entitled to profits from that matter in
15 the future, even when another firm's taken over the
16 matter.

17 JUDGE GRAFFEO: So you'd rather have us
18 focus on what's property of the firm - - -

19 MR. DVORETZKY: Well - - -

20 JUDGE GRAFFEO: - - - rather than what's a
21 client matter?

22 MR. DVORETZKY: I think that - - -

23 CHIEF JUDGE LIPPMAN: You would rather us
24 say that it's not property?

25 MR. LEVINSON: I think you don't reach the

1 second question, if you answer the first question the
2 way we're suggesting, which is that a law firm only
3 has a property interest in recovering fees for work
4 that it actually does.

5 CHIEF JUDGE LIPPMAN: If you have to answer
6 the question, you would say, what, that it's case
7 specific?

8 MR. DVORETZKY: Well, I have a lot of
9 trouble answering the question, honestly, because
10 it's difficult to find any analytically satisfying
11 way to define how a firm could have a property
12 interest that goes beyond the client's termination of
13 that firm.

14 JUDGE ABDUS-SALAAM: So you - - - I'm a
15 little confused now, because you're saying a client
16 matter is property, and I think I heard Mr. Miller
17 say the same thing.

18 MR. DVORETZKY: I don't believe that the
19 client matter is property. The only prop - - - (skip
20 in audio) - - - has - - - that a law firm has is a
21 right to collect fees for work that it actually does
22 that a client allows it to earn. Once the client
23 terminates the old firm, and hires a new one, the old
24 firm's property interest at that point ends. But the
25 firm - - - the old firm never has a property interest

1 in the matter itself. This court's case is about
2 client choice making clear that - - -

3 JUDGE GRAFFEO: What about receivables - -
4 -

5 MR. DVORETZKY: Well, you - - -

6 JUDGE GRAFFEO: - - - that haven't been
7 paid yet. Is that - - -

8 MR. DVORETZKY: Absolutely, you have a
9 property interest in receivables. That's not the
10 same thing as having a property interest in the
11 matter. The client can always take the matter to
12 whatever other firm it wants. That's his choice.

13 JUDGE RIVERA: Then you can't have a future
14 interest?

15 MR. DVORETZKY: I'm sorry?

16 JUDGE RIVERA: You're saying you can't have
17 a future interest? A future interest of being paid
18 in the future?

19 MR. DVORETZKY: You can't have a future
20 interest in being paid for someone else's work. Now,
21 the contingency fee cases, in that case, you may have
22 a future interest, but it's a future interest in
23 being paid for the work that you did and the risk
24 that you on by taking the contingency fee.

25 CHIEF JUDGE LIPPMAN: But theoretically you

1 agree with your colleagues that there's no
2 theoretical difference between contingency fee and
3 hours in terms of this concept that if it's worked
4 on, it's one thing, but if it's work to be done, it's
5 another thing.

6 MR. DVORETZKY: The concept is you get paid
7 for what you earn. I think the only difference is,
8 in the hourly fee case, what you earn is measured by
9 the time that you bill, the times, the rates that you
10 charged.

11 In the contingency-fee cases, I think what
12 some of the lower courts have recognized is you may
13 actually be entitled to more than that, but only
14 because the nature of a contingency fee case is such
15 that when you took it on, you bore some risk that you
16 would never be paid.

17 And so, even if you're terminated
18 midstream, you may be entitled to the value of your
19 services, plus some measure of that risk. But what -
20 - -

21 JUDGE RIVERA: So if - - - if we disagree
22 with you, what if any impact will this have on - - -
23 on individual lawyers who want to enter these
24 partnership agreements?

25 MR. DVORETZKY: It - - - I'm not sure I

1 follow the question. Individual lawyers who want to
2 enter the partnership agreements, and potentially
3 waive - - -

4 JUDGE RIVERA: You're saying if it's not
5 property, right? So what - - -

6 MR. DVORETZKY: Well - - -

7 JUDGE RIVERA: - - - what, if any,
8 understanding would you say they would have amongst
9 themselves?

10 MR. DVORETZKY: Individual lawyers are
11 always free, and I think would be free after whatever
12 decision the court might issue, to enter into a
13 partnership agreement that waives any right to these
14 so-called unfinished business profits. However, as
15 was suggested - - -

16 JUDGE SMITH: Or if you win, they could
17 enter into an agreement that created the Jewel ride
18 if they wanted to.

19 MR. DVORETZKY: Well, I don't think they
20 could, actually. I think it would be an
21 impermissible restraint on client choice to have a
22 partnership agreement that says no matter what you do
23 in the future, you must pay back profits on a matter
24 that you began to the original firm. That would run
25 into the same problem that this court invalidated in

1 the Denburg case.

2 JUDGE RIVERA: But I'm sorry; how is that
3 about client choice?

4 MR. DVORETZKY: Client choice is restricted
5 as this court recognized in Cohen and in Denburg. If
6 there are financial disincentives that are placed on
7 a lawyer's decision whether to represent the clients.
8 And so in Denburg this court invalidated even a 12.5
9 percent penalty. The other side is essentially
10 asking for - - -

11 JUDGE RIVERA: What about - - - what about
12 their argument about the client - - - the - - -
13 excuse me - - - the lawyer's ethical duties to the
14 client and the outstanding matters at the time?

15 MR. DVORETZKY: Well, the - - - but the
16 lawyers - - -

17 JUDGE RIVERA: You're saying a lawyer can
18 just walk away anytime?

19 MR. DVORETZKY: The - - - well, first of
20 all, the lawyer may be forced to walk away if he no
21 longer has the law firm that can handle the matter.
22 These are not cases being handled by individual
23 lawyers out of their basements. When Coudert
24 dissolves, there's no more real estate; there's no
25 more Westlaw; there are no res - - -

1 JUDGE RIVERA: And now they're being
2 handled by Jones Day and Seyfarth Shaw. Okay.

3 MR. DVORETZKY: Well, but when they're
4 handled by Jones Day, they're being handled by third
5 party firms. That's not the same thing as the
6 partner just moving over across the street and
7 handling it by himself.

8 JUDGE RIVERA: But - - - but isn't your
9 interest in - - - in the former partner the clients
10 they bring with them?

11 MR. DVORETZKY: Well, we don't believe that
12 former partners bring clients with them. Clients are
13 - - - clients come to us. Clients bring - - -

14 JUDGE SMITH: Well, well, they certainly
15 aren't going to bring them if the - - - and the new
16 firm isn't going to take them if the new firm doesn't
17 get the fees.

18 MR. DVORETZKY: Correct, and to - - - and
19 to go back to Judge Rivera's earlier question - - -

20 JUDGE RIVERA: Unless it's such an
21 interesting client that you want the future business,
22 and that the outstanding pending matter is not one
23 that will take a long period of time.

24 MR. DVORETZKY: It is conceivable that
25 there are situations where law firms might still be

1 willing to work for free. That's not a sensible
2 default rule - - -

3 CHIEF JUDGE LIPPMAN: Okay, counsel.

4 MR. DVORETZKY: - - - to impose on
5 partnership agreements.

6 CHIEF JUDGE LIPPMAN: Okay, thanks,
7 counsel.

8 All right, rebuttal? Counsel?

9 MR. MAGALIFF: Thank you, I have four
10 points, and I hope I can get to all of them. Several
11 of you have asked what is it that we are asking you
12 to do. We are asking you to do nothing. Because by
13 doing nothing - - - no, I'm serious - - - because
14 we're asking you to affirm what the law has been in
15 this state, what's expected - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but that's
17 saying this isn't the law. That's the whole thing is
18 - - -

19 MR. MAGALIFF: But it is the law. That's
20 our view. No - - -

21 CHIEF JUDGE LIPPMAN: Okay, that's your
22 argument, then.

23 MR. MAGALIFF: Of course.

24 CHIEF JUDGE LIPPMAN: Not theirs, but go
25 ahead.

1 MR. MAGALIFF: Of course. That's - - -
2 that's our view. And it may be - - - it may be that
3 the way law firms practice today with such a focus on
4 client books of business, and the fact that lawyers
5 move constantly that the rule ought to be changed,
6 but that's something for the legislature.

7 CHIEF JUDGE LIPPMAN: Or it may be that
8 we've never dealt with these issues that happened
9 today, which is their argument, right?

10 MR. MAGALIFF: Well, that may be, but, you
11 know, they say that the Brobeck case, the California
12 bankruptcy case, was the first time anybody did this.
13 Geist, which was decided in New York years ago, dealt
14 with the duty to account for hourly fee matters.
15 This is nothing new. I mean, Judge Smith was asking,
16 you know, you go back and you look at partnership law
17 from a hundred years ago. Partnership law hasn't
18 changed all that much. The New York Legislature - -
19 -

20 JUDGE PIGOTT: No, but you - - - you can
21 make - - - you can make the argument saying what you
22 want, if you got a partnership of A, B and C, and C's
23 the one - - - C dies, and the other two partners are
24 going to continue the partnership, and they're going
25 to provide for his partnership share.

1 But if he's the oil and gas guy, and the
2 other two aren't, I mean, all the oil and gas is
3 gone. I mean, they're not going to go and start
4 doing work that they otherwise could not do. And you
5 want them to. You want - - - you want them to say,
6 you have to take on this work for free.

7 MR. MAGALIFF: No, I don't want to - - -
8 I'm not saying - - -

9 JUDGE PIGOTT: That it's property.

10 MR. MAGALIFF: - - - that you have to take
11 on the work for free, but that may be the effect.
12 What I'm saying is that, we have rules - - -

13 JUDGE PIGOTT: Who's going to pay the - - -
14 who pays the - - -

15 MR. MAGALIFF: - - - in the partnership
16 law.

17 JUDGE PIGOTT: Who pays the malpractice
18 insurance, by the way?

19 MR. MAGALIFF: Excuse me?

20 JUDGE PIGOTT: When these people are doing
21 this work for free other there, who's - - - who's
22 paying the malpractice insurance?

23 MR. MAGALIFF: Look, what happens if you
24 have - - -

25 JUDGE PIGOTT: No, I'm serious. You're

1 saying - - -

2 MR. MAGALIFF: I don't know who pays the
3 malpractice insurance, Judge.

4 CHIEF JUDGE LIPPMAN: Well, someone better
5 know who's paying the malpractice insurance.

6 MR. MAGALIFF: Suppose that you are
7 charging 600 dollars an hour at your old firm. The
8 firm dissolves, goes into liquidation, and you move
9 to a new firm, and the new firm says, we will take
10 the matter, but only if we charge 900 dollars an
11 hour. And the client says no, I don't want to pay
12 900 dollars an hour. Does that impact the client's
13 choice of lawyer? No. It's a negotiated point.

14 When a lawyer goes to a new firm, they can
15 negotiate with the new firm the economic effect of
16 unfinished business claims. And one would hope,
17 Judge, that when all of these lawyers left these
18 dissolving and liquidating firms, and go to Jones Day
19 or any of the other firms, that if those firms ever
20 had the misfortune to dissolve and liquidate, that
21 the partners would owe the same fiduciary duties to
22 those firms - - - one would hope the firms would want
23 that - - -

24 JUDGE SMITH: Suppose - - - suppose - - -

25 MR. MAGALIFF: - - - we say they owe to

1 their firms.

2 JUDGE PIGOTT: Yeah, you know, you talk
3 about this in terms of these - - - of these huge
4 firms, and I unfortunately - - - I shouldn't say
5 "unfortunately", but I - - - where I'm from, you
6 know, most firms are nowhere near this. I mean, we
7 may have two or three, maybe six, that are over a
8 hundred lawyers. But most firms, I'm going to - - -
9 I'm going to wager are not. I mean, they're smaller
10 firms - - -

11 MR. MAGALIFF: Right.

12 JUDGE PIGOTT: - - - and they - - - and I'm
13 just picturing - - - picturing somebody going in and
14 grabbing all of these lawyers, and saying, by the
15 way, you know, all of those fees that you're
16 collecting in Justice Court for the next six months -
17 - -

18 MR. MAGALIFF: But that's our point.
19 They're saying, you know, this is the big firm. The
20 world is different. And we're saying, the world may
21 be different, but if you're going to change the rule
22 that's been in existence for over a hundred years,
23 it's for the legislature to do.

24 JUDGE PIGOTT: I don't think it has. It
25 almost sounds like a "gotcha", because if one of the

1 first things you said was, all they got to do is file
2 a Jewel waiver and this - - - and this all goes away.
3 These two didn't, so we win.

4 MR. MAGALIFF: Yes, because the partnership
5 law says unfinished client matters on the date of
6 dissolution are property of the partnership that must
7 be wound up for the benefit of the partnership.

8 JUDGE PIGOTT: But you can do that with
9 accounts receivable and - - - and a determination on
10 contingent fees. I - - -

11 MR. MAGALIFF: But then you're making a
12 determination that client matters are not partnership
13 property.

14 JUDGE PIGOTT: Right.

15 MR. MAGALIFF: And we've never said they're
16 property - - -

17 CHIEF JUDGE LIPPMAN: Counsel - - -

18 MR. MAGALIFF: - - - that you can sell;
19 we've said they're partnership property, and all of
20 the appellate departments in this state have said
21 that they are partnership property.

22 CHIEF JUDGE LIPPMAN: Okay, counsel, we're
23 going to determine that. Thank you. Judge Smith,
24 you want one more? Go ahead.

25 JUDGE SMITH: Yeah. On the malpractice

1 question, I was a little thrown. Suppose in one of
2 these mat - - - you win this case. And on one of
3 these matters that you say is yours, still belongs to
4 the - - - they have to pay you, somebody commits
5 malpractice. Are you on the hook for it?

6 MR. MAGALIFF: No.

7 JUDGE SMITH: Why not?

8 MR. MAGALIFF: All we're saying is - - -
9 because all we're saying is that the profits, if
10 there are any profits - - -

11 JUDGE SMITH: Oh, just the profits, not the
12 losses?

13 MR. MAGALIFF: Just the - - - that's right.

14 JUDGE SMITH: Wait, is that the way
15 partnerships are supposed to work?

16 MR. MAGALIFF: If there were losses, Judge,
17 there were no profits. Nothing goes back to the
18 firm.

19 CHIEF JUDGE LIPPMAN: Someone's on the
20 hook, counsel. Why wouldn't it be you?

21 MR. MAGALIFF: For what? For what?

22 JUDGE RIVERA: Well, you're saying there
23 are no profits.

24 MR. MAGALIFF: There may be no profits. If
25 there are no profits - - -

1 JUDGE SMITH: I - - - I - - -

2 MR. MAGALIFF: - - - the old firm gets
3 none.

4 JUDGE SMITH: Suppose - - - wait a minute.
5 Suppose in the course, you're winding up a
6 partnership, a dissolved partnership, you lose money.
7 Don't the partners have to share the losses?

8 MR. MAGALIFF: They may, but that - - -
9 that's different from - - -

10 JUDGE SMITH: You aren't going to share
11 losses with these guys.

12 MR. MAGALIFF: Judge, this is an issue of
13 the partners, okay. Let's look at what happened in
14 Thelen. We are saying in Thelen that, when the
15 partners left and the matters went to Seyfarth, that
16 the partners were the initial transferees of the
17 benefit of the waiver of the unfinished business. It
18 was their fiduciary duty to complete the matters and
19 account back.

20 And we allege that Seyfarth is the
21 subsequent transferee of those profits. That's the
22 theory, but the underlying question of what are the
23 client matters and - - - and whose property are the
24 client matters, is governed by partnership law.

25 Let me ask this, if a client - - -

1 CHIEF JUDGE LIPPMAN: Okay, coun - - -
2 counsel, I - - - I think you've made your argument
3 and we've heard it.

4 Let's get the next rebuttal, Mr. Adler.

5 MR. ADLER: Your Honor, I want to go back
6 to the malpractice point, and I want to - - -

7 CHIEF JUDGE LIPPMAN: Who pays for it,
8 counsel?

9 MR. ADLER: - - - state for the record,
10 first of all, it's an undisputed fact in this case
11 that the partners who joined the various law firms,
12 remained partners in Coudert Brothers. They get K-1s
13 every year. They still have a percentage of the
14 profits and losses.

15 CHIEF JUDGE LIPPMAN: So they pay the
16 malpractice? The old partnership?

17 MR. ADLER: Well, if - - - if malpractice
18 were to occur, you would need to determine when it
19 occurred, and to the extent that the former partner -
20 - -

21 CHIEF JUDGE LIPPMAN: Say it occurred after
22 they went to the new firm. Who pays for the
23 malpractice?

24 MR. ADLER: To the extent that the former
25 partner is on the hook, okay, and has to pay for his

1 liability, I assume he could place it against the
2 remaining partners under - - -

3 JUDGE PIGOTT: Does the trustee - - -

4 MR. ADLER: - - - the Partnership Law 26.

5 JUDGE PIGOTT: Does the trustee maintain
6 malpractice insurance for and on behalf of the - - -
7 of that law firm that's defunct, that's now going to
8 get this money?

9 MR. ADLER: There is no malpractice
10 insurance being maintained for - - - for current
11 matters. But it would - - -

12 JUDGE PIGOTT: Is that an issue?

13 MR. ADLER: A claim would exist against - -
14 -

15 CHIEF JUDGE LIPPMAN: Yeah, but don't you
16 think the partner who's working in the new place,
17 wants to know, you know, that he - - - he has
18 malpractice insurance - - -

19 MR. ADLER: Well, he has - - -

20 CHIEF JUDGE LIPPMAN: - - - for this
21 particular work?

22 MR. ADLER: Well, he obviously has
23 malpractice coverage from his new firm.

24 CHIEF JUDGE LIPPMAN: For this particular
25 work? They're not getting paid; why are they

1 covering them in mal - - -

2 MR. ADLER: Because they have a general
3 malpractice - - -

4 CHIEF JUDGE LIPPMAN: So you say they pay
5 the malpractice insurance.

6 MR. ADLER: But I'm saying that if the
7 partner were hit for some specified liability - - -

8 CHIEF JUDGE LIPPMAN: Then he could go back
9 against Coudert.

10 MR. ADLER: - - - he could go back and - -
11 -

12 JUDGE PIGOTT: No, no, no. It's not
13 getting hit. It's when - - - it's when you get sued
14 by your - - -

15 MR. ADLER: Right, it - - -

16 JUDGE PIGOTT: - - - you know, now - - -
17 now you take that summons or complaint and you hand
18 it to whom?

19 MR. ADLER: Under the way the Coudert plan
20 was set up, he would be able to assert a contribution
21 claim - - -

22 JUDGE PIGOTT: No, no, who's going to
23 defend you? You got a lawyer for your malpractice.
24 You know, you call your carrier and they say, send it
25 over to that law firm that represents us in these

1 malpractice cases. In this one, I would assume you
2 turn it over to the trustee and say, I got sued; here
3 it is, right?

4 MR. ADLER: Unless the successor firm were
5 - - - were - - -

6 CHIEF JUDGE LIPPMAN: Why would the
7 successor firm want to - - - want to defend him?
8 He's not doing - - -

9 MR. ADLER: Well, it would - - -

10 CHIEF JUDGE LIPPMAN: - - - he's not doing
11 their work?

12 MR. ADLER: It would depend on - - - on
13 when the action took place. I mean, if - - - if the
14 partner is a partner in Coudert Brothers and in Jones
15 Day, all right, I mean, it depends on, you know,
16 where the action took place and, you know, if there's
17 coverage at Jones Day, I'm assuming Jones Day's
18 carrier would - - - would cover it.

19 CHIEF JUDGE LIPPMAN: It's after the
20 dissolution. It happens when the partner's at Jones
21 Day. Jones Day is not getting paid, but they - - -
22 but they're insuring him - - -

23 MR. ADLER: Well, hold on. Jones Day is
24 getting paid. That is a point that I don't think has
25 been, you know, made.

1 JUDGE RIVERA: Well, they'll get the
2 overhead.

3 MR. ADLER: Right. I mean - - -

4 JUDGE RIVERA: They'll have overhead and
5 costs.

6 MR. ADLER: Jones Day is getting paid - - -

7 JUDGE RIVERA: What they don't get is the
8 profit for the partner's work - - -

9 MR. ADLER: Correct. Correct.

10 JUDGE RIVERA: - - - for the - - - excuse
11 me - - - the lawyer's work.

12 MR. ADLER: Correct. Jones Day is getting
13 paid for its overhead, its expenses, its rent,
14 whatever, you know, is included in that calculation
15 of expenses. What it's not getting paid for is the
16 profits.

17 JUDGE RIVERA: If the client doesn't pay,
18 who gets to collect?

19 MR. ADLER: If the client doesn't - - -

20 JUDGE RIVERA: Pay, who gets to the
21 collect? The old firm, you? Who gets to collect?

22 MR. ADLER: That issue hasn't been
23 addressed, but I'm assuming it would be - - - it
24 would be either/or, you know, it would depend on the
25 circumstances.

1 One final point - - -

2 CHIEF JUDGE LIPPMAN: Final point, counsel,
3 go ahead.

4 MR. ADLER: Final point is that we hear
5 that there's a different rule for hourly cases than
6 there is for contingency cases. I would note that
7 the hourly cases that are out there, other than the
8 two cases from the lower courts here in New York,
9 have been uniform that the unfinished business rule
10 applies to hourly cases. They've been around for a
11 very long time. They've been around since 1940 in
12 Geist v. Burnstine, 1998 as to new firms in Labrum &
13 Doak, and - - -

14 CHIEF JUDGE LIPPMAN: Okay, counsel,
15 thanks.

16 Okay, last rebuttal, Mr. Miller?

17 MR. LEVINSON: Mr. Levinson, Your Honor.

18 CHIEF JUDGE LIPPMAN: I'm sorry, Mr.
19 Levinson, go ahead.

20 MR. LEVINSON: Unless the panel has any
21 questions, we would waive any rebuttal at this point.

22 CHIEF JUDGE LIPPMAN: Okay, thank you all,
23 appreciate it.

24 MR. LEVINSON: Thank you.

25 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of In re: Thelen LLP (Geron v Seyfarth Shaw LLP), No. 136, and In re: Coudert Brothers, LLP (Development Specialists, Inc. v K&L Gates LLP), No. 137, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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