Attorneys - Law Firm May Obtain Injunction Barring Solicitation of Clients by Former Salaried Associates

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Recent Developments

ATTORNEYS—LAW FIRM MAY OBTAIN INJUNCTION BARRING SOLICITATION OF CLIENTS BY FORMER SALARIED ASSOCIATES.

Adler, Barish, Daniels, Levin and Creskoff v. Epstein (Pa. 1978)

Appellees were four salaried associates in the law firm of Adler, Barish, Daniels, Levin and Creskoff (Adler Barish), the appellant. 1 Having decided to resign their positions at Adler Barish and form their own law firm, appellees contacted, by telephone and in person, those Adler Barish clients on whose active cases appellees were working. 2 Appellees advised the clients that they were leaving Adler Barish to start their own practice and that the clients could continue to be represented by Adler Barish or could elect to be represented by appellees' new firm or by any other attorney. 3 Appellees confirmed this information in writing and provided the clients with form letters which could be used to discharge Adler Barish and hire appellees. 4 Furthermore, appellees obtained a bank line of credit and furnished, as security, a list of Adler Barish cases on which they were working. 5

2. ___ Pa. at ___, 393 A.2d at 1177-78. Appellees were working under the supervision of the Adler Barish partners on cases which clients had brought to the firm. Id. at ___, 393 A.2d at 1177. According to the superior court, appellees had announced their intention to resign from Adler Barish but had not yet left the firm when they began contacting approximately 400 Adler Barish clients. Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 252 Pa. Super. Ct. 553, 557, 382 A.2d 1226, 1228 (1977). The supreme court opinion, however, indicated that the contacts began after appellees terminated their employment but, in the case of one of the appellees, while he was still permitted to remain on the premises of Adler Barish. ___ Pa. at ___, 393 A.2d at 1177-78. Neither court indicated whether the timing of the contacts vis-à-vis the employment relationship had any effect upon its decision.
3. ___ Pa. at ___, 393 A.2d at 1178.
4. Id. at ___, 393 A.2d at 1178. These form letters were transmitted under a cover letter which provided in part:

In confirmation of our recent conversation, I have terminated my association with the offices of Adler, Barish, Daniels, Levin and Creskoff and will be continuing in the practice of law in center city Philadelphia. As I explained, you have the right to determine who shall represent your interests and handle the above captioned matter in the future. You may elect to be represented by my former office, me or any other attorney permitted to practice in this jurisdiction.

During our conversation, you expressed a desire to have me continue as your legal representative, and in recognition of your choice in this regard, I have enclosed . . . [a form discharging Adler Barish and a new contingent fee agreement] which must be signed and returned to me in the enclosed stamped, addressed envelope to effect this end. Copies of these documents are also enclosed for your records.

Id. at ___, 393 A.2d at 1186 app.
5. Id. at ___, 393 A.2d at 1177. Before leaving Adler Barish, appellees obtained a $150,000 credit line and gave the bank a list of 88 Adler Barish cases on which they were working and which had combined anticipated legal fees in excess of $500,000. Id. There is no indication in the opinion that appellees had reason to believe that any client on the list would hire them if and when appellees left Adler Barish.

(770)
A few days after appellees departed, Adler Barish filed a complaint in the Court of Common Pleas of Philadelphia to stop appellees from interfering with existing contractual relationships between Adler Barish and its clients. A preliminary injunction was issued, and following a nonjury hearing, the court of common pleas permanently enjoined appellees "from contacting and/or communicating with those persons who up to and including April 1, 1977, had active legal matters pending with and were represented by" Adler Barish. The Superior Court of Pennsylvania, in a plurality opinion, dissolved the injunction and dismissed the complaint. The Supreme Court of Pennsylvania reversed the superior court, holding that appellees had tortiously interfered with appellant's contractual and business relations and that their conduct was not protected by the first and fourteenth amendments to the Constitution of the United States. Adler, Barish, Daniels, Levin and Creskoff v. Epstein, Pa., 393 A.2d 1175 (1978), cert. denied, 47 U.S.L.W. 3775 (May 29, 1979).

The legal profession's rules against advertising and solicitation have recently been challenged by attorneys who were sanctioned for using those

6. Id. at ___, 393 A.2d at 1177-78. Adler Barish filed its complaint on April 4, 1977. Id. at ___, 393 A.2d at 1177. One of the Adler Barish partners testified that each new client had given Adler Barish a power of attorney and had signed a contingent fee agreement. Id. n.4. The trial court considered these agreements to be protected from third-party interference. Id.

7. Id. at ___, 393 A.2d at 1178. Preliminary relief was granted Adler Barish on April 4, 1977. Id.

8. Id., quoting Adler, Barish, Daniels, Levin and Creskoff v. Epstein, No. 77-195 (Phila. C.P. Ct., May 5, 1977) (order granting final injunction). To this otherwise total ban on communication, the decree provided for two exceptions:

1. Nothing in this Final Decree shall be construed to preclude the defendants from announcing the formation of their new professional relationship in accordance with the requirements of DR 2-102 of the Code of Professional Responsibility.

2. Nothing in this Final Decree shall preclude those persons who, up to and including April 1, 1977, had active legal matters pending with and had been represented by Adler Barish from voluntarily discharging their present attorney and selecting any of the defendants, or any other attorney, to represent them. Id. at ___, 393 A.2d at 1178. The trial court held that appellees had "engaged in illegal solicitation in complete and total disregard for the Code of Professional Responsibility" and "tortiously interfered with the contractual and business relations that exist between Adler Barish and its clients." Id. An injunction was considered appropriate relief in view of appellees' "avowed intentions . . . to continue their illegal solicitation." Id.


10. Id. at 567, 382 A.2d at 1233. For a further discussion of the superior court decision, see note 65 infra.


12. See ABA Code of Professional Responsibility, Disciplinary Rules (DR) 2-101 to 2-105, and Ethical Considerations (EC) 2-6 to 2-16 [hereinafter cited as ABA Code]. The Code of Professional Responsibility has been adopted in all states and in the District of Columbia. A. Kaufman, Problems in Professional Responsibility 29 (1976). There may be substantial variations among the adopted versions, however. Id. Violation of the Code could result in disbarment, suspension, public censure, probation, private reprimand, or informal admonition. See Pa. R.D.E. 204.
practices to attract clients. In Bates v. State Bar of Arizona,\textsuperscript{13} the United States Supreme Court held that a state could not prevent the newspaper publication of a truthful advertisement concerning the availability and terms of routine legal services.\textsuperscript{14} Since the flow of such information could not be restrained, the attorneys who submitted the advertisement could not be disciplined without violating their first amendment rights.\textsuperscript{15} The Bates opinion, however, specifically excluded the problems associated with in-person solicitation of clients.\textsuperscript{16} The Court addressed these problems the following year in two cases which, like Bates, involved challenges to disciplinary actions on first amendment grounds.\textsuperscript{17}

In Ohralik v. Ohio State Bar Association,\textsuperscript{18} an attorney had been suspended from practice for soliciting business from accident victims.\textsuperscript{19} The Supreme Court affirmed the suspension,\textsuperscript{20} holding that "the State—or the

\textsuperscript{13} 433 U.S. 350 (1977).

\textsuperscript{14} Id. at 384. The attorneys in Bates ran a "legal clinic" specializing in routine matters such as uncontested divorces, simple personal bankruptcies, and name changes. Id. at 354. To achieve the goal of providing low cost services to persons of moderate income, the clinic depended on a substantial volume of business and therefore sought to attract clients through advertising. Id. In placing an advertisement in a newspaper, the attorneys concededly violated a disciplinary rule which provided in part:

(B) A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.

Id. at 355 (footnote omitted), quoting ABA Code, supra note 12, DR 2-101(B). The state bar association recommended that the attorneys be suspended from practice for one week. 433 U.S. at 356. On review by the Supreme Court of Arizona, the sanction was reduced to censure only. Id. at 358.

\textsuperscript{15} 433 U.S. at 384. The Court stressed that the first amendment did not preclude all regulation of advertising by attorneys; false, deceptive, or misleading advertising would still be subject to restraint. Id. at 383. Additionally, the Court stated that there may be reasonable restrictions on time, place, and manner and that special considerations could apply to the problems of advertising through the electronic broadcast media. Id. at 384.

\textsuperscript{16} See id. at 366.

\textsuperscript{17} See Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); In re Primus, 436 U.S. 412 (1978).

\textsuperscript{18} 436 U.S. 447 (1978).

\textsuperscript{19} See id. at 449-52. The attorney learned about an automobile accident in which two young women were injured when their car was struck by an uninsured motorist. Id. at 449. The attorney was casually acquainted with one of the women and visited her in the hospital where she was lying in traction. Id. at 450. He told her that he would represent her and urged her to sign a contingent fee agreement. Id. She did not sign the agreement at that time but later on the same day orally agreed that he could "go ahead" with her representation. Id. The attorney also went, without invitation, to the home of the second woman and obtained her oral agreement for him to represent her on a contingent fee basis. Id. at 451.

\textsuperscript{20} Id. at 468. In the state disciplinary proceedings, the attorney was found to have violated Disciplinary Rules 2-103(A) and 2-104(A) as promulgated by the Supreme Court of Ohio. Id. at 453. Disciplinary Rule 2-103(A) provides: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer." OHIO CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(A). The latter Disciplinary Rule provides in relevant part:

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:
Bar acting with state authorization—constitutionally may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent.” 21 In In re Primus, 22 an attorney associated with the American Civil Liberties Union offered a woman free legal assistance to redress an allegedly unconstitutional sterilization. 23 The attorney was reprimanded for engaging in unethical solicitation, 24 but, relying upon NAACP v. Button, 25 the Supreme Court reversed

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(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

Id. 26 DR 2-104(A).

21. 436 U.S. at 449. The majority opinion was written by Justice Powell, who had dissented in Bates. In Bates, the Court rejected the argument that advertising would have an adverse effect on the legal profession, observing that the belief that lawyers are somehow “above” trade was an “historical anachronism” rooted, not in rules of ethics, but in rules of etiquette which were no longer viable. 433 U.S. at 368-72. Likewise, in Ohralik, the Court found the historical basis for the ban on solicitation to be invalid. 436 U.S. at 460. This insufficient historical basis, however, was not found to detract from the force of other interests that the ban continued to serve. Id. The substantive evils of solicitation, according to the Court, encompassed “stirring up litigation, assertion of fraudulent claims, debasing the legal profession, and potential harm to the solicited client in the form of overreaching, overcharging, underrepresentation, and misrepresentation.” Id. at 461 (footnote omitted).

For an illustration of the differences between Bates and Ohralik, as viewed by a state supreme court, see Kentucky Bar Ass’n v. Stuart, 568 S.W.2d 933 (Ky. 1978). In Stuart, the Supreme Court of Kentucky dismissed a complaint against attorneys who had mailed letters to real estate agencies. Id. at 934. These letters had stated the cost of routine legal services, the fact that an approved member of the bar would perform the services, and the time frame in which the services would be performed. Id. The court dismissed as irrelevant the fact that the advertising medium was a letter rather than a newspaper, and stated that Bates prohibited disciplinary action. Id. According to the Stuart court, this was not the Ohralik type of “in person solicitation” which would involve the danger of pressure upon the client to make a speedy and uninformed decision to consult an attorney. Id. The court disagreed that advertising in the form of a letter increased the potential for overreaching and deceptive practices by unscrupulous attorneys or made enforcement of ethical standards more difficult. Id. The court noted that the written form provided a record and therefore a protection against abusive conduct. Id.


23. Id. at 422. The newspapers had reported that pregnant mothers on public assistance in Aiken County, South Carolina, were being sterilized or threatened with sterilization as a condition for continued receipt of Medicaid benefits. Id. at 415. A local organization serving indigents invited an attorney to address some of the women who had been sterilized. Id. The attorney advised the women of their legal rights and thereafter sent one woman a letter expressing the interest of the American Civil Liberties Union in representing her in a damages suit against the doctor who performed the sterilization. Id. at 416-17.

24. Id. at 421. The attorney’s conduct had been adjudged unethical by the Supreme Court of South Carolina because she had solicited a client while acting as staff counsel for a nonprofit organization which primarily renders legal services, and because she had solicited the client after providing unsolicited legal advice. Id. at 420-21. See S.C. CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103(D)(5) and DR 2-104(A)(5).

25. 371 U.S. 415 (1963). In Button, the Supreme Court reversed a state court determination that the activities of members and staff attorneys for the National Association for the Advancement of Colored People constituted unlawful solicitation of legal business. Id. at 428-45. Since the solicitation of prospective litigants was undertaken to express legitimate political beliefs and to advance civil rights objectives, the Court found that such activity was protected by the first amendment as part of the right “to engage in association for the advancement of beliefs and ideas.” Id. at 430, quoting NAACP v. Alabama, 357 U.S. 449, 460 (1958).
the disciplinary action. The Court held that a state may not punish a lawyer "who, seeking to further political and ideological goals through associational activity, including litigation, advises a lay person of her legal rights and discloses in a subsequent letter that free legal assistance is available from a nonprofit organization with which the lawyer and her associates are affiliated." Whether the attorney's solicitations are protected by the first amendment is only a threshold question. In disciplinary proceedings, if the attorney loses the first amendment battle, he might still argue that his conduct was not unethical. In a business relations tort action, if there is no first

The Court has also relied upon Button to protect group legal activity against charges of solicitation and unauthorized practice of law where the legal activity did not involve racial discrimination or other constitutional claims. See United Transp. Union v. State Bar of Michigan, 401 U.S. 576 (1971) (union plan to protect members from excessive attorney fees); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967) (union employed attorney to assist members with workmen's compensation claims); Brotherhood of R.R. Trainmen v. Virginia Bar, 377 U.S. 1 (1964) (union recommended attorneys to members for personal injury claims). In United Transp. Union, the Court noted:

The common thread running through our decisions in NAACP v. Button, Trainmen, and United Mine Workers is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation. 401 U.S. at 585-86.


27. Id. at 414. Distinguishing Ohralk, the Court stressed that the attorney in Ohralk "was not engaged in associational activity for the advancement of beliefs and ideas: his purpose was the advancement of his own commercial interests." Id. at 438 n.32, citing Ohralk v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). As was pointed out in Ohralk, where an attorney solicits employment for pecuniary gain, the first amendment does not require the state to prove actual harm to the solicited individual in order to justify disciplinary action against the attorney. 436 U.S. at 464. The Court remarked:

The rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs. The rules were applied in this case to discipline a lawyer for soliciting employment for pecuniary gain under circumstances likely to result in the adverse consequences the State seeks to avert. In such a situation which is inherently conducive to overreaching and other forms of misconduct, the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed.

Id. On the other hand, the Primus opinion makes it clear that where the attorney's conduct involves political expression and association, the state must prove that harm from solicitation has actually occurred. 436 U.S. at 434.

28. Recently, the District of Columbia Court of Appeals amended its Code of Professional Responsibility to bar in-person solicitation only when it involves the use of false, fraudulent, misleading, or deceptive claims, the use of undue influence, or involves a potential client whose physical or mental condition would make unlikely the exercise of a reasonable, considered judgment as to the lawyer's solicitation. See 47 U.S.L.W. 2050 (July 25, 1978). Cf. note 21 supra (discussing the substantive evils which the ban on solicitation may constitutionally aim to prevent). See also Louisville Bar Ass'n v. Hubbard, 282 Ky. 734, 139 S.W.2d 773 (1940). In Hubbard, the court stated:

While it is not within keeping with the ethics of the profession, and we do not condone it, yet, an attorney may personally solicit business with impunity, where he does not take advantage of the ignorance, or weakness, or suffering, or human frailties of the expected clients, and where no inducements are offered them.

Id. at 739, 139 S.W.2d at 775 (emphasis added).
amendment protection, the attorney might contend that his conduct was not tortious.

The rule of the Restatement of Torts describing the elements of intentional interference with existing contractual relationships was adopted in Pennsylvania in 1961. The Restatement provides that “one who, without a privilege to do so, induces or otherwise purposely causes a third person not to (a) perform a contract with another, or (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby.” The Restatement (Second) of Torts modifies this approach by stating that the interference need only be improper in order to be actionable.

29. Restatement of Torts § 766 (1939).
31. Restatement of Torts § 766 (1939) (emphasis added). Section 767 provides:

In determining whether there is a privilege to act in the manner stated in § 766, the following are important factors:
(a) the nature of the actor’s conduct,
(b) the nature of the expectancy with which his conduct interferes,
(c) the relations between the parties,
(d) the interest sought to be advanced by the actor and
(e) the social interests in protecting the expectancy on the one hand and the actor’s freedom of action on the other hand.

Id. § 767. The Restatement further points out:
The issue in each case is whether the actor’s conduct is justifiable under the circumstances; whether, upon a consideration of the relative significance of the factors involved, his conduct should be permitted despite its expected effect of harm to another. Decision therefore depends upon a judgment and choice of values in each situation.

Id., Comment c.

32. Compare Restatement of Torts § 766 (1939) with Restatement (Second) of Torts § 766 (1979). The second Restatement provides:

One who intentionally and improperly interferes with the performance of a contract ... between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the third person’s failure to perform the contract.

Restatement (Second) of Torts § 766 (1979) (emphasis added).

The second Restatement lists the factors to consider in determining whether the actor’s conduct was “improper” as follows:
(a) the nature of the actor’s conduct,
(b) the actor’s motive,
(c) the interests of the other with which the actor’s conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor’s conduct to the interference and
(g) the relations between the parties.

Id. § 767. It should be noted that the draft version of the second Restatement did not include what is now paragraph (e) at the time the principal case was decided. See Restatement (Second) of Torts § 767 (Tent. Draft No. 23, 1977).

The “improper” interference test set forth in the new Restatement was considered necessary because “a crystallized set of definite rules as to the existence or non-existence of a privilege” has never developed within this branch of tort law. Restatement (Second) of Torts § 767, Comment b (1979). The new Restatement, however, like the original, recognizes that in a number of circumstances, courts have consistently found a privilege to cause interfer-
In Pennsylvania and elsewhere, the action for intentional interference with existing contractual relations has long been employed to try to protect attorney-client fee agreements. In the typical case, plaintiff alleges that defendant, in an adversarial context, deprived him of a fee by wrongfully inducing plaintiff’s client to settle a claim. A notable exception to this typical factual setting occurred in the Massachusetts case of Walsh v. O'Neill. In Walsh, plaintiff alleged that defendants, rival attorneys in a competitive context, wrongfully induced a large corporate client to terminate its long term relationship with plaintiff. The Supreme Judicial Court of Massachusetts refused “to extend to the attorney-client relationship the principle that interference with an existing business relationship, if malicious or without justification, is actionable even though the relationship is not founded in a contract.” The holding in Walsh was based on the public policy interest of assuring clients the freedom “to select an attorney, to change attorneys, and to seek and obtain advice as to the competency and suitability of any attorney for the particular need of the client.”

ence with the business relations of another. Compare id. §§ 768-74 with RESTATEMENT OF TORTS §§ 768-74 (1939).


35. In those cases where an attorney was sued directly or was the agent of the actual defendant, the issue of unethical solicitation did not arise or was not relevant. But see MacLeod v. Vest Transp. Co., 235 F. Supp. 369 (N.D. Miss. 1964). In MacLeod, the court refused to enjoin the defendant from settling the claim of plaintiffs’ client where plaintiffs had obtained employment through “shameless solicitation” and had thus sought the aid of equity with unclean hands. Id. at 372 (alternative basis for decision). None of the cases contained a first amendment argument and in almost all cases the attorneys had acted out of pecuniary motives. But see Bledsoe v. Watson, 30 Cal. App. 3d 105, 106 Cal. Rptr. 197 (1973) (constitutional right to challenge assertedly illegal expenditures of public funds). For the relevance of pecuniary motives in a first amendment context, see note 27 supra.

36. See RESTATEMENT OF TORTS § 772 (1939). The Walsh court noted, however, that if defendants had used unlawful means to induce a breach of the relationship, a cause of action would have arisen based on the "well recognized legal wrong." 350 Mass. at 918 n.1. 215 N.E.2d at 918 n.1.
Like the appellees in the principal case, the defendants in Walsh were not attempting to advance a client's interests, but were seeking to further their own interests by obtaining a client's business. According to both of the Restatements, a party may be privileged to interfere with the business relations of his competitor where, inter alia, the third party, whose business is sought, is free to deal with either of the competitors.\textsuperscript{39} Since it is universally recognized that clients are free to change attorneys,\textsuperscript{40} it is arguable that this privilege might apply to competition between attorneys. The Walsh court, however, did not examine the competitor's privilege in reaching its decision,\textsuperscript{41} and no other court has discussed this privilege in this context.\textsuperscript{42}

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Section 772 of the Restatement provides:

One is privileged purposely to cause another not to perform a contract, or enter into or continue a business relation with a competitor of the actor if:

(a) the relation concerns a matter involved in the competition between the actor and the competitor, and

(b) the actor does not employ improper means, and

(c) the actor does not intend thereby to create or continue an illegal restraint of competition, and

(d) the actor's purpose is at least in part to advance his interest in his competition with the other.

The original Restatement provides:

(1) One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if:

- (a) the relation concerns a matter involved in the competition between the actor and the competitor, and
- (b) the actor does not employ improper means, and
- (c) the actor does not intend thereby to create or continue an illegal restraint of competition, and
- (d) the actor's purpose is at least in part to advance his interest in his competition with the other.

(2) The fact that one is a competitor of the other for the business of a third person does not create a privilege to cause the third person to commit a breach of contract with the other even under the conditions stated in Subsection (1).

The corresponding provision in the new Restatement is similar but is stated in terms of "an existing contract terminable at will." See Restatement (Second) of Torts § 772 (1979).

39. See MacLeod v. Vest Transp. Co., 235 F. Supp. 369, 371 (N.D. Miss. 1964). Cf. ABA Code, supra note 12, DR 2-110(B)(4) (mandatory withdrawal by attorney when discharged by his client). The discharged attorney, however, would be entitled to compensation for his services. See Sundheim v. Beaver County Bldg. & Loan Ass'n, 140 Pa. Super. Ct. 529, 14 A.2d 349 (1940). The judicial trend seems to favor limiting the attorney to a claim in quantum meruit for the reasonable value of his services. See, e.g., Fracasse v. Brent, 6 Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972); In re Estate of Poli, 132 N.J. Super. 222, 338 A.2d 888 (Mercer County Ct., Prob. Div. 1975). It has also been held, however, that discharge of the attorney without cause constitutes a breach of contract by the client, entitling the attorney to damages which could potentially equal the agreed fee. See Williams v. Philadelphia, 208 Pa. 282, 57 A. 578 (1904). In Pennsylvania, both the quantum meruit and breach of contract theories have been applied. See id.; Sundheim v. Beaver County Bldg. & Loan Ass'n, 140 Pa. Super. Ct. 529, 14 A.2d 349 (1940); 54 Dick. L. Rev. 465 (1950). For a discussion of the factors that a court will consider in determining the compensation payable to an attorney, see LaRocca Estate, 431 Pa. 542, 546, 246 A.2d 337, 339 (1968).

40. See notes 35-38 and accompanying text supra.

41. Courts may be unwilling to treat the terminable aspect of the attorney-client relationship as justification for permitting competition between lawyers. See generally Bennett v.
Even if a court were willing to apply the competitor’s privilege in the attorney-versus-attorney context and thereby defeat the cause of action based on contractual interference, other principles might pertain where the defendant was soliciting clients of his former employer. It is well established in Pennsylvania that solicitation of a former employer’s customers may be enjoined where it involves the use of “a particular secret of the business, of value to the employer and wrongfully appropriated by the employee.” It is the confidential character of the information, not the manner in which it was taken, that determines whether it is a trade secret, and to be entitled to equitable protection, it must be “confidential and secret information obtained as a result of the trust and confidence of previous employment.” In some Pennsylvania cases, these principles have been applied to protect customer information, including lists of customers’ names.

Sinclair Nav. Co., 33 F. Supp. 14 (E.D. Pa. 1940). “Parties may settle and compromise their litigation without consulting counsel, but such right of settlement does not confer the right to interfere with the contractual obligations existing between counsel and client.” Id. at 15.

43. The principal case and Walsh appear to be the only reported decisions involving solicitation of clients by former law associates. In Walsh, it was alleged that one of the defendants had learned of the client’s situation “because of his confidential relationship with the plaintiff as special counsel for the corporation engaged by the plaintiff.” 350 Mass. at 587, 215 N.E.2d at 916. The Walsh court, however, did not base its decision on the unfair competition issue. See notes 35-38 and accompanying text supra.


It is not a phenomenal thing in American business life to see an employee, after a long period of service, leave his employment and start a business of his own or in association with others. And it is inevitable in such a situation, where the former employee has dealt with customers on a personal basis that some of those customers will want to continue to deal with him in his new association. This is so natural, logical and part of human fellowship, that an employer who fears this kind of future competition must protect himself by a preventive contract with his employee, unless, of course, there develops a confidential relationship which of itself speaks for non-disclosure and non-competition in the event the employer and employee separate.

Id. at 363-64, 162 A.2d at 375.

It is viewed as unethical for an attorney who employs another attorney to require the latter to refrain from practicing law in the city and county for a limited period upon termination of the employment. ABA Comm. on Professional Ethics, Opinions, No. 300 (1961) (presupposes that it is unethical for a lawyer to solicit the clients of his former employer). See also ABA Comm. on Professional Ethics, Informal Decisions, No. C-787 (1964).

45. See Van Prods. Co. v. General Welding and Fabricating Co., 419 Pa. 248, 262-63, 213 A.2d 769, 777 (1965). An injunction may be issued when the employee carried the information away in his memory or in written form. Id. at 262, 213 A.2d at 777. It is not meaningful that the employee may have personally compiled the information. Id. at 263, 213 A.2d at 777.


In Adler Barish, a tort action by a law firm against former associates, appellees argued that the first and fourteenth amendments to the Constitution of the United States protected their efforts to solicit the clients of their former employer.\textsuperscript{49} Addressing the constitutional issue first, the Supreme Court of Pennsylvania noted that appellees' solicitation of the Adler Barish clients exceeded the advertising activity permitted under Bates\textsuperscript{50} and violated the Code of Professional Responsibility.\textsuperscript{51} Viewing appellees' interest in financial gain as "vastly different" from the pursuit of ideological goals by the attorney in Primus,\textsuperscript{52} the court found Ohralik apposite.\textsuperscript{53} Appellees' active attempts to induce the clients to change law firms, coupled with their concern for their line of credit and the success of their new law firm, created, according to the Adler Barish court, an atmosphere in which their contacts "posed too great a risk that clients would not have the opportunity to make a careful, informed decision."\textsuperscript{54} Relying upon Ohralik, the court reasoned that regulation of appellees conduct was constitutionally permissible.\textsuperscript{55}

Having thus rejected appellees' first amendment defense, the court turned to the merits of Adler Barish's tort claim. The court adopted the position of the Restatement (Second) of Torts as the test for determining whether there was a tortious interference with existing contractual relations.\textsuperscript{56} In applying this test, the Adler Barish court stated that "the sole dispute is whether appellees' conduct is 'improper.'"\textsuperscript{57} In resolving this issue, the Supreme Court of Pennsylvania reiterated that the in-person solicitation of Adler Barish's clients violated the Code of Professional Responsibility\textsuperscript{58} and observed that ethical codes could be significant considerations in applying the rule of the Restatement.\textsuperscript{59} The court further found that Adler

\textsuperscript{49} See generally notes 1-11 and accompanying text supra.
\textsuperscript{50} \textit{Id.} at \textit{n.19}, 393 A.2d at 1179. For a discussion of Bates, see notes 13-17 and accompanying text supra. The Adler Barish court noted that the injunction still permitted appellees to send announcements of the formation of their new firm to "lawyers, clients, former clients, personal friends, and relatives." \textit{Id.} at \textit{n.20}, 393 A.2d at 1179, quoting ABA Code, \textit{supra} note 12, DR 2-102(A)(2). "This would include the very clients of Adler Barish whose business appellees sought." \textit{Id.} at \textit{n.21}, 393 A.2d at 1179, citing ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL DECISIONS, No. 861 (1963). For the relevant text of the injunction, see note 8 and accompanying text supra.
\textsuperscript{51} \textit{Id.} at \textit{n.22}, 393 A.2d at 1179-80.
\textsuperscript{52} \textit{Id.} at \textit{n.23}, 393 A.2d at 1180-81. For a discussion of Primus, see notes 22-27 and accompanying text supra.
\textsuperscript{53} See \textit{Id.} at \textit{n.24}, 393 A.2d at 1181-82. For a discussion of Ohralik, see notes 18-21 and accompanying text supra.
\textsuperscript{54} \textit{Id.} at \textit{n.25}, 393 A.2d at 1181.
\textsuperscript{55} \textit{Id.} at \textit{n.26}, 393 A.2d at 1183. \textit{Id.} at \textit{n.27}, 393 A.2d at 1183.
\textsuperscript{56} \textit{Id.} at \textit{n.28}, 393 A.2d at 1184. \textit{Id.} at \textit{n.29}, 393 A.2d at 1184. See ABA CODE, \textit{supra} note 12, DR 2-103(A). For the text of this rule, which was adopted verbatim in Ohio, see note 20 supra.
\textsuperscript{57} \textit{Id.} at \textit{n.30}, 393 A.2d at 1184. The Adler Barish court noted that "ethical codes . . . may . . . be significant in evaluating the nature of the actor's conduct as a factor in determining whether his interference with the plaintiff's economic relations was improper or not." \textit{Id.} at \textit{n.31}, quoting \textit{RESTAMENT (SECOND) OF TORTS § 767}, Comment c (Tent. Draft No. 23, 1977). For the text of § 767, see note 32 supra.
Barish's contingent fee agreements with its clients were sources of anticipated revenue which were protected from outside interference.\textsuperscript{60}

Finally, the \textit{Adler Barish} court pointed out that appellees had a right to compete with their former employer but, in pursuing their interests, had taken advantage of confidential information—the details and status of the cases to which they had been assigned.\textsuperscript{61} The court refused to condone the use of confidential information in a manner that "unduly suggested a course of action for Adler Barish clients and unfairly prejudiced Adler Barish."\textsuperscript{62}

In his dissenting opinion, Justice Manderino argued that the majority's reliance upon \textit{Ohralik} was misplaced, particularly because there was no indication of an "arm-twisting device pressuring clients to make an immediate response"\textsuperscript{63} or an attempt to "stir up litigation."\textsuperscript{64} He argued that the majority was wrong "to prohibit not only what is a protected form of direct solicitation under the First Amendment but to prohibit an attorney from truthfully informing a client about the client's legal rights."\textsuperscript{65}

It is submitted that the distinctions between \textit{Adler Barish} and \textit{Ohralik}, which the majority failed to explore, are even greater than Justice Manderino's dissent suggested. For example, the \textit{Ohralik} Court emphasized the direct, in-person nature of the attorney's solicitations in that case.\textsuperscript{66} The \textit{Adler Barish} court ignored any possible distinctions between in-person contacts and telephone calls or letters even though appellees employed all of these forms of communication.\textsuperscript{67} Another major difference between the

\begin{itemize}
  \item \textsuperscript{60} Id. at ____, 393 A.2d at 1184-85.
  \item \textsuperscript{61} \textit{Id.} at ____, 393 A.2d at 1185. The court noted that appellees' right to compete with Adler Barish was limited by the rule that an agent "has a duty to the principal not to take advantage of a still subsisting confidential relation created during the prior agency relation." \textit{Id.}, quoting \textit{Restatement (Second) of Agency} § 396(d) (1958).
  \item \textsuperscript{62} Id. at ____, 393 A.2d at 1185.
  \item \textsuperscript{63} \textit{Id.} at ____, 393 A.2d at 1187-88 (Manderino, J., dissenting).
  \item \textsuperscript{64} \textit{Id.} at ____, 393 A.2d at 1188 (Manderino, J., dissenting).
  \item \textsuperscript{65} \textit{Id.} Justice Manderino would have affirmed the superior court, based on the opinion of either Judge Hoffman or Judge Spaeth. \textit{Id.} at ____, 393 A.2d at 1187-88 (Manderino, J., dissenting). In the Superior Court of Pennsylvania, Judge Hoffman, speaking for the court, concluded that the contacts between appellees and Adler Barish's clients were privileged and, therefore, immune from liability under the general test of §§ 766 and 767 of the Restatement. 252 Pa. Super. Ct. at 567, 382 A.2d at 1233 (plurality opinion). See note 31 and accompanying text \textit{supra}. In finding that a privilege existed, Judge Hoffman relied heavily upon the reasoning in \textit{Bates} and considered the controlling factor to be the clients' "significant interest in expeditious handling of their case by the attorney of their choice." 252 Pa. Super. Ct. at 565, 382 A.2d at 1232-33. Because Judge Hoffman found that appellees' solicitations were privileged, he did not determine whether the communication was also protected under the first amendment. \textit{Id.} at 559 n.5, 382 A.2d at 1229 n.5. Judge Spaeth, on the other hand, believed that \textit{Bates}, though factually distinguishable, was dispositive. \textit{Id.} at 568-72, 382 A.2d at 1234-36 (Spaeth, J., concurring). His reasons for concluding that \textit{Bates} was controlling were: 1) like the advertisement in \textit{Bates}, the letters here were a form of commercial speech, \textit{id.} at 570, 382 A.2d at 1234 (Spaeth, J., concurring); 2) \textit{Bates} protected the flow of information to those who had no lawyer and to those who, like the Adler Barish clients, already had a lawyer and might decide to change, \textit{id.} at 571-72, 382 A.2d at 1235-36 (Spaeth, J., concurring); 3) there was neither misrepresentation nor a showing of undue influence. \textit{Id.} at 572, 382 A.2d at 1236 (Spaeth, J., concurring).

  \item \textsuperscript{66} See 436 U.S. at 454-55.
  \item \textsuperscript{67} See ___. \textit{Pa.} at ____, 393 A.2d at 1177-78. Excepting formal announcement of appellees' new firm, the Pennsylvania court's broad injunction prohibited all communication with the Adler Barish Clients. \textit{See id.} at ____, 393 A.2d at 1178; note 8 and accompanying text \textit{supra}.\end{itemize}
cases lies in the extent to which the solicited persons had been exposed to the legal system. The *Ohralik* Court suggested that there might be a "critical distinction" where the person being solicited had had prior contact with an attorney.68 The persons who were solicited by the appellants in *Adler Barish* had not only contacted attorneys, but also had hired those attorneys, and, in fact, their cases had been assigned to appellants.69 In addition, it was stressed in *Ohralik* that the two young women who were solicited by the attorney were only eighteen years old and were victims of a serious automobile accident which had occurred only ten days earlier.70 The *Adler Barish* opinion did not consider the physical or mental status of the clients solicited by appellants. Finally, there is a marked contrast in the way these cases developed. *Ohralik* was a disciplinary case which arose when the solicited individuals complained to the local bar association.71 In contrast, *Adler Barish* was a tort suit instituted by a firm of attorneys trying to protect their fees.72 There were no complaints from the clients, who are the persons ostensibly protected by the rules against solicitation.73

In view of this tenuous relationship between the cases, the *Adler Barish* court's reliance upon *Ohralik* seems difficult to justify. When *Ohralik* was decided, Justice Marshall suggested that it represented an extreme case.74 It is submitted that the mere existence of appellants' concern for their credit line and for the success of their new law firm75 would not create the type of

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68. See 436 U.S. at 464-65. The *Ohralik* Court noted:
   Most lay persons are unfamiliar with the law, with how legal services normally are
   procured, and with typical arrangements between lawyer and client. To be sure, the same
   might be said about the lay person who seeks out a lawyer for the first time. But the
   critical distinction is that in the latter situation the prospective client has made an initial
   choice of a lawyer at least for the purposes of a consultation; has chosen to seek legal
   advice; has had a prior opportunity to confer with family, friends, or a public or private
   referral agency; and has chosen whether to consult with the lawyer alone or accompanied.

69. ___ Pa. at ___, 393 A.2d at 1177-78.

70. See 436 U.S. at 449-51. In discussing Ohralik's activities, the Court noted:
   He approached two young accident victims at a time when they were especially in-
   capable of making informed judgments or of assessing or protecting their own interests.
   He solicited Carol McClinstock in a hospital room where she lay in traction and sought out
   Wanda Lou Holbert on the day she came home from the hospital, knowing from his prior
   inquiries that she had just been released.

Id. at 465 n.24 (emphasis added).

71. Id. at 467.

72. ___ Pa. at ___, 393 A.2d at 1177.

73. See generally Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Berlant Appeal, 458

74. See Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 471 (1978) (Marshall, J., concurring in
   part). Justice Marshall suggested that one of the "intermediate situations" not addressed by
   the Court in *Primus or Ohralik* was the commercial but otherwise "benign" solicitation of
   clients by an attorney. Id. at 472 (Marshall, J., concurring in part). In a footnote, he added:
   By "benign" commercial solicitation, I mean solicitation by advice and information
   that is presented in a noncoercive, nondeceitful and dignified manner to a potential client
   who is emotionally and physically capable of making a rational decision either to accept or
   reject the representation with respect to a legal claim or matter that is not frivolous.

Id. n.3 (Marshall, J., concurring in part), citing Louisville Bar Ass'n v. Hubbard, 282 Ky. 734,
   139 S.W.2d 773 (1940).

75. See ___ Pa. at ___, 393 A.2d at 1181.
coercive atmosphere that troubled the *Ohralik* Court. Moreover, the *Adler Barish* opinion did not discuss the possibility that the clients might actually be interested in that which appellees were attempting to tell them. In discussing first amendment protection for commercial speech, the Court in *Bates* noted that the “listener's interest is substantial.”

Some of the Adler Barish clients, it is submitted, might desire that appellees continue to handle their cases, and appellees’ letters merely purported to inform the clients that this would be possible even though appellees would no longer be associated with the Adler Barish firm.

Difficulties also exist with respect to the court’s handling of the tort claim itself. In resolving the issue, the *Adler Barish* court applied the Restatement’s general rule regarding interference with contractual relations but did not mention the Restatement’s companion rules concerning specific privileges.

It is submitted that a colorable argument can be made for the applicability of either the privilege afforded competitors or the privilege which pertains to the giving of truthful advice. Moreover, in finding that appellees had “improperly” interfered with Adler Barish's contingent fee agreements, the court placed primary emphasis on the bar’s rule against

76. 433 U.S. at 364. The Court in *Bates* stated:

[The consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. . . . And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system.]


77. See 252 Pa. Super. Ct. at 564-65, 382 A.2d at 1232 (plurality opinion). Judge Hoffman noted:

Many of the clients have dealt personally both with partners in Adler, Barish and the associate to whom the case was assigned. In some instances, the associate may have developed the client's trust and faith in his professional competence, despite the fact that the partner may have procured the client's business. Having one's file transferred to a new associate will undoubtedly engender additional cost and time to the client. That may well be contrary to the client's best interest.

Id.

78. For the text of the form letter, see note 4 supra. It may be significant, however, that the letters do not mention the manner in which the fees would be handled if the clients were to change attorneys. See generally note 40 and accompanying text supra.

79. ___ Pa. at ___, 393 A.2d at 1183.

80. See Restatement (Second) of Torts §§ 768-774 (1979). See generally notes 29-32 and accompanying text supra.

81. See Restatement (Second) of Torts § 768 (1979). For a discussion of the competitor's privilege, see notes 39-42 and accompanying text supra.

82. See Restatement (Second) of Torts § 772 (1979). The corresponding section in the original Restatement has been applied in the attorney-versus-attorney context. See Walsh v. O'Neill, 350 Mass. 586, 215 N.E.2d 915 (1960). For a discussion of Walsh, see notes 35-38 and accompanying text supra.

The Supreme Court of Pennsylvania has previously stated: "Anyone has the right to advise a person in legal difficulties to change lawyers just as one concerned about a friend's health may recommend him to a doctor other than the one presently prescribing for him. Such advice, however, must not be accompanied with threats." Richette v. Pennsylvania R.R., 410 Pa. 6, 15, 187 A.2d 910, 915 (1963) (found that employer had coerced injured employee into signing revocation of power of attorney).
solicitation. According to the Restatement, violation of an ethical rule is only one of several factors which may relate to the "nature" of the allegedly tortious conduct, and the nature of the conduct is only one of several factors which should be considered in determining whether the interference was "improper." The court's analysis, however, did not reflect the balancing process contemplated by the Restatement. It also seems difficult to accept, as the primary basis for preserving Adler Barish's legal business, a rule which was intended not to protect attorneys but to protect laymen.

It is submitted that the unfair competition aspect of the principal case, which the court addressed only briefly at the end of the opinion, may have been a more appropriate focal point for its analysis than the ethical rules against solicitation. Aside from the ethical issue, there was a question whether the contacting of Adler Barish's clients involved unfair competition by improper use of trade secrets or confidential information which appellees had previously obtained during their employment by Adler Barish. It is submitted that no precedent exists to support first amendment protection for unfair business practices. Had the court initially focused upon the competition issue, it could have rejected the first amendment defense without having to rely upon Ohralik. Furthermore, since the court found that appellees had improperly used "confidential information," it could have resolved the tort issue without having to rely upon the ethical rules.

It is nevertheless submitted that difficulties exist with Adler Barish even when viewed as an unfair competition case. It is true that appellees obtained confidential information through their positions as trusted employees of Adler Barish. There is, however, no indication that appellees used any confidential information other than the names of the clients

83. See Pa. at ___, 393 A.2d at 1184.
84. See Restatement (Second) of Torts § 767, Comment c (1979). For the text of this section, see note 59 supra.
85. See Restatement (Second) of Torts § 767 (1979). For the text of this section, see note 32 supra.
86. The Supreme Court of Pennsylvania has stated that the legal profession's "proscription against self-recommendation in DR 2-103" is intended "to eliminate the active recruitment of clients and stirring up of litigation by or on behalf of attorneys." Berlant Appeal, 458 Pa. 439, 443, 328 A.2d 471, 474 (1974), cert. denied, 421 U.S. 964 (1975). See generally notes 12-27 and accompanying text supra.
87. See Pa. at ___, 393 A.2d at 1184-85.
88. See generally notes 43-48 and accompanying text supra.
89. Speech may be entitled to constitutional protection even though it proposes "a mundane commercial transaction." Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977). It has never been contended, however, that the speech element in the solicitation of business outweighs the state's interest in preventing predatory business practices. See also Judge Hoffman's opinion in the court below. 252 Pa. Super. Ct. at 566, 382 A.2d at 1233.
90. For a critical analysis of the court's reliance upon Ohralik, see notes 66-78 and accompanying text supra.
91. Pa. at ___, 393 A.2d at 1185.
92. For a critique of the court's reliance upon the ethical rules, see notes 83-86 and accompanying text supra.
93. Pa. at ___, 393 A.2d at 1185.
and the fact that the clients were involved in active cases. The Supreme Court of Pennsylvania has held that where customer retention is primarily dependent upon personal contact with the employees, customer lists are not protectible from use by the employees if they later become competitors.

It is submitted that application of this rule to the principal case may have been warranted given the personal nature of the attorney–client relationship and the fact that the clients solicited by appellees were the ones who had been assigned to appellees during their employment. Finally, the Adler Barish court emphasized that appellees had used the confidential information in a way that "unduly suggested a course of action for Adler Barish clients." It is suggested, however, that the use of high pressure salesmanship would be a separate issue not to be confused with the competitive use of customer information.

The scope of the Adler Barish decision is difficult to define. Since the court emphasized the financial pressures on appellees and disregarded the competence of the clients, it is arguable that a different result might occur where the attorney–defendant has not obtained credit on the strength of anticipated revenues from the clients he is soliciting. Notwithstanding the Pennsylvania court's silence on the matter, Ohralik would seem to suggest a stronger case for the defendant where the solicited client is, for example, a large corporation. Furthermore, assuming the absence of financial pressure on the soliciting attorney or undue influence upon the client, it is unclear whether Adler Barish would protect a law firm against competition.

94. See generally id. at , 393 A.2d at 1177-78. In the superior court, Judge Hoffman stated:

The only confidential information which . . . [appellees] attempted to use was the names of the various clients; they certainly did not attempt to breach the attorney–client privilege by revealing to other parties information about ongoing cases. Further, . . . [Adler Barish] did not attempt to protect the interest now asserted by contractual agreement with . . . [appellees].

252 Pa. Super. Ct. at 564, 382 A.2d at 1232 (plurality opinion).


96. See id. Holding that route listings in the retail dairy industry could not be considered trade secrets, the court stated:

The most significant factor in the retention of customers in the retail dairy industry is the personal contact with the route drivers. This is fostered in part by the high minimum standards of product quality required by the government and the industry itself. This relationship is the foremost working tool of the driver-salesman and is his own work product.

Id. at 283-84, 203 A.2d at 473.

97. Id. at , 393 A.2d at 1185.

98. See Carl A. Colteryahn Dairy, Inc. v. Schneider Dairy, 415 Pa. 276, 203 A.2d 469 (1964). The court held that solicitation of a former employer's customers by former employees may not be enjoined where customer retention is primarily dependent upon personal contact with employees. Id. at 282, 203 A.2d at 472. A court may, however, enjoin false and misleading representations as to circumstances under which former employees left employment when such representations are intended to play on the sympathies of the customers and influence them to continue dealing with the employees in their new business. Id. at 284, 203 A.2d at 473.

99. See Pa. at , 393 A.2d at 1181. For a discussion of the court's reasoning, see text accompanying note 54 supra.

100. Cf. 436 U.S. at 465 n.24 (distinguishing lay person who has sought out lawyer for the first time from most lay persons who are unfamiliar with the law).
from a stranger\textsuperscript{101} or from a former partner as opposed to a former salaried associate.\textsuperscript{102}

Another distinguishable situation might occur where the departing attorney merely sends a letter to the client announcing his departure and the client's right to hire him but does not enclose any form letters or make any in-person solicitations.\textsuperscript{103} Even if the attorney merely announced the formation of his new firm, as would be permissible under Adler Barish,\textsuperscript{104} it is conceivable that a client, receiving the announcement, might contact the attorney. In that event, the attorney could presumably advise the client of his right to be represented by him, his former employer, or any other qualified attorney.\textsuperscript{105} It is submitted that this, at least in substance, was the information conveyed by the appellees in Adler Barish.\textsuperscript{106}

The central question in Adler Barish was whether appellees had committed a business related tort. Since appellees were attorneys, the court's analysis was heavily influenced by the legal profession's rules against solicitation of clients. Absent those rules, it is submitted that the analysis, if not the ultimate outcome, would have been quite different. At the least, the court's emphasis upon the legal profession's rules of ethics seems to give established law firms a competitive advantage not enjoyed by their counterparts in other industries.

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\textsuperscript{101} See \textit{___} Pa. at \textit{___}, 393 A.2d at 1185. The court found that appellees had exceeded the limits of their right to compete with their former employer because they had taken advantage of a confidential relation. \textit{Id.} See notes 61 & 62 and accompanying text supra. In discussing that confidential relation, the court noted:

Appellees' contacts were possible because Adler Barish partners trusted appellees with the high responsibility of developing its clients' cases. From this position of trust and responsibility, appellees were able to gain knowledge of the details, and status, of each case to which appellees had been assigned. In the atmosphere surrounding appellees' departure, appellees' contacts unduly suggested a course of action for Adler Barish clients and unfairly prejudiced Adler Barish.

\textit{___} Pa. at \textit{___}, 393 A.2d at 1185.

\textsuperscript{102} In forming Adler Barish, the partners brought with them cases from their old law firm, Freedman, Borowsky, and Lorry, and the two firms later signed an agreement giving Adler Barish custody and control of the cases transferred. \textit{___} Pa. at \textit{___} n.3, 393 A.2d at 1177 n.3. Where law partners have agreed, upon termination of the partnership, not to do business with a client designated as that of another partner, such agreement has been held void for public policy reasons because it restricted the clients in their choice of counsel. Dwyer v. Jung, 133 N.J. Super. 343, 336 A.2d 498 (Super. Ct. Ch. Div.), aff'd, 137 N.J. Super. 135, 348 A.2d 208 (Super. Ct. App. Div. 1975), noted in \textit{4 Fordham Urb. L. J.} 195 (1975). See also Rutstein, \textit{Handling the Breakup of a Professional Practice}, 21 FRAC. LAW. 57 (Dec. 1975).

\textsuperscript{103} See \textit{___} Pa. at \textit{___}, 393 A.2d at 1177-78. The court noted:

After making Adler Barish clients expressly aware that appellees' new firm was interested in procuring their active cases, Epstein provided the clients the forms that would sever one attorney-client relationship and create another. Epstein's aim was to encourage speedy, simple action by the client. All the client needed to do was to "sign on the dotted line" and mail the forms in the self-addressed, stamped envelopes.

\textit{Id.} at \textit{___}, 393 A.2d at 1181.

\textsuperscript{104} See \textit{id.} at \textit{___}, 393 A.2d at 1178.

\textsuperscript{105} See notes 46-48 and accompanying text supra. See generally ABA Code, \textit{supra} note 12, DR 2-104(A)(1).

\textsuperscript{106} See \textit{___} Pa. at \textit{___}, 393 A.2d at 1186.