INDECENT PROPOSAL: ABRAHAM SOFAER, LIBYA AND THE APPEARANCE OF IMPROPRIETY

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In the wake of evidence linking Libya to the tragic 1988 bombing of Pan American Airlines flight 103 (Pan Am 103) over Lockerbie, Scotland, Colonel Muammar el-Qaddafi approached several prominent United States lawyers, businessmen, and lobbyists, seeking assistance in avoiding United Nations sanctions. Although many lawyers refused, Abraham Sofaer and his law firm, Hughes, Hubbard and Reed, accepted Qaddafi's government as a client in connection with the Pan Am 103 bombing. But after only a week, the former law professor, federal judge, and, most significantly, State Department Legal Adviser, announced that his firm had dropped the unpopular client, citing as reasons for the decision, "the public perception of this undertaking and the reaction of government authorities."

As the highest ranking State Department lawyer between 1985 and 1990, Sofaer was involved in formulating the United States government’s


2. See Sharon Walsh, Former U.S. Official Drops Libya as Client After Outcry, WASH. POST, July 17, 1993, at A1. In the year preceding Sofaer's agreement to the representation, Libya had been turned away by several leading Washington lawyers, including Brendan Sullivan, former Senator John Culver, and Thomas Hale Boggs Jr. See id. As one lawyer commented, "Life is too short to represent people who get you in trouble." Id.

legal policy with regard to international terrorism—specifically, to Libya. In addition, Soffar and his staff crafted the legal justification for the United States military strike on Tripoli in 1986, an attack which many believe provoked the bombing of Pan Am 103. In light of this history, it was no surprise that Soffar's representation of Libya in 1993 caused widespread public obloqui, reflected in the comments of television personality Jay Leno who referred to Soffar's actions as "fresh proof lawyers will do anything for money."

More serious than the discomfort of public condemnation, however, were the official investigations which began shortly after the public became aware of Soffar's acceptance of Libya as a client. Senator Carl Levin requested the Office of Government Ethics to investigate whether Soffar had violated any federal ethics laws. A federal grand jury investigated whether Soffar or his firm made false statements in applying to the Treasury Department's Office of Foreign Assets Control for a license to represent the government of Libya. And finally, the District of Columbia Bar charged Soffar with violations of its "revolving door" rule for government lawyers' professional conduct. Although neither Soffar nor his firm were charged with any violation of federal criminal law, the professional ethics charges remain pending before the D.C. Bar Board on Professional Responsibility (the Board).

4. See Walsh, supra note 2 ("There's no question [Soffar] was involved in shaping the department's legal analysis of Pan Am 103 and of U.S. responses to certain Libyan terrorist activities") (quoting Michael McCurry, State Department spokesman).


6. Walsh, supra note 2. It is likely Soffar and his firm received a sizeable retainer for accepting the representation. According to news reports, Libya offered other lawyers $1.5 million to represent it in connection with the Pan Am 103 bombing. See id.


8. See Walsh, supra note 5. Under Treasury Department regulations, any United States citizen doing business with Libya must obtain a license from the Treasury's Office of Foreign Assets Control. A party who makes false statements in such an application is punishable under 18 U.S.C. § 1001 (1994).

9. See Andrew Blum, Libya Ties Yield Bar Charges, NAT. L.J., Sept. 25, 1995, at A4. D.C. Bar Rule 1.11 prohibits a lawyer from accepting "employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee." D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1994).

The Sofaer case is being closely watched by government and private lawyers alike, as its resolution will undoubtedly influence their willingness to venture through the revolving door of government service. Not only must the Board revisit controversial policy questions affecting the careers of present and future United States government attorneys, but it must address novel ethical issues of interest to lawyers who practice in the somewhat esoteric realm of public international law. I will first discuss the policies traditionally forwarded in support of restricting the activities of lawyers after they leave government service and examine whether these policies apply equally to the State Department Legal Adviser. Next, I will address federal criminal law as it relates to the attorney who leaves government service and explain why Sofaer’s conduct was not unlawful under the Ethics in Government Act of 1978. I will then examine Rule 1.11 of the D.C. Rules of Professional Conduct (D.C. Rules) and the case law construing ethical restrictions on the revolving door in an attempt to determine whether Sofaer’s conduct was improper. Lastly, I will discuss the aspects of the Sofaer case which distinguish it from other revolving door cases and how this distinction requires that the “appearance of impropriety” be afforded greater weight in this context than in the typical revolving door scenario.

I. THE REVOLVING DOOR AND PUBLIC POLICY

A. Benefits to the Private and Public Sector

American public life traditionally has been marked by the movement, particularly of lawyers, back and forth between the private sector and government service. At the federal level, some six thousand political jobs change hands every four years; at the Department of Justice alone, the annual attorney turnover rate is fourteen percent.11 This professional diaspora inevitably creates conflicts of interest, and thus requires vigilant oversight. The benefits conferred on both government and the private sector by the revolving door, however, have made legislatures and courts

(At the time of this writing, the Board has taken the matter under submission, but has not yet issued an opinion.).

reluctant to unduly impede the movement of lawyers between government and private practice.

When a lawyer leaves government service, he carries with him a wealth of substantive and institutional experience of great benefit to private employers and clients. Young attorneys who accept government positions after graduating from law school often gain invaluable knowledge of, and experience in, highly technical areas of the law.12 Equally valuable to private employers is the institutional knowledge which attorneys acquire while in the government employ. Government lawyers acquire an understanding of the workings and procedures of an agency, which facilitates the attorney's future navigation through bureaucratic back channels.13 As one commentator has observed, "A lawyer cannot serve his clients adequately without knowing how the governmental process works . . . . There is no substitute for having seen the world from the government's side."14

The public sector benefits from the free movement of lawyers between the private and public sectors, as the revolving door greatly enhances the quality of government decision-making. Government gains from the experience and skill of private attorneys who enter public service even for short periods of time. The flow of legal talent through government also prevents the establishment of a permanent legal bureaucracy, an institution repugnant to the valued democratic ideal of citizen participation in government.15 If burdensome restrictions were placed on

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12. See id. at 111. Given this fact, as the legal market's trend toward specialization continues, one should expect the private sector's demand for ex-government attorneys to increase, even in the face of the ethical dilemmas such employment may pose.

13. See Michael L. Spak, America for Sale, 78 KY. L.J. 237, 274 (1990). See also Allied Realty of St. Paul, Inc. v. Exchange Nat'l Bank, 283 F. Supp. 464, 467 (D. Minn. 1968), aff'd 408 F.2d 1099 (8th Cir. 1969) ("Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed [and of its] procedures . . . . Certainly this is perfectly proper and ethical."). An ex-government lawyer has also learned how to craft arguments for presentation based on the informal practices and standards of his prior employer. See Spak, supra at 274.


15. See id.; see also Irving R. Kaufman, Comment, The Former Government Attorney and the Canons of Professional Ethics, 70 HARV. L. REV. 657 (1957). It has also been noted that the revolving door lends accessibility and legitimacy to
the revolving door, attorneys interested in government service would have to make a *de facto* career commitment to government service, resulting in conservative and myopic decision-making.¹⁶ This consequence, combined with the comparative lack of financial incentive to enter public service, would make recruitment of legal talent from the private sector a nearly impossible task.¹⁷

**B. Problems Created by the Revolving Door**

For all the benefits the revolving door bestows on our system of governance, it remains fraught with difficulties. In his testimony before the Subcommittee on Oversight of the Senate Governmental Affairs Committee in 1988, former Solicitor General and Watergate Special Prosecutor Archibald Cox identified four fundamental problems presented by the revolving door.¹⁸ First, an agency official may be tempted to curry favor with prospective employers or clients while still employed by the government.¹⁹ Second, an ex-government official may be able to use inside government actions through the communication of government policies by government alumni. *See* Thomas D. Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters Before an Agency*, 1980 DUKE L.J. 1, 56 (1980). Communication facilitates compliance with an agency's laws and regulations because there is "no better aid to voluntary compliance than the former government lawyer who has participated in shaping the regulation and has respect for both its goals and the good faith and dedication of the government servants implementing it." Mundheim, *supra* note 14, at 709.


¹⁷. Attorneys from the private sector also bestow less tangible benefits upon government service. As one time Department of Treasury General Counsel Robert Mundheim has written, "The flow of lawyers from private practice brings to us the variety of experience, the enormous energy, and the spirit of independence which leavens our work." Mundheim, *supra* note 14, at 708.


¹⁹. *See* id. This potential abuse was of particular concern to a panel of the Second Circuit in *General Motors Corp. v. New York*, 501 F.2d 639 (1974), which stated, "The ethical problem raised here, we repeat, does not stem from the breach of confidentiality bred by a conflict of interest, but from the possibility that a lawyer might wield Government power with a view toward subsequent private gain." *Id.*
information not available to the public for the benefit of his private employer or client.20 Third, the revolving door may give an ex-government lawyer an unfair advantage by allowing him to trade upon habits of deference engendered during his days as a government employee.21 The fourth problem created by the revolving door is the potential for unfair preferential treatment afforded to the ex-official, what Archibald Cox called "insidious influences."22 Lawyers who pass through the revolving door must also take heed of the warnings of the Canons of Professional Conduct, particularly Canon 9, which requires that members of the profession "avoid the appearance of impropriety," even where none exists.23 Although not specific to re-

at 650 n.20.

20. See Cox Testimony, supra note 18 at 470. See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 cmt. 3 (1994) ("power or discretion vested in public authority might be used for special benefit of a private client . . . . [U]nfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service.").

Of course, the potential misuse of non-public information is not limited to the revolving door context; it is one of the principal bases for conflict of interest regulation in the legal profession as a whole. See Armstrong v. McAlpin, 625 F.2d 433, 444 (2d Cir. 1980) (en banc), vacated on other grounds and remanded mem., 449 U.S. 1106 (1981). The concern for the protection of client confidences lies at the heart of the legal profession's prohibition on "switching sides" on the same case and on taking another substantially related case against a former client. See T.C. & Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

21. See Cox Testimony, supra note 18, at 470. It has been postulated that one reason for granting an ex-agency official special deference is the "protecting future employment" problem. See Developments in the Law—Conflict of Interest, supra note 16, at 1432-33. Concerned about their future opportunities in the private employment market, agency personnel may grant special deference to ex-agency lawyers in the hope that the favor will someday be returned. See id.

22. Cox Testimony, supra note 18 at 470. "The ex-official. . . comes as a friend, an insider, a 'player' . . . . At a minimum, [the ex-official] gets a little different hearing or preferred access. That advantage . . . may make the difference . . . And with the hearing, the risk of the influence of friendship, common political interests, and reciprocal back-scratching grow." Id. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(e) (1994) ("it is professional misconduct for a lawyer to state . . . or imply an ability to influence improperly a government agency or official").

volving door lawyers, the profession's concern for appearances is often implicated in their post-government activities. An ex-government lawyer is often retained for his experiences in the public sector. When he is instead hired for his influence and privilege, the once valued asset of public service becomes a liability, especially in the court of public opinion. As the American public has become increasingly more cynical about the activities of lawyers and of government in general, ex-government lawyers must be equally as vigilant in their attempts to avoid the appearance of impropriety in their private professional activities.

C. The Legal Adviser and the Revolving Door

1. Duties and Responsibilities of the Legal Adviser.—The Legal Adviser and his staff of over one hundred lawyers are generally responsible for advising the Secretary of State on issues of international law which arise in the course of the work of the Department of State. The office's duties include ascertaining and applying international law as recognized by the United States government; concluding, interpreting and administering over six thousand treaties and international agreements to which the United States is a party; and carrying out other international legal functions, such as representing the United States in international organizations and before international tribunals. Given the broad scope and significance of the work of the office, the Legal Adviser is often integrally involved in formulating and implementing United States foreign policy.

These duties and responsibilities distinguish the Office of the Legal Adviser from the general counsel of other executive agencies in two

1981) (noting the importance of an ex-government lawyer avoiding the appearance of impropriety).

24. "Few things are more discouraging and demoralizing to honorable public servants and to the American people than the spectacle of public officials cashing in on their positions of public trust." McBride, supra note 18, at 470.

25. See generally Richard B. Bilder, The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs, 56 AM. J. INT'L L. 633 (1962). The Office of the Legal Adviser is also from time to time called upon by other governments, other U.S. government agencies, Congress, the courts, state officials, and private companies and individuals for its views concerning questions of international law. See id. at 641.

26. For a comprehensive description of the work of the Office of the Legal Adviser, see id. at 639-654.
significant respects. First, the Legal Adviser has two clients, each of which operates within the framework of a different, but not always separate and distinct, legal system. On the one hand, like the general counsel for other executive agencies, he represents the interests of his agency within the domestic legal system. His other client, however, is one of over 160 nations whose statements, actions and interactions constitute the body of international law. Given the prominence of the United States within the international society of nation-states, the work of the Legal Adviser and his office significantly affects the content and integrity of international legal rules and institutions.

Second, the Legal Adviser’s advice is subject to very weak external checks. Because issues of international law are not often litigated in domestic or international courts, the work of the Legal Adviser is rarely subject to judicial review. Even when his views are scrutinized, domestic courts, other executive agencies and even members of Congress are traditionally deferential to his position. Likewise, there is very little

27. See Current Development—The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association, 85 AM. J. INT’L L. 358, 360-62 (1991) [hereinafter ASIL Report]. The Joint Committee found four distinctions, but I will address in detail only the two which have the greatest bearing on the revolving door. See id.

28. Although the Legal Adviser does not appear in domestic courts on behalf of the agency (the Department of Justice performs this function), his office is nevertheless responsible for ensuring that the State Department’s interests are afforded consideration in the domestic legislative and judicial sphere.

29. See ASIL Report, supra note 27, at 361.

30. See id. The three primary sources of international law are treaties, customary international law and general principles of law. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 36, 59 Stat. 1055. Because the United States is a frequent actor in international relations, its statements and actions play a substantial role in defining international law.


32. See ASIL Report, supra note 27, at 361. Another instance in which the Legal Adviser is accorded great deference by domestic courts occurs when a court is faced with a need for the United States government’s interpretation or position on certain international law questions. In these situations, a court can request the Legal
public oversight of the Legal Adviser's work, simply because other officials, the media and the public generally have minimal expertise in public international law.\textsuperscript{33}

2. The Legal Adviser and Revolving Door Concerns.—The legal and ethical problems of the revolving door are of equal relevance to the post-government activities of the Legal Adviser. In fact, in some circumstances the unique nature of the Legal Adviser's position increases the need for concern over his post-government professional activity.

First, the danger that a government attorney may attempt to curry the favor of prospective employers and clients while in office is as much a concern with the Legal Adviser as it is with other government lawyers. He could advance interpretations of treaty obligations which favor particular private parties or foreign governments, or use his influence within the State Department and the White House to direct foreign policy in a manner favoring some interests over others.\textsuperscript{34} The opportunity, therefore, exists for the Legal Adviser to direct State Department legal policy with an eye on post-government employment opportunities.

The second potential revolving door problem, the misuse of inside information, also remains a concern in this context. Because the Legal Adviser participates substantially in the workings of United States foreign policy, he has broad access to non-public information.\textsuperscript{35} The data upon

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Adviser's office to provide it with a "statement of interest." \textit{See} 28 U.S.C. § 517 (1994). This statement is afforded great weight and can be dispositive in many cases.

\textsuperscript{33} \textit{See ASIL Report, supra note 27, at 361.}

\textsuperscript{34} The ASIL Report highlighted the unique pressures of the position as another factor distinguishing the Legal Adviser from other executive agency general counsel. \textit{See id.} Because he is often under substantial pressure to "bend" or ignore international law in order to support policy decisions, the position requires a person with sufficient reputation, integrity and forcefulness to resist. \textit{See id.} The pressures of the job also require that he maintain a close relationship with the President and Secretary of State. These two attributes enable the Legal Adviser to affect foreign policy to benefit future employers or clients.

\textsuperscript{35} A large degree of the Legal Adviser's work, and information to which he is privy, is classified for national security reasons. Although the misuse of confidential information is governed by criminal statute (\textit{see} 18 U.S.C. § 798 (1994)), the use of information acquired while employed by the government need not be criminal to present problems associated with the revolving door. After all, it is unlikely that federal criminal law is sufficient to protect valuable confidential information that is not strictly "classified," \textit{e.g.,} knowledge of the interests considered, of the positions
which his legal advice may rely comes from a number of diverse sources, including the various bureaus of the State Department and its overseas missions,\textsuperscript{36} other Executive agencies and foreign governments. In particular, his inside knowledge of the interests driving government policy could be useful to a client who is affected by or seeks to change that policy.

The potential for trading on habits of deference and for availing himself of insidious influences, the third and fourth problems created by the revolving door, are likewise implicated in the post-government activities of the Legal Adviser, but for different reasons than in the ordinary revolving door context. Traditionally, our concern is with a lawyer’s ability to use his influence in appearances before an agency with which he was once employed. However, one rarely represents a client before the State Department, as the agency does not generally perform the conventional administrative functions of adjudication and rulemaking.\textsuperscript{37} Nevertheless, in the complex world of international relations, contacts within the State Department could assist an attorney in promoting the interests of his client, particularly if those contacts have influence over foreign policy. In a broader sense, the credibility bestowed upon the ex-Legal Adviser by his previous position may have a more subtle, but nevertheless improper, effect on those to whom he must argue on behalf of his client.\textsuperscript{38}

\textsuperscript{36} A short survey of the bureaus that make up the State Department reveals the broad scope such information can cover. For instance, information could come from any of the Department’s five regional bureaus or its bureaus of Law Enforcement and Intelligence, Political-Military Affairs and Economics and Business. Data from such a wide variety of sources could be of value to any number of nations or companies engaged in international commerce.


\textsuperscript{38} On this point I would posit whether such influence is really improper. After all, a judge would give the arguments of Professor Lowenfeld more credence than those of the author of this paper. Clearly, Professor Lowenfeld has not engaged in improper conduct by mere virtue of his success in his field. In the case of the Legal Adviser, however, past government service in that position tends to stamp one’s
Finally, the unique nature of his position requires the Legal Adviser to pay close attention to avoiding the appearance of impropriety after leaving the government employ. The pre-eminent position of the United States in international affairs gives the Legal Adviser considerable influence in the formulation and interpretation of international law. Post-government actions which appear improper to the public, that includes international organizations and foreign nations, reflects upon the State Department’s credibility during his tenure. As a result, the credibility of the United States government’s enunciation of principles of international law is also implicated. Hence, the Legal Adviser must heed the proscription of Canon 9, not merely to protect the integrity of the profession, but to preserve the credibility of the United States government as a source of international law.

II. FEDERAL CRIMINAL LAW AND THE REVOLVING DOOR

Congress first imposed restrictions on the revolving door in an 1872 postal appropriations bill which included a restriction on acting as an attorney or agent within two years of the cessation of employment with an executive department on any claim against the United States pending in the department during one’s tenure. For almost a century afterward, a jumble of federal statutes provided often-conflicting, and sometimes incomplete or overbroad, coverage of the issue. In order to give teeth to the principle “that a public servant owes undivided loyalty to the government,” Congress repealed existing government ethics statutes in

arguments with the imprimatur of authority, especially in the field of public international law. When the fate of one’s client depends on the government’s action or inaction, this extra boost of credibility could improperly influence a government official’s decision.

39. Another problem, narrower in scope but no less benign, is the possibility that the Legal Adviser’s post-government activities may jeopardize the credibility of continuing policies initiated during his tenure. It is difficult for the government to justify the continued implementation of a policy that one of its architects is subsequently arguing against. Absent drastically changed circumstances, such an about face could seriously jeopardize the policy’s legitimacy.

40. See McBride, supra note 18, at 471 (citing SENATE COMM. ON THE JUDICIALITY, INTEGRITY IN POST-EMPLOYMENT ACT, S. REP. NO. 100-101, at 8 (1987)).

41. See United States v. Medico Indus., 784 F.2d 840, 843 (2d Cir. 1986).

42. Id. (quoting H.R. REP. NO. 87-748 (1961))
1962 and enacted 18 U.S.C. sections 201 through 209.\footnote{Pub. L. No. 87-849, 76 Stat. 1119 (1962).} Then, in the aftermath of Watergate, Congress expanded these restrictions with the Ethics in Government Act of 1978 (the Act),\footnote{Pub. L. No. 95-521, 92 Stat. 1824 (1978).} which specifically addresses the revolving door phenomenon.\footnote{See id.} Section 501 of the Act forbids former government employees from:

knowingly mak[ing], with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the Untied States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter—

A) in which the United States or the District of Columbia is a party or has a direct and substantial interest,

B) in which the person participated personally and substantially as such officer or employee, and

C) which involved a specific party or specific parties at the time of such participation . . . \footnote{18 U.S.C. § 207(a) (1994). The remaining provisions of sections 201 through 209 are not directly relevant to Sofoaer’s case, and are therefore beyond the scope of this discussion. Likewise, the remaining paragraphs of section 207 are inapposite to a discussion of the Sofoaer case because only sub-paragraph (a) imposes a lifetime ban on certain types of representation by ex-government employees. Sub-paragraphs (b) through (d) impose more stringent temporary restrictions, e.g., a one-year ban on communications to an agency from which a senior officer has departed. See id. at §§ 207(b)-(d). In Sofoaer’s case the fact that the representation at issue was clear of any of section 207’s temporary prohibitions is beyond purview.}  

Like D.C. Bar Rule 1.11, section 501 of the Act is aimed at preventing government lawyers from representing clients in matters in which they substantially participated while in the government employ.\footnote{For purposes of this discussion of federal law, I will assume that Sofoaer’s post-employment representation of Libya satisfied the remaining criteria of the Act, e.g., it concerned a matter substantially related to one in which Sofoaer participated personally and substantially while Legal Adviser. I will return to these issues in Section III when discussing the case law construing these terms in the context of D.C. Bar Rule 1.11 and its application to Sofoaer’s conduct.} But one essential difference between federal criminal law and D.C. Bar Rule 1.11 explains why Sofoaer has avoided criminal liability but may nevertheless be subject to discipline by the D.C. Bar.\footnote{There are other differences between the two revolving door standards, but}
Under section 501 of the Act, an ex-government attorney must make an appearance before, or a communication to, some governmental body to constitute criminal conduct.49 D.C. Bar Rule 1.11 includes no such requirement, and therefore casts a broader net than the federal law.50 It is likely this element of the federal offense lay behind the refusal of federal prosecutors to pursue criminal charges against Sofaer. In the two weeks he represented the government of Libya, Sofaer made no appearance before, or communications to, the federal government on behalf of his client. In fact, there is evidence that Sofaer never envisioned his representation of Libya to encompass such appearances. In a letter to an attorney representing the families of the victims of the Pan Am 103 bombing, Sofaer stated his role in the Libya matter would be “limited in nature,” merely advising the Libyan government on extradition and settlement matters.51 Because the revolving door provision of the Act can be inter-

49. See 18 U.S.C. § 207(a) (1994). Interestingly, the 1962 version of 18 U.S.C. § 207, did not include this element of the offense. Rather, an ex-government employee was restricted from representing a party “in connection with any judicial or other proceeding, application . . . or other particular matter.” Sofaer’s representation of the government of Libya then, if even for only one week, would have been considered criminal under federal criminal law prior to the Ethics in Government Act of 1978.

50. See D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1994); see also Blum, supra note 10.

51. See Andrew Blum, Libya Wanted to Make a Deal With Flight 103 Families,
interpreted as allowing "behind the scenes assistance," a criminal case against Sofaeer was premature.\textsuperscript{52}

III. THE REVOLVING DOOR AND THE CODE OF PROFESSIONAL RESPONSIBILITY

Disciplinary Rule 9-101(B) of the American Bar Association Model Code of Professional Responsibility (ABA Model Code), entitled "Avoiding Even the Appearance of Impropriety," provides that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."\textsuperscript{53} In 1982 the District of Columbia Court of Appeals adopted and amended Disciplinary Rule 9-101(B) in its Revolving Door decision,\textsuperscript{54} the provisions applicable to the Sofaeer case reading:

A lawyer shall not at any time accept private employment in connection with any matter which is the same as, or substantially related to, a matter in which he or she participated personally and substantially as a public officer or employee, which includes acting on the merits of a matter in a judicial capacity.\textsuperscript{55}

Although the language of the ABA Rule is worded differently than the D.C. Bar Rule, the case law construing the ABA Rules is instructive for purposes of examining the D.C. Bar Rule as it applies to Sofaeer. At least one court has concluded the "essential impact or purpose of the rules" is the same in each.\textsuperscript{56} In the following discussion I will address the two

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\footnotetext{52}{See In re Restaurant Dev. of Puerto Rico, Inc., 128 B.R. 498, 502 (Bankr. D.P.R. 1991).}
\footnotetext{53}{MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(b) (1994).}
\footnotetext{54}{Revolving Door, 445 A.2d 615, 617 (D.C. 1982), codified as amended at D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1994).}
\footnotetext{55}{Id. In Revolving Door, the D.C. Court of Appeals was concerned mainly with notice and screening requirements for a former government lawyer’s firm, and the bulk of the amendments to the court’s amendments to the ABA Rules addressed these issues. See id. Although Sofaeer’s firm "walled off" a law clerk who had previously worked in the State Department Bureau of Counter-Terrorism, it made no attempts to screen Sofaeer from the matter. See Blum, supra note 10.}
\footnotetext{56}{See National Bonded Warehouse Ass’n Inc. v. United States, 718 F. Supp. 967, 971 (Ct. Int’l Trade 1989). Arguably, there are substantive differences between the two standards, e.g., does “substantial responsibility” have the same meaning as “personal and substantial participation”? For a discussion of the potential substantive...}
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essential elements of the revolving door rule as interpreted by ethics opinions and courts—"the meaning of the "same matter" and of "personal and substantial participation"—and apply these provisions to Sofaer's representation of the government of Libya.

A. The Same Matter

For a lawyer to be subject to discipline under D.C. Bar Rule 1.11, his post-government representation must be in connection with "a matter which is the same as, or substantially related to, a matter" with which he was involved as a government attorney. Determining what qualifies as a "matter" is simple enough, for the Rule defines it broadly enough to encompass just about any task a government lawyer may be called upon to perform. However, a clear interpretation of the nexus required between one's work as a government attorney and as a private employee for the two to constitute the same matter remains ambiguous.

difference between the language of the two rules, see infra note 88.

57. It should be noted that courts have addressed the revolving door issue primarily in the context of a litigating party's motion to disqualify opposing counsel based on his prior involvement with the matter as a government employee. See, e.g., Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976); Laker Airways Ltd. v. Pan American World Airways, 103 F.R.D. 22 (D.D.C. 1984); Brown v. District of Columbia Bd. of Zoning Adjustment, 486 A.2d 37 (D.C. 1984). Although the issue has not arisen in the litigation or adjudication context in the Sofaer case, the interests to be protected by the Rules of Professional Conduct are the same.

58. The remaining provisions of the Rule, e.g., public employee, private employment, government consent, are all clear in Sofaer's case, therefore, I will not address their meaning and application.

59. "[A] 'matter' is any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties." D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.11(g) (1994).

60. Its ambiguity has led at least one commentator to speculate that its comforting vagueness and generality explain its ubiquity. See WOLFRAM, supra note 48 at 471 ("The term has the same universal application in law as it does in physics, and with as little precision").

The D.C. Bar Rules differ from the ABA Model Code with regard to their apparently more expansive reach, forbidding representation in matters "substantially related" to those with which an attorney was involved as a government employee. See D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1994). The language was added by the D.C. Court of Appeals which in Brown v. District of Columbia Bd. of Zoning Adjustment, 486 A.2d 37, 48 (1984) (Brown II), announced that "matter" as
I. Factual Analysis.--Confronted with concern among government agencies and former government lawyers over the interpretation and application of ABA Rule 9-101(B), the ABA Committee on Ethics and Professional Responsibility published its interpretation of the provision in a formal opinion (Formal Opinion No. 342). The opinion instructed that "the same matter" should be interpreted as envisioning "a discrete and isolatable transaction or set of transactions between identifiable parties." By example, the Committee noted the same lawsuit or litigation clearly would constitute the same matter, as would the same issue of fact involving the same parties and conduct. Emphasizing its view of the relevant inquiry as essentially factual in nature, the ABA concluded that a government employee involved in drafting, enforcing, or interpreting government regulations or laws is not precluded from private employment involving those same regulations or laws. Thus, the determination is whether there are "discrete, identifiable transactions" or "conduct involving a particular situation and specific parties."

Recent case law applying the ABA Rule supports this interpretation of "the same matter." In Securities Investment Protection Corp. v. enunciated in ABA Model Code DR 9-101(b) was intended to embrace all matters "substantially related" to one another. However, the court went no further in discussing the extent to which the language expands the scope of facts necessary to constitute the requisite factual nexus. For purposes of the Sofae case this ambiguity need not be resolved for, as outlined below, the Board will not need to rely on the "substantially related" language to conclude Sofae's post-government representation of Libya concerned the same matter with which he was involved as Legal Adviser. See infra Section III.A.


62. Id. (citing BAYLESS MANNING, FEDERAL CONFLICT OF INTEREST LAW 204 (1964)).

63. See id. As an illustration of this principle, the Committee cited Emle Industries, Inc. v. Patentex, Inc., 578 F.2d 562 (2d Cir. 1973), in which the same issue of fact arose in two subsequent litigations, and General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974), where the two cases at issue involved the same allegedly monopolizing conduct of General Motors.

64. See Formal Opinion No. 342, supra note 61.

65. Id. at 116. See also General Motors, 501 F.2d at 652 n.22 ("in determining whether [a] case involves the same matter . . . the most important consideration is not whether the two actions rely for their foundation upon the same section of the law, but whether the facts necessary to support the two claims are sufficiently similar.")
Vigman, for instance, a district court in the Central District of California considered an SEC civil injunctive action and a private securities fraud action to constitute the same matter for purposes of a motion to disqualify two ex-SEC attorneys from representing the plaintiffs in the securities fraud suit. Relying on Formal Opinion No. 342, the court concluded the allegations upon which each action was based arose out of the same “discrete series of transactions involving a specific situation and specific parties.”

The District of Columbia Court of Appeals, however, arrived at the opposite conclusion in Committee for Washington’s Riverfront Parks v. Thompson. In Riverfront Parks the court held the prior government employment of two lawyers did not disqualify them from assisting in preparations for the administrative review of a development proposal for an historic district. The court based its conclusion on three factors. First, two years had elapsed since the lawyers had any involvement with the project as government employees. Second, each matter involved different parties. Third, although each design proposal concerned the same piece of property, the two designs differed so significantly that each assessment of historical compatibility involved clearly distinct factual issues. For the court, this was not enough of a factual nexus to treat the proceedings as the same matter.

From these cases, we can distill a few general principles a court should apply in determining whether Mr. Sofaer’s 1993 representation of the government of Libya concerns the same matter as that with which he was involved as Legal Adviser in 1988. Clearly, Sofaer’s 1993 representation arose out of the same discrete, identifiable “transaction” or “situation.” Sofaer was hired by the Libyans to negotiate a compensation package for the families of the victims of Pan Am 103 and to resolve the impasse over the Libyan government’s refusal to extradite the suspected bombers to the United States. Likewise, his 1993 representation involved the same parties as those affected by the events surrounding the Pan Am 103 bombing in 1988—the Libyan government, the United

67. See id.
68. Id. at 1366. See also General Motors, 501 F.2d 639.
70. See id.
71. See id.
73. See Blum, supra note 10.
States, the suspected terrorists, and the victims and their families. True, a period of five years passed before the Libyan government approached Sofiaer concerning the bombing, but, given the strength of the factual nexus between the two "representations," there can be little doubt Sofiaer's 1993 representation was in connection with a matter in which he participated as Legal Adviser.

2. The Rulemaking Exception.--In Laker Airways Ltd. v. Pan American World Airways (Laker Airways), 74 a D.C. district court carved out an exception to what constitutes a "matter" within the meaning of the ABA and D.C. Codes: "rulemaking and policy making activities." 75 In Laker Airways, the court was faced with a motion to disqualify counsel on the ground he was involved in prior Civil Air Board rate-setting as a government attorney. 76 Interpreting the D.C. Code's definition of "matter" to limit its application to "government actions focusing upon distinct and identifiable sets of facts," the court concluded that a government attorney "may participate in a legislative or other policy-making activity without precluding his subsequent representation of private parties affected by such rules or policies." 77 But the Laker Airways court did not go so far as to exempt all rulemaking activity from the reach of the Code. The court held that if rulemaking is "narrow in scope and is confined to specific issues and identifiable parties such that it may be properly characterized as "quasi-judicial" in nature," it is properly the subject of revolving door restrictions. 78

Sofiaer's participation in issues arising out of the Pan Am 103 bombing while at the State Department could not, strictly speaking, be characterized as rulemaking. However, his duties were not solely of a legal nature either. The degree to which a Legal Adviser must involve himself with policy issues arguably might thrust Sofiaer's involvement with the Pan Am 103 incident into the Laker Airways policy-making exception.

75. Id. at 34.
76. See id. at 26-27.
77. Id. at 34. See also National Bonded Warehouse v. United States, 718 F. Supp. 967, 972 (Ct. Int'l Trade 1989).
78. Laker Airways, 103 F.R.D. at 34. Another exception to the Laker Airways court's rulemaking exception, although not discussed by the court, would be a rule or policy in which a lawyer participated, which the lawyer subsequently argues directly against on behalf of a private client affected by the rule or policy. See Wolfram, supra note 48.
But even assuming his involvement could be characterized as policy-making, it was certainly "narrow in scope" and "confined to specific issues and identifiable parties," the Laker Airways definition of "quasi-judicial." Thus, Sofiaer will be unable to avail himself of the Laker Airways rulemaking and policy-making exceptions to revolving door restrictions.

3. Brown v. District of Columbia Board of Zoning Adjustment (Brown II).--The D.C. Court of Appeal's most recent foray into revolving door restrictions was in Brown v. District of Columbia Board of Zoning Adjustment (Brown II). In its first opportunity to consider the revolving door issues raised by the participation of two former D.C. attorneys in an application for a zoning exception for off-street parking (Brown I), the court remanded the matter to the Board of Zoning Adjustment (BZA) to determine whether the application and two earlier transactions concerning the same property constituted the same matter within the meaning of ABA Rule 9-101(B). After remand the BZA concluded the disqualification of the two attorneys was not required because the transactions at issue were not the same matter. In Brown II the court, sitting en banc, affirmed the finding of the BZA, and in so doing, articulated a new understanding of the connection necessary for a pre-and post-revolving door transaction to constitute the same matter.

Purporting merely to be confirming a principle inherent in its Riverfront Parks decision, the court concluded that matters are the same for revolving door purposes if they are "substantially related to one anoth-

79. See Laker Airways, 103 F.R.D. at 34.
82. See id. at 1284. The court applied ABA Code DR 9-101(B) because the initial motion to disqualify counsel was filed in 1978, before the 1982 amendments to DR 9-101(B) made by the court in Revolving Door, 445 A.2d 615, 640 n.1 (D.C. 1982), and subsequently codified in D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1994).
83. See Brown II, 486 A.2d at 41.
84. On its initial review of the BZA's findings, a panel of the court concluded as a matter of law, that the transactions constituted the same matter and again remanded the record to the BZA. See id. Before further proceedings, the court granted respondent's petition for rehearing en banc. See id.
The court’s adoption of the “substantial relationship” test relied on the rationale traditionally behind the test’s use in cases of side switching by attorneys in private litigation—the protection of confidential information. A substantial relationship, the court held, exists when there is sufficient overlap between the facts of two or more transactions for “a reasonable person [to] infer that the former government attorney may have had access to information legally relevant to, or otherwise useful in, the subsequent representation.”

As discussed above, there is certainly significant overlap between the 1988 bombing and the facts underlying Sifaer’s representation of the government of Libya. But are the factual similarities sufficient to create a reasonable inference of access to potentially useful or legally relevant confidential information? Any inquiry into the exact content of Libya-related material which passed through Sifaer’s office as Legal Adviser will remain largely conjectural. However, given the nature of the Legal Adviser’s position, it would not be unreasonable to suspect Sifaer had access to information of potential value to the government of Libya, particularly in its negotiations with the United Nations and the United States government.

First, Sifaer would have known the scope of the evidence on which the United States could base its allegations of Libyan involvement in the bombing of Pan Am 103, i.e., just how strong a “case” it has against the suspected terrorists and the Libyan government. Second, a reasonable person could infer Sifaer was involved in the policy level discussions concerning Libya, and thus had knowledge of the factors on which the Reagan and Bush administrations based their policies and actions involving Libya. Access to this type of confidential information would have placed Sifaer in a stronger position in his negotiations with government authorities on behalf of the Libyan government. Sifaer’s involvement with the Pan Am 103 matter as a government attorney, therefore, could give rise to an inference that he had access to information legally relevant or useful to the Libyan government.

85. Id. at 41-42.
B. Personal and Substantial Responsibility

The second criteria necessary for an attorney’s post-government representation to fall afoul of revolving door restrictions is personal and substantial participation in, or substantial responsibility for, the same matter while employed by the government. D.C. Bar Rule 1.11 applies the former standard, and the ABA Rule the latter. Although phrased differently, neither the case law applying these standards nor ABA opinions interpreting them provide any reason to believe they differ in substantive meaning. Thus, for purposes of the following discussion, I will look to materials addressing the meaning of “substantial responsibility” for guidance in the interpretation and application of D.C. Rule 1.11.

In Formal Opinion No. 342, the Committee defined the level of participation in a prior matter necessary to disqualify an attorney from a post-government representation as more than “mere perfunctory approval or disapproval of the matter in question.” But at the same time, the

88. When addressed in the context of litigation this determination is one of fact, not of law. See Ah Ju Steel Co., Ltd. v. ARMCO, Inc., 680 F.2d 751, 753 (C.C.P.A. 1982).

89. Compare D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1994) (“A lawyer shall not accept other employment in connection with a matter which is the same as, or substantially related to, a matter in which the lawyer participated personally and substantially as a public officer or employee”) with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) (1994) (“A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee”).

90. See National Bonded Warehouse Ass’n, Inc. v. United States, 718 F. Supp. 967, 971 (Ct. Int’l Trade 1989) (“Although the ABA Rules and the D.C. Code differ in their wording, the essential impact or purpose of the rules governing former government employees is the same in each.”).

On first impression, the semantic difference between the two standards might lead one to the conclusion that ABA Code DR 9-101(B) has a broader application than D.C. Bar Rule 1.11. For instance, an attorney may have had substantial responsibility for a matter without ever participating personally or substantially in its investigation or adjudication. However, the ABA Committee on Ethics and Professional Responsibility discredited this interpretation in Formal Opinion No. 342, supra note 61.

91. Unfortunately, few opinions address the nature of the “personal and substantial responsibility” requirement of D.C. Bar Rule 1.11, and those that do are unhelpful in assessing the scope of its application. See, e.g., Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980).

92. Formal Opinion No. 342, supra note 61, at 116. This conclusion was in re-
Committee did not limit the scope of “substantial participation” to direct, personal investigation of the particular matter.93 Instead, the Committee reasoned, “it is sufficient that [a former government lawyer] had such a heavy responsibility for the matter in question that it is unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter.”94

Since the Committee’s formal opinion, few published judicial decisions have addressed this particular issue in detail. In fact, the two opinions which have done so were nullified by subsequent adjudication, one overturned on appeal95 and the other vacated by an en banc decision of a federal appellate court.96 Even if one looks to the reasoning of these decisions for guidance, no clearer vision of how the standard should be applied to Sofaaer emerges, for each case focused primarily on protecting the fairness and integrity of the judicial process. As a result, a determination of whether Sofaaer personally and substantially participated in the Pan Am 103 matter while Legal Adviser will necessarily rely on the principles enunciated in Formal Opinion No. 342 and any rational inferences to be drawn from the duties and responsibilities of the Legal Adviser.

In the 1980s Libya occupied a prominent position in newspaper headlines and on the international political agenda. The air strike on Tripoli initiated by the United States, the known terrorist activities of Libya, the bombing of Pan Am 103 and the increase in international terrorist activity necessarily required the attention of policy officials at every level of the United States government. The Office of the Legal Adviser certainly was called upon to advise the President and Secretary

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93. See Formal Opinion No. 342, supra note 61, at 118.
94. Id.
96. See Armstrong v. McAlpin, 606 F.2d 28 (2d Cir. 1979), rev’d en banc, 625 F.2d 433 (1980).
of State on the legal issues raised by these events.\textsuperscript{97} Sofaer did not likely personally participate in the investigative processes of the bombing, as this job surely fell upon persons beneath him in the State Department hierarchy. However, given the importance of the legal and policy issues raised by the bombing of Pan Am 103, it is not unreasonable to infer Mr. Sofaer was involved in the "deliberative processes" regarding the incident.\textsuperscript{98} Any doubts about the accuracy of this inference should be resolved by the following analysis—the profession's concern with the "appearance of impropriety."

\section{C. The Appearance of Impropriety}

The nature of the information to which Sofaer had access and the extent to which he was involved in decision-making processes will largely remain out of the public's gaze. National security concerns require it be so. In this respect the Sofaer case is dramatically different from other revolving door cases. But few would argue national security concerns should shield an ex-government attorney from allegations of unethical conduct. To resolve the difficulties created by the lack of verifiable facts and the potentially unreliable inferences to be drawn therefrom, this author proposes the "appearance of impropriety" be given more weight here than it might be afforded in other contexts. Such an approach is not only in accord with judicial treatment of revolving door concerns, but it is justified by the unique nature of the Legal Adviser's position.

Canon 9 of the ABA Code cautions members of the profession to "avoid even the appearance of professional impropriety,"\textsuperscript{99} and is as applicable to the revolving door context as it is to any other question of professional legal ethics. In fact, one of the ethical considerations listed by the Canon's drafters specifically advises that a lawyer who leaves a judicial or public office should not accept employment in connection with

\textsuperscript{97} For instance, these events raised important issues of international law related to armed incursions into foreign territory, the international law of self defense, the legality of belligerent reprisals, the proper scope and subject of international sanctions, and participation in international organizations.

\textsuperscript{98} See \textit{Formal Opinion No. 342}, supra note 61, at 118. This inference is buttressed by the fact that the Legal Adviser has traditionally been a lawyer with a close relationship to the President and Secretary of State. See \textit{ASIL Report}, supra note 27, at 362.

\textsuperscript{99} \textbf{Model Code of Professional Responsibility} Canon 9 (1994).
a matter in which he had substantial responsibility prior to leaving, since to do so “would give the appearance of impropriety even if none exists.”¹⁰⁰ Formal Opinion No. 342, on the other hand, downplays the significance of the appearance of impropriety, cautioning that “the appearance of evil is probably not the most important reason for the creation and existence of the [revolving door] rule itself.”¹⁰¹ Nevertheless, this consideration has remained important to courts deciding motions to disqualify counsel based on prior involvement with the matter being litigated as a government attorney.

In some instances courts have held that the appearance of impropriety is sufficient in itself to disqualify counsel.¹⁰² However, a recent judicial trend has courts abandoning this approach and requiring more than some remote possibility of an ethical violation before granting a motion to disqualify counsel.¹⁰³ The Fifth Circuit has moved the furthest in this direction, requiring both a “reasonable possibility that some specifically identifiable impropriety did in fact occur” and that the “likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer’s continued participation in a particular case.”¹⁰⁴ Although this approach keeps courts out of the business of fishing for ethics violations, it does significantly weaken the deterrent effect of revolving door restrictions. The D.C. Circuit, on the other hand, has wisely chosen a test which places a less onerous burden on the moving party, instead requiring courts to emphasize the relevant social interests at stake.¹⁰⁵

In *Kessenich v. Commodity Futures Trading Commission*,¹⁰⁶ the court noted with qualified approval the Fifth Circuit’s narrowing of the grounds on which the appearance of impropriety justifies the disqualification of counsel.¹⁰⁷ However, the court’s approval appears limited only to the principle that a “hypothetical possibility that an innocuous violation

¹⁰⁰ *Id.* at Ethical Consideration 9-3.
¹⁰¹ *Formal Opinion No. 342, supra* note 61, at 116.
¹⁰² *See, e.g.*, Allied Realty of St. Paul, Inc. v. Exchange Nat’l Bank, 408 F.2d 1099, 1101-02 (8th Cir. 1969); United States v. Trafficante, 328 F.2d 117, 120 (5th Cir. 1964).
¹⁰³ *See* Armstrong v. McAlpin, 625 F.2d 433, 445 (2d Cir. 1980); Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979).
¹⁰⁴ *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976).
¹⁰⁵ *See* Kessenich v. Commodity Futures Trading Comm’n, 684 F.2d 88, 98 (D.C. Cir. 1982).
¹⁰⁶ *Id.*
¹⁰⁷ *See id.*
of the Code might have occurred” is not sufficient to justify disqualification of counsel.\textsuperscript{108} More important to the court was the effect of counsel’s conduct on the “relevant social interests.”\textsuperscript{109} Principal among these public considerations is the potential for an attorney’s post-government representation to undermine public confidence in the procedures of the agency at which the attorney was once employed.\textsuperscript{110} Later, in 	extit{Riverfront Parks}, the D.C. Court of Appeals cited 	extit{Kessenich} with approval, stating “even if an actual conflict of interest is not present we must consider whether the possibility that insider information relevant to the particular matter in controversy was obtained through prior government employment presents the appearance of impropriety.”\textsuperscript{111} Thus, it is clear

\textsuperscript{108} See \textit{id}. ("We agree with the \textit{implication} that counsel should not be disqualified merely because of a hypothetical possibility that an innocuous violation of the Code might have occurred.") (emphasis added).

\textsuperscript{109} Id.

\textsuperscript{110} See 	extit{Kessenich}, 684 F.2d 98. The court was concerned that public confidence in the CFTC’s reparation procedures would be undercut if litigants were to fear that public officials handling their case might one day oppose them in the same matter. See also Wagner v. Lehman Bros, 646 F. Supp. 643, 666 (N.D. Ill. 1986) (noting the effect on future SEC investigations if potential defendants must wonder if the investigating attorney may one day turn out to represent the plaintiff).

The Kessenich court mentioned three other public considerations which militated in favor of disqualification: (1) concern for the integrity of the judiciary, (2) the relevant agency’s position on whether DR 9-101(B) had been violated and (3) the potential prejudice to a party unable to retain qualified counsel. See 	extit{Kessenich}, 684 F.2d at 98.

\textsuperscript{111} 451 A.2d 1177, 1188 (D.C. App. 1982). Although the D.C. Court of Appeals adopted the 	extit{Kessenich} analysis in 	extit{Riverfront Parks}, its interpretation and application of the D.C. Circuit’s standard was rather haphazard and should not be given great weight. For instance, the court was applying principles of attorney ethics to a non-lawyer on the ground that his conduct was potentially criminal under 18 U.S.C. § 207 (1994), which, according to the court, advances similar goals as the ABA Rules. See 	extit{Riverfront Parks}. 451 A.2d at 1189. Moreover, the court failed to reach the analysis of relevant social interests required by the 	extit{Kessenich} test because it concluded “petitioners failed to establish ‘more than a hypothetical possibility’” that this individual was engaged in improper conduct. Id. (citing 	extit{Kessenich}). However, the 	extit{Kessenich} court did not require a petitioner to meet such a burden; it merely voiced its agreement with the Fifth Circuit’s hyperbolic “implication that counsel should not be disqualified merely because of a hypothetical possibility that an innocuous violation of the Code might have occurred.” 	extit{Kessenich}, 684 F.2d at 98. Last, the 	extit{Riverfront Parks} opinion describes 	extit{Kessenich} as requiring a court to “balance the improper conduct against the detrimental impact” of the attorney’s conduct. 451 A.2d at 1189. Not only is this statement logically flawed—how does one balance improper
that the D.C. Bar must approach the Sofaer matter with a particular emphasis on the former government lawyer’s duty to avoid the appearance of impropriety.

The mere fact that Sofaer had access to confidential government information concerning the Pan Am 103 incident should be sufficient to create “more than a hypothetical possibility some innocuous violation of the code occurred.”112 Nevertheless, in this context a “hypothetical possibility” should be all that is necessary before analyzing the relevant social interests at stake. As stated above, the confidential nature of the Legal Adviser’s position means it is unlikely that any determination of whether a violation of the code occurred can be made without an inquiry into the somewhat amorphous realm of hypotheticals. Accordingly, the D.C. Bar must consider the impact the former Legal Adviser’s conduct has had “beyond its effect on the immediate parties involved.”113

First, this episode has had a negative effect on the integrity of the State Department in general, and on the integrity of the Office of the Legal Adviser in particular. Second, Sofaer’s actions reflect unfavorably on the legal or policy basis of the United States’ position toward Libya. Third, and perhaps most profound (but paradoxically, also the most abstract) is the potential impact which Sofaer’s acts will have on the reliability of the United States as a source of international law.

IV. CONCLUSION

Canon 9 enunciates a prophylactic ethical principle, which, if conscientiously observed, assists lawyers in respecting the somewhat unclear line of demarcation between proper and improper post-government professional activity. In the case of the activities of a former State Department Legal Adviser that line is even less clear. The confidential nature of his duties and responsibilities tends to place any determination of whether conduct against detrimental impact?—but it mischaracterizes the D.C. Circuit’s articulation of the “appearance of impropriety” analysis. The Kessenich opinion does not instruct courts to perform any balancing of interests. Rather, it requires courts to consider the effect of counsel’s conduct on relevant social interests, which is a one-sided analysis, not a balancing test. For these reasons, the D.C. Bar should look beyond the Riverfront Park court’s flawed interpretation of Kessenich and analyze the Sofaer case under the law of Kessenich itself.

112. Kessenich, 684 F.2d at 98.
113. Id.
actual improprieties ever took place out of the public's gaze. Interestingly enough, the factor which makes a definitive determination of alleged ethical misconduct difficult—access to confidential information—requires that stricter scrutiny be applied to the Legal Adviser's post-government conduct. The most effective resolution to this apparent logical conflict is through judicial emphasis on the avoidance of the appearance of impropriety. Increased reliance on this simple ethical principle will assist the D.C. Bar in its resolution of the difficult issues implicated by the Sofaer matter and guide present and future government attorneys in their professional activities in the private sector.