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Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

The District of Columbia, as the site of the federal government, has the greatest number of attorneys leaving government service for private practice.[1] This "revolving door"[2] movement by attorneys from the public sector to the private sector creates a potential conflict of interest if attorneys subsequently become involved, on behalf of private litigants, with a government agency or department which formerly employed them. Consequently, the District of Columbia Bar (D.C. Bar) and the District of Columbia Court of Appeals have played an active role in clarifying and amending the rules of professional responsibility relevant to the revolving door. In *Brown v. District of Columbia Board of Zoning Adjustment (Brown II),*[3] the court of appeals addressed this controversial problem.

Interest in the revolving door issue, however, is not limited to the professional legal community. The general public has an interest in an ethical government bureaucracy as well as in an ethical legal system.[4] The public's perception that lawyers abuse their government positions in order to gain more lucrative employment in the private sector contributes to an overall

1. The "revolving door" of Washington, D.C. is particularly active in the zoning context. *Zoning Law Firms Make D.C.'s Experts Offers They Can't Refuse,* Wash. Post, July 22, 1985, at C1, col. 2; *see* Brown v. District of Columbia Board of Zoning Adjustment, 486 A.2d 37, 63 (D.C. 1984) (en banc) [hereinafter cited as *Brown II].* "[The revolving door problem] has a special sensitivity in Washington, D.C., being, as it is, the seat of government. Most law firms here continually hire or make partners of former government attorneys to gain their expertise and experience and government contacts." *Id.*

2. "Revolving door" is a euphemism for the movement by attorneys from practice with either the state or federal government to private practice. The most common scenario involves government attorneys entering private practice in the same field or area of expertise. This is especially true in specialized areas where the majority of the practice occurs before one agency, giving rise to the so-called "federal regulatory bar." Laumann & Heinz, *Washington Lawyers and Others: The Structure of Washington Representation,* 37 STAN. L. REV. 465, 493 (1985). In addition to its use as a euphemism, the court of appeals entitled its decision regarding the amendments to the D.C. Code of Professional Responsibility, *Revolving Door. See infra* notes 15-28 and accompanying text.

3. 486 A.2d at 37. Prior to the *Brown II* decision, the court of appeals decided a related issue in the same case. This case, Brown v. District of Columbia Board of Zoning Adjustment, 413 A.2d 1276 (D.C. 1980) [hereinafter cited as *Brown I],* will be discussed *infra* notes 49-54 and accompanying text.

4. Provisions in such acts as the Freedom of Information Act and Government in the Sunshine Act of 1976, 5 U.S.C. § 552 (1982 & Supp. II 1985) and the Ethics in Government Act of 1978, 18 U.S.C. § 207 (1982) attest to such an interest.

low public confidence in the legal profession.[5] In addition to the general concern for the ethical behavior of government employees, the public also has an interest in the efficient administration of justice. To the extent that the revolving door is used as grounds for attorney disqualification motions, it slows litigation and expends judicial resources.[6]

This Note will examine the content of the District of Columbia Code of Professional Responsibility in light of the recent amendments.[7] It will then discuss the holding of the *Brown II* majority and the contentions of the dissenters.[8] Finally, this Note will conclude that the District of Columbia Court of Appeal's en banc decision in *Brown II* unnecessarily restricted the relevant disciplinary rule and failed to create a workable standard to guide local law firms.

I. THE DISTRICT OF COLUMBIA CODE OF PROFESSIONAL RESPONSIBILITY

A. Relevant Ethical Rules

An ethical dispute dependent on the District's Code of Professional Responsibility arose in *Brown II* when the plaintiff sought the disqualification of two attorneys from a zoning dispute.[9] To succeed, disqualification motions must detail a violation of the disciplinary rules of the District of Columbia Code of Professional Responsibility.[10] In the revolving door context, the relevant rule is Disciplinary Rule 101 of Canon 9 (DR 9-101), entitled *Avoiding Impropriety or the Appearance of Impropriety.*[11]

In the District, this disciplinary rule had originally been identical to the

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5. In the zoning context, which is the subject of *Brown II*, one member of the public voiced this general concern by asking:

> How early in their careers [do] these people decide they want lucrative positions in the private sector[?] To what degree does the desire to ingratiate themselves with those who are "watching them in action" influence the performance of their official duties? Why does the District government permit this potentially abusive system to continue?

Letter to the Editor, Wash. Post, July 27, 1985, at A22, col. 5.

6. The United States Court of Appeals for the Second Circuit recently commented on "the proliferation of disqualification motions and the use of such motions for purely tactical reasons, such as delaying the trial." Armstrong v. McAlpin, 625 F.2d 433, 437 (2d Cir. 1980) (en banc), *vacated on other grounds*, 449 U.S. 1106 (1981).

7. *Revolving Door*, 445 A.2d 615 (D.C. 1982). *See infra* notes 15-28 and accompanying text.

8. *See infra* notes 55-77 and accompanying text.

9. *Brown II*, 486 A.2d at 40 n.1.

10. *Brown II* arose under the D.C. Code prior to any amendments. The court, however, noted that the new rule was not intended to alter substantively subsections (A) and (B) and hence "the result would be the same if the new rule were applicable." *Id.*

11. D.C. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101 (1982).

American Bar Association disciplinary rule.[12] As of April 1982, however, the District of Columbia Court of Appeals adopted the following version of DR 9-101:

> DR 9-101 *Avoiding Impropriety or the Appearance of Impropriety*
> (A) A lawyer shall not state or imply that he or she is able to influence improperly, or upon grounds irrelevant to a proper decision on the merits, any tribunal, legislative body or legislator, or public official.
> (B) A lawyer shall not at any time accept private employment in connection with any matter in which he or she participated personally and substantially as a public officer or employee, which includes acting on the merits of matter in a judicial capacity.[13]

The District of Columbia Committee on Legal Ethics was a moving force behind the revision of the District's Professional Responsibility Code.[14] The court of appeals discussed and published amendments to the Code of Professional Responsibility in a decision titled *Revolving Door.*[15] The amendments to the Code revised the disciplinary rules of canon 9 as well as a disciplinary rule of canon 5 which was relevant to the revolving door issue.[16] These changes played an extensive role in *Brown II* and hence deserve further explanation.

In 1979, the District of Columbia Committee on Legal Ethics, via the Board of Governors of the D.C. Bar, petitioned the court of appeals "to make comprehensive changes in canon 5 to provide clearer guidance to former government attorneys and their firms."[17] After extensive debate[18] and

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12. The American Bar Association Model Code of Professional Responsibility Disciplinary Rule 9-101 states:

> DR 9-101 Avoiding Even the Appearance of Impropriety.
> (A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.
> (B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.
> (C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101 (1981).

13. *Revolving Door,* 445 A.2d at 617.

14. *Id.* at 616.

15. 445 A.2d 615 (D.C. 1982). To clarify, Disciplinary Rule 9-101 was directly relevant to *Brown II* as the basis of the disqualification motion. Additionally, Disciplinary Rule 9-102 which addresses imputed disqualification was indirectly related to *Brown II* because its effect became a point of dispute between the majority and dissenting opinions. *See infra* notes 71-74 and accompanying text.

16. *Revolving Door,* 445 A.2d at 616. The D.C. Committee on Legal Ethics intended the changes to completely restructure the revolving door rules.

17. D.C. Comm. on Legal Ethics, Op. 84 (Jan. 23, 1980).

several false starts,[19] the court of appeals denied the petition of the Board of Governors with the exception of the revisions of DR 5-105(D), and DR 9-101, DR 9-102, and DR 9-103.[20] The adopted proposals contained procedures that, if followed, would halt vicarious disqualification of entire law firms.[21] Specifically, under DR 9-102(C) of the District of Columbia Professional Responsibility Code, the law firm must screen the attorney at risk from any form of participation in the matter and notify the affiliated agency

18. *Revolving Door,* 445 A.2d at 616 ("[H]undreds of written critiques" were filed with the court.).

19. *See* appendices A and B of *Revolving Door,* 445 A.2d 615 (D.C. 1982).

20. *Id.* at 622.

21. District of Columbia Code of Professional Responsibility Disciplinary Rule 9-102 governs the vicarious disqualification of entire firms. The amended version follows:

> DR 9-102 Imputed Disqualification of Partners, Associates, and Of Counsel Lawyers.
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> (A) If a lawyer is required to decline or to withdraw from employment under DR 9-101(B), on account of personal and substantial participation in a matter other than as a law clerk, no partner or associate of that lawyer, or lawyer with an of counsel relationship to that lawyer, may accept or continue such employment except as provided in (B) and (C) below.
>
> (B) The prohibition stated in DR 9-102(A) shall not apply if the personally disqualified lawyer is screened from any form of participation in the matter or representation as the case may be, and from sharing in any fees resulting therefrom.
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> (C) When any of counsel lawyer, partner or associate of a lawyer personally disqualified under DR 9-101(B) accepts employment in connection with the matter giving rise to the personal disqualification, or when the fact and subject matter of such employment are otherwise disclosed on the public record, whichever occurs later, the following notifications shall be required: (1) The personally disqualified lawyer shall file with the public department or agency and serve on each other party to any pertinent proceeding a signed document attesting that during the period of his or her disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation, will not discuss the matter or the representation with any partner, associate, or of counsel lawyer, and will not share in any fees for the matter or the representation. (2) At least one affiliated lawyer shall file with the same department or agency and serve on the same parties a signed document attesting that all affiliated lawyers are personally aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being taken to screen the personally disqualified lawyer.
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> (D) Signed documents filed pursuant to DR 9-102(C) shall be public except to the extent that a lawyer submitting a signed document shows that disclosure is inconsistent with Canon 4 or provisions of law.
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> (E) When the fact and subject matter of a client's employment of any of counsel lawyer, partner or associate of a lawyer personally disqualified under DR 9-101(B) has been otherwise disclosed to the public department or agency but not to the general public, the signed documents required by DR 9-102(C) shall be filed only with the public department or agency to which such disclosure has been made and shall not be served on any other person. So long as disclosure has not been otherwise made on the public record, the public department or agency shall keep the signed documents confidential.

or department that all involved attorneys are aware of the screening requirements.[22] This procedure for screening-off an attorney is commonly referred to as "building a Chinese Wall."[23] The screened attorney also has to submit a signed document that attests to his or her intention not to participate.[24]

Despite the amendments to DR 9-101, the court of appeals *Revolving Door* decision did not state definitively what constitutes the same "matter" for purposes of the disciplinary rule. "Matter" is the pivotal term in DR 9-101(B) which requires that a lawyer decline private employment "in connection with any *matter* in which he or she participated personally and substantially as a public officer or employee."[25] Consequently, if a court defines a series of episodes with the government and a private party as the same matter, the attorney will be disqualified from the case. The *Revolving Door* decision, therefore, encourages law firms to use their own initiative in order to determine whether or not a lawyer may violate DR 9-101 because of prior government service. Otherwise, if a firm waits for the court's interpretation of "matter" and the possible subsequent disqualification, it will be too late to use the screening mechanism to avoid imputed disqualification of the remainder of the law firm.[26] Hence, law firms probably choose to screen, as a precautionary move, ex-government attorneys in close cases in order to avoid the possibility of later vicarious disqualification of the entire firm. From an economic standpoint, it behooves firms to err on the "ethical" side.

The only concrete example of "matter" included within the Disciplinary Rule is "acting on the merits in a judicial capacity."[27] The amendments to the Code, however, define "matter" as including "any judicial or other proceeding, application, request for a ruling or other determination, contract,

22. D.C. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(C)(2) (1982).

23. The "Chinese Wall" concept was first created in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975). ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975) followed this case and somewhat lessened the weight of the disqualification sanction because it allowed firms to screen the ex-government lawyer from direct and indirect participation in a conflict of interest case. The District of Columbia Court of Appeals relied on ABA Formal Op. 342 in Committee for Washington's Riverfront Parks v. Thompson, 451 A.2d 1177 (D.C. 1982).

24. D.C. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-102(C)(1) (1982).

25. D.C. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) (1982) (emphasis added).

26. The court described the typical scenario and the effect of DR 9-101:

> [t]he private firm already has (or may wish to accept) a client involved in a matter which the lawyer was involved with on the other side while with the government. Thus, if the lawyer's own disqualification is not to be imputed to the private firm, there is a need to insulate that lawyer from his or her firm's participation in the matter, in order to prevent any actual or apparent impropriety.

Revolving Door, 445 A.2d at 616.

27. D.C. CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(B) (1982).

claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties."[28] The flexibility of the definition, however, leaves ample room for judicial disagreements over the scope of episodes that fall within the prohibitions against representing a private party on the same matter. Amidst this background the District of Columbia Court of Appeals again entered the field of professional responsibilty and decided, in *Brown II,* what methodology should be employed to define what constitutes "matter."[29] As will be discussed further, the court's opinion lessened the incentive for firms to err in favor of screening by creating a rebuttable prima facie standard.[30] In other words, by making it harder to support a disqualification motion under DR 9-101(2), the court decreased the incentive for law firms to screen preventively close cases of potential ex-government attorney conflict.

B. Policy Choices

The court of appeals' application of DR 9-101(B) in *Brown II* involved a policy choice between: (1) a narrow interpretation of "matter" and the consequent limited scope of DR 9-101(B); or (2) a broader interpretation of "matter" that would encompass a greater number of revolving door incidents.[31] The definition of "matter" in DR 9-101 affects not only law firm economics but also important public interests. For example, a very narrow definition of "matter" would preclude the bulk of disqualifications of ex-government attorneys. In turn, this would increase the amount of movement between the public and private sector, and would result in the following benefits: first, no permanent legal bureacracy would be created;[32] second, the government would have an easier time recruiting attorneys;[33]

28. *Revolving Door,* 445 A.2d at 618.

29. *Brown II,* 486 A.2d at 49.

30. *See infra* notes 62-65.

31. *See* ABA Comm. on Ethics, and Professional Responsibility, Formal Op. 342 (1975) and D.C. Comm. on Legal Ethics, Op. 16 (1976). *See generally Developments in the Law—Conflicts of Interest Second in the Legal Profession,* 94 HARV. L. REV. 1422, 1428-39 (1981); United States v. Standard Oil Co., 136 F. Supp. 345 (S.D.N.Y. 1955). The presiding judge in *Standard Oil,* Kaufman, authored an article discussing the case, Kaufman, *The Former Government Attorney and the Canons of Professional Ethics,* 70 HARV. L. REV. 657 (1957);

32. *See Developments in the Law, supra* note 31, at 1428. The assumption of the article is that a permanent legal bureaucracy would be inefficient and counter-productive "because they would be relatively insulated from external pressures for flexibility and change, their approach to policymaking would tend to be more rigid and conservative." *Id.* at 1429.

33. *Standard Oil,* 136 F. Supp. at 363 (The government must constantly recruit attorneys from private practice. A strict interpretation of the scope of canon 9 might result in young attorneys avoiding government service because it would adversely restrict their future career opportunities.). The government itself claimed this interest in Armstrong v. McAlpin, 625 F.2d 433, 443 (2d Cir. 1980) (en banc), *vacated,* 449 U.S. 1106 (1981). The court commented:

third, the one-time government agency lawyer might serve as a conduit of information to regulated entities (who are their clients) and increase the efficiency of the regulatory process;[34] and finally, little or no regulation of ethical issues may further the right to counsel of choice.

On a practical level, any decision on professional responsibility has economic consequences for all law firms and lawyers with past government service. As the *Brown II* dissent pointed out, "Any disciplinary rule which potentially may impinge upon this flow of experienced legal talent to private practice understandably would send tremors through the top levels of local law firms."[35] Specifically, the law firms might curtail the recruitment of attorneys away from government service and institute extensive screening procedures. The court's decision in *Brown II* set the standard upon which law firms will decide the necessity of a "Chinese Wall."

In addition to the economic considerations, substantial movement of attorneys between the public and private sectors erodes an already low public confidence in the judicial system.[36] Public suspicion of unethical behavior may be based on a variety of factors. For example, there may be the appearance of misuse of government information[37] or the perception of favoritism by government agencies to ex-employees and their clients.[38] The public may

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> While the tone of these assertions may be overly apocalyptic, it is true that a decision rejecting the efficacy of screening procedures in this context may have significant adverse consequences. Thus, such disapproval may hamper the government's efforts to hire qualified attorneys; the latter may fear that government service will transform them into legal "Typhoid Marys," shunned by prospective private employers because hiring them may result in the disqualification of an entire firm in a possibly wide range of cases. The amici also contend that those already employed by the government may be unwilling to assume positions of greater responsibility within the government that might serve to heighten their undesirability to future private employers. Certainly such trends, if carried to an extreme, may ultimately affect adversely the quality of the services of government attorneys.

Id. at 443; *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342, at 4 (1975).

34. Laumann & Heinz, *supra* note 2, at 483-85.

35. *Brown II*, 486 A.2d at 63.

36. *See, e.g.*, Brackel, *Pro Se,* 14 A.B.A. STUDENT LAW., Feb. 1986, at 38 ("From Shakespeare to Dickens to today's mere mortal critics . . . , the next most ancient profession has come in for some truly scathing commentary.").

37. *See Developments in the Law, supra* note 31, at 1431 ("A second danger of the revolving door involves . . . protection of client confidences. Former officials could benefit improperly from their government employment by abusing their knowledge of confidential information."). In *Brown II,* the court addressed the confidentiality issue under canon 4 of the D.C. Code of Professional Responsibility. Canon 4 deals with preserving client confidences and avoiding conflicts of interest. *See Brown II*, 486 A.2d at 42-44. This Note, however, focuses primarily upon the court's treatment of the "concerns in addition to confidentiality" involved in the revolving door issue. *Id.* at 44.

38. *See Developments in the Law, supra* note 31, at 1432. "The principal concern is that a

also suspect that government attorneys channel public resources in a manner designed to further their future career prospects.[39] All of these appearance-related disadvantages will exist to a limited degree unless there is a total closure of the revolving door.[40] The court's interpretation of DR 9-101(B),

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former top official in an agency might receive special deference from former subordinates who are used to treating that individual with special respect." *Id.*

39. *See supra* note 5 and accompanying text.

40. The Ethics in Government Act of 1978, 18 U.S.C. § 207(c) (1982) represents a legislative determination that such a closure of the revolving door should be imposed for a one year period for specified officials. 18 U.S.C. § 207 states:

> Disqualification of former officers and employees disqualification of partners of current officers and employees
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> (a) Whoever, having been an . . . employee of . . . any independent agency . . . or of the District of Columbia, . . . after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to—
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> (1) any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and
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> (2) in connection with 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 in which the United States or the District of Columbia is a party or has a direct and substantial interest, and
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> (3) in which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recomendation, the rendering of advice, investigation, or otherwise, while so employed, or
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> (b) Whoever, (i) having been so employed within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed and as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, counsults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before—
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> (1) any department, agency, court, courtmartial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and
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> (2) in connection with any judicial or other proceeding, aplication, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and
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> (3) as to (i), which was actually pending under his official responsibilty as an officer or employee within a period of one year prior to the termination of such responsibility, or, as to (ii), in which he participated personally and substantially as an officer or employee; . . . .

however, reflected a policy evaluation of the relative importance of public confidence in the judicial system and the economic consequences to area law firms.

II. THE IMPACT OF *BROWN II* ON THE DISTRICT OF COLUMBIA CODE OF PROFESSIONAL RESPONSIBILITY

The *Brown II* decision acted as a vehicle for the court of appeals' assessment of the revolving door issue. The court fully examined the inherent policy choices in the regulation of the revolving door and the majority concluded that the risk of decreased public confidence did not justify disqualification of the two private attorneys on the present facts.[41] The dissent vehemently disagreed and characterized the majority opinion as "excessively solicitous of the law firms."[42]

A. The Tortured Route of Brown II

As noted previously, the *Brown II* disqualification decision occurred in a zoning conflict involving Oliver T. Carr, Washington's "premier developer,"[43] and his development called the Westbridge. In chronological order, the following events set the stage for *Brown II.* In April, 1975 Carr successfully challenged, on constitutional grounds, the Zoning Commission's sixty-foot height limitation on any construction at the Westbridge site. The Zoning Commission's attorney in this episode was Iverson Mitchell.[44] Six months later, in October 1975, Carr instructed his attorneys to inquire about the legality of an air rights condominium at the Westbridge. Another zoning attorney, C. Francis Murphy, as well as Mitchell, participated in the conver-

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> Shall be fined not more than $10,000 or imprisoned for not more than two years or both: . . . .

Id. Section (c) did not apply in *Brown II* because both attorneys in question had left government service before the provision was enacted. *Brown II,* 486 A.2d at 46 n.12. Perhaps the majority's concern over the punitive element of disqualification (unjustified according to the dissent), may be related to the existence of this provision.

41. The court of appeals foreshadows its final decision by its characterization of the choices:

> One could argue, of course, that the prophylactic effect of DR 9-101(B) should be extended—in the spirit of § 207(c)—to cover appearances that do not necessarily reflect established or likely corruption of the subsequent litigation. The only basis for doing so, however, would be a policy judgment that, despite the absence of any prejudicial relationship between a government transaction and a former government attorney's later work for a private client, the attorney's government reputation, expertise, and contacts should, for the sake of appearances, be kept from the new private client.

Brown II, 486 A.2d at 46-47.

42. *Id.* at 75.

43. *Carr Buys Old Hecht's Property,* Wash. Post, Jan. 7, 1986, at B1, col. 4.

44. *Brown II,* 486 A.2d at 40.

sations and correspondence surrounding the Westbridge air rights issue. The idea was subsequently dropped for nonlegal reasons.[45]

In 1976, Wilkes, Artis, Hedrick & Lane (Wilkes and Artis), a large Washington law firm specializing in zoning, hired both Mitchell and Murphy upon their departure from practice with the Corporation Counsel.[46] One year later, Carr hired Wilkes and Artis to pursue a special exception for more underground parking at the Westbridge. Wilkes and Artis failed to screen Murphy and Mitchell from participation in the Carr parking case.[47] Consequently, when the parking exception pursuit resulted in hearings before the Board of Zoning Adjustment, the plaintiff moved for disqualification of both attorneys and the entire law firm because of violations of DR 9-101(B).[48]

At this juncture, the Board of Zoning Adjustment held a hearing on the disqualification motion. The Board, however, refused to disqualify the lawyers on the ground that the Board did not have the authority to regulate the legal practice before it.[49] The petitioner appealed to the District of Columbia Court of Appeals. In *Brown v. Board of Zoning Adjustment (Brown I),* the court remanded the case back to the Board, stating that the Board had both the power and obligation to regulate the legal practice before it.[50]

In *Brown I,* the court refrained from deciding the merits of the case but it did offer "some guidance" to the Board.[51] The court stressed that one of the policies behind the disciplinary rules of canon 9 is "to avoid even the appearance of impropriety."[52] The court stated later that the Board of Zoning must consider the *appearance* of wrongdoing even if no actual conflict has been found.[53] The court articulated a three step analysis: First, do the items constitute the same matter? If so, did the attorneys have substantial responsibility for either of the previous transactions? Finally, should Wilkes and

45. *Id.*

46. *Id.* Both Murphy and Mitchell were employed by Corporation Counsel that served as the provider of legal services to the Board of Zoning Adjustment. For a discussion of the benefits of hiring from government practice, see *Zoning Law Firms Make D.C.'s Experts Offers They Can't Refuse,* Wash. Post, July 22, 1985, at B1, col. 5. As one hiring attorney stated, "You have the added opportunity of watching them in action." *Id.* at C5, col. 4.

47. *Brown II,* 486 A.2d at 40 n.2.

48. *Id.* at 41. Brown, the plaintiff, had an interest in the proceedings as an affected resident. He argued, through counsel, that Murphy and Mitchell had violated DR 9-101(B) because their past employment with the Zoning Commission had encompassed work on the same matter as presently under discussion, namely, the Westbridge building. *Brown I,* 413 A.2d at 1278.

49. *Brown I,* 413 A.2d at 1279.

50. *Id.* at 1285.

51. *Id.* at 1282.

52. *Id.*

53. *Id.* at 1283.

Artis be disqualified as an entity?[54]

Despite these admonitions by the court of appeals in *Brown I,* the Board of Zoning considered the case on remand, and again refused to disqualify the attorneys and the law firm of Wilkes & Artis.[55] The findings from this administrative hearing became the factual basis of the majority's holding in *Brown II.*[56]

After the Board's refusal to disqualify, the case again went up on appeal, now as *Brown II,* and a division of the court reversed the Board, ruling as a matter of law, that the parking exception case constituted the same "matter" under DR 9-101.[57] The court then granted the respondent's petition for a rehearing en banc, and the full court reversed the panel's holding and affirmed the Board's refusal to disqualify.[58]

B. The Rebuttable Prima Facie Case

The *Brown II* case thoroughly examined the revolving door ethical dilemma. The crux of the disagreement between the majority and the dissent was the desirability of easy movement from public to private practice. The majority opinion analyzed the issue of whether the "substantial relationship" test suffices in the revolving door context.[59] Briefly stated, the substantial

54. *Id.* at 1282. The court mentioned that the law firm of Wilkes & Artis should not be disqualified if they had adequately screened Murphy and Mitchell; or, in the alternative, Corporation Counsel had waived its right to protest. *Id.* at 1284. In *Brown II,* the court never progressed beyond the first question because it determined that the transactions were not the same matter. *Brown II,* 486 A.2d at 54-59 (D.C. 1984).

55. *Brown II,* 486 A.2d at 41.

56. *Id.* at 52-53. The court concluded that the factual findings should be upheld even if the Board applied an incorrect legal framework: "But, even if the BZA did not apply the substantially related test, its findings are explicit enough and sufficiently supported by record evidence to permit this court [to apply the correct legal standard]." *Id.* at 53. For a discussion of the "substantially related" test, see *infra* note 59.

57. *Brown II,* 486 A.2d at 41 (citing Brown v. District of Columbia Board of Zoning Adjustment, No. 13,670 (D.C. July 15, 1983)) (unpublished panel decision prior to en banc review which held that the three episodes constituted the same matter under DR 9-101(B)).

58. Brown v. District of Columbia Board of Zoning Adjustment, No. 13,670 (D.C. filed Sept. 29, 1983) (order granting rehearing en banc).

59. *Brown II,* 486 A.2d at 41-50. The District of Columbia Court of Appeals had previously endorsed the "substantial relationship" test for DR 9-101 in Committee for Washington's Riverfront Parks v. Thompson, 451 A.2d 1177 (D.C. 1982). In other words, to define whether two episodes or incidents were the same "matter", the court would look to whether the episodes were substantially related. The *Thompson* case adopted the ABA's definition of "matter": "a discrete and isolatable transaction or set of transactions between identifiable parties." *Id.* at 1188 (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342, at 6 (1975) (footnotes omitted). The court did not disqualify the attorneys involved because "the design at issue . . . [was] distinct from the proposal and guidelines." *Id.* at 1190. The court stated further that "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

relationship test evolved in the side-switching context to prevent misuse of confidential information. The test originally announced in *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc.*[60] is as follows: "where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited."[61]

The majority held that in the revolving door context DR 9-101(B) requires a "few refinements" in order to effectuate adequately its emphasis on the *appearance* of impropriety, as opposed to *actual* impropriety.[62] The court characterized its action as broadening the scope of the substantial relationship test,[63] in creating a prima facie case for disqualification under DR 9-101(B) that is satisfied if the "transactions overlap in such a way that a reasonable person could infer that the former government attorney may have had access to information legally relevant to, or otherwise useful in, the subsequent representation."[64] This test is also known as the "useful information" test.

This test covers the appearance of impropriety prong of canon 9. Yet the court then proceeded to allow rebuttal of the prima facie case by proof that the appearance was deceiving and the attorney did not actually have access to the useful information.[65] Hence, the court retreated from implementing its prima facie case on the appearance of impropriety prong and instead sought to prevent only actual impropriety.

In the process, the majority opinion rejected the proposal offered by the

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controversy was obtained through prior government employment presents the *appearance* of impropriety." *Id.* at 1188 (citing Kessenick v. Commodity Futures Trading Commission, 684 F.2d 88 (D.C. Cir. 1982)) (emphasis in original). So unlike *Brown II,* the flow of information need not cause prejudice for it to be the basis of disqualification.

60. 113 F. Supp. 265 (S.D.N.Y. 1953), *aff'd,* 216 F.2d 920 (2d. Cir. 1954).

61. *Id.* at 268 (footnote omitted).

62. *Brown II,* 486 A.2d at 49.

63. *Id.* at 50. The court believed their "useful information" test was broader than the traditional "substantial relationship" test because theoretically two incidents which were not at all related and would not qualify under the latter might still contain enough overlapping information that was either legally relevant or useful so as to qualify under the court's new test. *Id.* at 50 n.17.

64. *Id.* at 49-50.

65. *Id.* at 52. The court stated:

> [T]he three land use transactions . . . provide a sufficient factual overlap for a reasonable person to infer that Iverson Mitchell and C. Francis Murphy, while attorneys for the District, may have had access to information from the height litigation and the air rights condominimum [sic] discussions that could be legally relevant to, or otherwise useful in, the special exception case at issue here.

Id. Yet the court then proceeded to denigrate the importance of such reasonable inferences by allowing rebuttal. The court, however, shifted the burden of rebutting the inferences to Wilkes & Artis. *Id.*

District of Columbia Committee on Legal Ethics.[66] The Committee, as amicus, suggested that " 'where transactions pertain to a single objective and involve the same property and the same party, public concerns about the fair administration of justice usually will support a determination that the transactions are part of the same matter.' "[67] The majority denigrated this straightforward test as being "too vague and wooden."[68] The majority opinion stated that the amicus proposal "would completely shut the revolving door" because it is directed at appearances rather than at the flow of useful information.[69] The majority implicitly decided that any possible lessening of public confidence in the government does not merit interpreting DR 9-101 to include appearance of impropriety unaccompanied by the flow of prejudicial information.

The majority concluded that, "properly informed of the countervailing concerns, the public would find the revolving door rules—protecting against prejudicial use of government information—palatable" and "[t]his court should expect no more than what the rules require."[70] Such reasoning elicited a vehement response from the dissent. The dissenting opinion characterized the decision as "irresolute" and "backward-looking" and chastized the majority for restraining the Bar's "effort to establish an . . . uplifting standard of legal ethics."[71] In short, the dissent viewed the majority opinion as unnecessarily solicitous of law firms because the "useful information" test transfers the emphasis from a judgment on the appearance of impropriety to a quest for proof of actual misfeasance.[72] In the dissent's view, a favorable public perception of the judicial system must be considered an important goal of DR 9-101 and hence the appearance of wrongdoing should be sufficient grounds for disqualification.[73] In support of its view, the dissent stated that "the 'useful information' test is too protective in this jurisdiction where we have a screening provision which avoids the heavy sanction [of vicarious

66. *Id.* at 50-52.

67. *Id.* at 50 (quoting amicus without citation).

68. *Id.* at 52.

69. *Id.* at 51-52.

70. *Id.* at 59.

71. *Id.* at 60.

72. *Id.* at 70, 75-76.

73. *Id.* at 69. The dissent considered the majority's fear that disqualification based on appearance would "shut the door" as grossly inaccurate. *Id.* at 52. The dissent stated, "Because of the moderate screening provision—with the law firm remaining in the particular case—there is no interference with the governmental hiring program due to future economic inhibitions on attorneys considering government employment. The screening provision removes any such problem." *Id.* at 64. For an explanation of the screening mechanism, see *supra* notes 21-24 and accompanying text.

disqualification] against the law firm."[74]

In sum, the majority and dissent have a vastly different perception of the relationship between public confidence in the judicial system and the implementation of disciplinary rules. The majority characterized the public confidence issue as beyond the realm of DR 9-101, and not a valid component of the disqualification unless an actual flow of useful information accompanies the improper appearance.[75] On the other hand, the dissent argued that such an approach eviscerates canon 9 and may call into question "the reliability of our legal system."[76] On balance, the dissent correctly promoted the aspirational goals of the Code by reasoning that the practical difficulties have already been mitigated by allowing firms to build the Chinese Wall and thereby avoid economic penalties.[77] The majority failed to respond adequately to the challenge posed by the dissent.

III. CONCLUSION

Brown II represents the District of Columbia Court of Appeals' latest foray into the professional responsibility field, specifically into the "revolving door" area. The case involved a zoning battle over a parking exception in which the petitioner moved for the disqualification of two attorneys and their law firm on the grounds that they had previously worked for the involved government agency on substantially the same matter.

The majority of the court held that the attorneys should not be disqualified because the past incidents were not sufficiently related to the parking exception case and hence the attorneys could not have gained "useful information" from their previous government work. The dissent, in contrast, argued that the appearance of impropriety should be sufficient grounds for disqualification even if no misfeasance has occurred.

The District of Columbia Court of Appeals' latest decision in the professional responsibility area in all probability will not curtail the proliferation of litigation on disqualification motions. At first glance, the useful information test and the prima facie case appear to create a uniform standard that would encourage internal screening and discourage litigation. The ability to rebut and the grounds sufficient for rebuttal, however, will probably encourage more litigation in borderline cases.

Regarding the public's opinion of the legal profession, the effect of *Brown II* will be negligible, at best, insofar as it will merely perpetuate the already

74. *Brown II*, 486 A.2d at 74.
75. *See supra* notes 62-64 and accompanying text.
76. *Brown II*, 486 A.2d at 72. *See supra* notes 70-74 and accompanying text.
77. *See supra* notes 5, 36, and accompanying text.

low esteem in which attorneys are held. At worst, the decision will encourage verbal semantics to sidestep ethical issues and such behavior will contribute to a further decline in respect for the legal profession.

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