DISTRICT OF COLUMBIA COURT OF APPEALS

No. 97-BG-1096

IN RE: ABRAHAM D. SOFAER, RESPONDENT.

On Exception of Respondent to Report and Order
of the Board on Professional Responsibility

(Argued April 29, 1998 Decided April 22, 1999)

Samuel Dash, with whom *David B. Isbell, Robert J. Sisk*, and *M. Kathleen O'Connor* were on the brief, for respondent.

Leonard H. Becker, Bar Counsel, with whom *Michael S. Frisch*, Senior Assistant Bar Counsel, was on the brief, for Bar Counsel.

Edwin D. Williamson filed a brief as amicus curiae on behalf of respondent.

Before FARRELL and RUIZ, *Associate Judges*, and KING,* *Senior Judge*.

FARRELL, *Associate Judge*: This case is before us on exceptions to the report and order of the Board on Professional Responsibility (the "Board") directing Bar Counsel to issue an informal admonition to respondent for having violated Rule 1.11 (a) of the District of Columbia Rules of Professional Conduct. The rule states in relevant part:

> 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.

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* Judge King was an Associate Judge of the court at the time of argument. His status changed to Senior Judge on November 23, 1998.

A hearing committee and the Board both concluded that respondent had violated this rule by undertaking to represent the government of Libya in connection with criminal and civil disputes and litigation arising from the 1988 bombing of Pan American Flight 103 over Lockerbie, Scotland, after respondent, while serving as Legal Advisor in the United States Department of State, took part personally and substantially in the government's investigation of the bombing and in related diplomatic and legal activities.

We sustain the Board's order and adopt its comprehensive report, which sets forth (and in turn adopts) the hearing committee's findings of fact,[1] correctly explains the elements of a Rule 1.11 (a) violation, and demonstrates why Bar Counsel proved by clear and convincing evidence that respondent violated the Rule. We limit ourselves to the following discussion, which presupposes familiarity with the Board's report, annexed hereto.

1. Respondent argues that in defining the "matter" in which he took part while Legal Advisor as "the legal activities flowing from the government's efforts to address [the Pan Am 103 bombing]," the Board bundled together activities so diverse in nature as to give him no fair warning of a potential overlap when he accepted the private representation of Libya. We are not persuaded. The activities in question, including diplomatic intervention with an unnamed country, attendance at confidential briefings on the criminal investigation, and overseeing the State Department's response to civil third-

[1] This court must accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record. D.C. Bar R. XI, § 9 (g) (1998). The Board, in turn, must accept the hearing committee's factual findings if similarly supported. *See, e.g., In re Micheel*, 610 A.2d 231, 234 (D.C. 1992).

party subpoenas, all centered about a distinct historical event involving specific parties,[2] whether or not all had been identified. As the Board recognized, "The 'matter' is not terrorism, or even Libyan terrorism"; rather, "[t]he core of fact at the heart of each piece of legal activity is . . . why and how Pan Am 103 blew up over Lockerbie." The contours of the bombing and the government's investigation and related responses to it were defined sharply enough to constitute a "matter" under the Rule.

2. Respondent contends that his work as Legal Advisor concerned the Pan Am 103 bombing in ways that were too marginal, infrequent, or passive to amount to "personal and substantial" participation in the matter. The main feature of the government's response, he asserts, was the criminal investigation conducted by the Department of Justice, not the Department of State; State's role (hence respondent's) consisted largely of a routine response to a third-party subpoena issued by Pan Am[3] in furtherance of its theory that the U.S. government had advance warning of the bombing but failed to act.

Respondent's discounting of the subpoena as routine depends partly on hindsight: the district court eventually quashed the subpoena. Until then, however, the subpoena had the potential of embroiling the government in the tort litigation, and so respondent's role in reviewing and approving the memorandum recommending the State Department's response to the subpoena cannot be considered

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[2] *See* Rule 1.11 (a), comment [3] ("'Matter' . . . encompass[es] only matters that are particular to a specific party or parties.").

[3] The subpoena was issued in the mass tort litigation brought against Pan Am by relatives of the Pan Am 103 victims.

perfunctory. But his participation went further. After Pan Am voiced its theory of government foreknowledge at a meeting with the Secretary of State which respondent either attended or knew of, respondent's judgment was sought on whether, or how fully, to inform the Department's designated witness in the subpoena matter of the meeting, in preparation for his testimony. That action, as Bar Counsel points out, did not become "insubstantial" because the legal judgment was easily arrived at or because the government subsequently concluded that Pan Am's theory of government complicity was unsupported.

Moreover, respondent's actions take on added significance when viewed in the context of his participation, as one of a small number of senior State Department officials, in confidential oral and written briefings which periodically included information about the progress of the criminal investigation and related diplomatic actions. The fact that respondent played no role in the investigation itself and was not shown to have recommended or taken action based on the briefings[4] is not critical. As the Board explained, "Respondent was much more than the passive recipient of general agency information. As chief legal officer of the State Department, [he] was kept abreast of the progress of the investigation and the diplomatic efforts in response to the bombing precisely so that he could provide legal advice and perform legal duties concerning the bombing when called upon to do so."

All told, respondent's active participation in the Pan Am 103 matter bears no resemblance to the merely peripheral or formal involvement in a matter which

[4] An apparent exception was respondent's participation, occasioned by the Pan Am 103 bombing, in a diplomatic exchange with an unnamed country intended to persuade the country to abate terrorist activity.

the Rule does not encompass. *See* Opinion No. 84, D.C. Bar Legal Ethics Committee (1980) (interpreting former DR 9-101).

Respondent's assertion that by emphasizing his receipt of confidential information from the briefings the Board confused Rule 1.11 (a) with Rule 1.6 (restricting use of client confidences or secrets) is mistaken. While he is correct that "no one has ever suggested any improper disclosure of confidences by Respondent," Rule 1.11 (a) bars participation in overlapping government and private matters where "it is reasonable to infer counsel may have received information during the first representation that might be useful to the second"; "the 'actual receipt of . . . information,'" and hence disclosure of it, is immaterial. *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37, 50 (D.C. 1984) (en banc) (citations omitted).

3. Rule 1.11 (a) prohibits a lawyer from accepting employment in connection with a matter "the same as, or substantially related to," a matter in which he or she took part as a public officer or employee. The inquiry is a practical one asking whether the two matters substantially overlap.[5] Respondent insists that he stayed clear of that overlap by restricting the terms of his agreement to represent Libya so as to "assum[e] Libya's culpability for the [Pan

[5] As the Board explained, Rule 1.11 (a) carries forward the test and methodology for determining whether matters are "substantially related" set forth in *Brown, supra*. *See* Rule 1.11 (a), comment [4]. *Brown* "broadened the scope of the 'substantially related' test" over that applicable to side-switching in the private sphere. 486 A.2d at 50. At the same time, the Board recognized that we deal in this case with attorney discipline and not (as in *Brown*) a conflict of interest issue arising from a civil dispute. Thus, the Board was careful to view respondent's conduct, including the "substantial" overlap of the two matters, from the perspective of Bar Counsel's obligation to prove an ethical violation by clear and convincing evidence.

Am 103] bombing." A lawyer may, of course, limit the objectives of a representation with client consent. Rule 1.2 (c). But respondent's retainer agreement exemplifies why, in our view, limiting the private representation rarely will succeed in avoiding the convergence addressed by Rule 1.11 (a). While stating that "[the firm's] efforts will not include substantial activities as litigators but rather would be limited to activities associated with agreed upon measures, including consensual dispositions," the agreement emphasized that "[m]easures will be taken only with your [*i.e.*, Libya's] prior consent, and *without admission of liability*" (emphasis added). The proposed activities included "investigating the facts and legal proceedings, preparing legal analyses, providing legal advice and proposing legal steps to deal with" the "ongoing civil and criminal disputes and litigation" stemming from the destruction of Pan Am 103 -- all clearly features of a comprehensive attorney-client relationship. We do not question the sincerity of respondent's belief that the representation could be insulated, factually and ethically, from the investigation and diplomatic efforts of which he had been part. The "substantially related" test by its terms, however, is meant to induce a former government lawyer considering a representation to err well on the side of caution. Respondent did not do so.[6]

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[6] Our holding in *Brown, supra*, that the several transactions at issue in that case were not substantially related, hence were not the same "matter," comports with our conclusion here. That holding, although ultimately a "legal conclusion . . . for this court to make," 486 A.2d at 54, rested critically upon findings of
fact by the administrative agency negating any overlap between the earlier zoning matters and the later one. *Id.* at 52-58. Here, in contrast, the hearing committee made factual findings fully supporting our conclusion that respondent's representation of Libya was substantially related to his involvement as Legal Advisor in the post-bombing governmental actions.

4. Respondent points to the exact words "accept other employment" in the Rule and makes an argument which neither the Board nor the hearing committee addressed. To conclude that he had accepted employment on behalf of Libya, he maintains, the Board had to find "that [his] conditional agreement to represent Libya was capable of being legally carried out," which required that the firm obtain the necessary OFAC authorization[7] for the representation -- a critical part of which was not received before he and his firm withdrew from the representation. Bar Counsel counters that the reason neither the Board nor the hearing committee considered this argument is that it was not raised until now and thus has been waived. *See, e.g., In re James*, 452 A.2d 163, 168 (D.C. 1982). We have examined all of respondent's arguments to the hearing committee and the Board and can, indeed, find none directed to "what constitutes 'accept[ing] other employment'" (Br. for Resp. at 38). His arguments instead focused entirely upon the meaning and application of the terms "matter," "substantially related," and "participated personally and substantially." We thus would be well within our authority to disregard the present argument.

In any event, we reject it on the merits. Respondent did not just conditionally *agree* to represent Libya -- the representation actually began after four things took place: OFAC issued a specific license authorizing respondent's firm to receive fees and expenses in connection with the pending criminal and civil cases affecting Libya; the firm received a letter of credit from Bank Credit Suisse for $2.5 million, ensuring payment of Libya's legal fees; the firm

[7] OFAC is the government agency that administers economic sanctions imposed on foreign countries by the United States, including sanctions imposed on Libya in 1986.

issued a press release announcing the representation and its receipt of the license from OFAC; and the firm received the first $250,000 installment of the legal fees. Thereafter, respondent and the firm performed the services summarized in paragraph 52 of the Board's report which included, but were not limited to, resolving continued differences with OFAC as to the correct license needed to carry on the representation. In these circumstances, it would be a wholly artificial reading of the Rule to say that respondent had not "accept[ed the] employment" before withdrawing from it two weeks later for reasons unrelated to OFAC permission.[8]

5. Joined by *amici curiae* who are former government officials, respondent urges that finding an ethical violation in this case will deter District of Columbia lawyers from entering the government or serving for long once there, lest Rule 1.11 (a) trip them up after they enter private practice. We are sensitive to the concern, already voiced in *Brown*, *supra*, that over-zealous application of the revolving-door rule would be "at the cost of creating an insular, permanent legal bureaucracy." 486 A.2d at 47. But that concern is misplaced here. Our finding that respondent violated Rule 1.11 (a) is well within the heartland of Rule 1.11 (a)'s application. Further, Bar Counsel aptly states why no lawyer need find himself inadvertently in the position of risk that respondent and amicus hypothesize:

> A former government lawyer in the Respondent's position is free to solicit the views of his or her

[8] The fact that respondent's representation of Libya lasted so briefly is a separate consideration which, we agree with the Board, went to the issue of appropriate sanction, not violation.

> former agency concerning the proposed private legal undertaking (which the Respondent deliberately elected not to do in this case), or to consult with ethics advisers in his or her law firm (which, again, the Respondent seems not to have done concerning Rule 1.11) or with the Legal Ethics Committee of the Bar (which the Respondent never suggested he did). If, while in government service or while contemplating entry into such service, the attorney deliberates the prospect that Rule 1.11 will narrow somewhat the career choices and client selections available to the attorney following departure from the government, then the Rule will have served one of its salutary objectives.

We affirm the Board's conclusion that respondent violated Rule 1.11 (a) and the Board's order directing Bar Counsel to issue an informal admonition.

So ordered.