COMBATING THE MOTIVATIONAL CONSTRAINT BARRIER IN LEGAL AID PARTICIPATION BY LAWYERS IN THE JUDICIARY*

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ABSTRACT

The recently released Code of Professional Responsibility and Accountability introduces a provision generally prohibiting government lawyers from engaging in the private practice of law. This Article examines such provision as applied to lawyers in the judiciary, along with the other related laws, rules, and jurisprudence on private practice, and demonstrates how it engenders a "motivational constraint" that discourages such lawyers from participating in legal aid. To overcome such constraint, the Article considers the American approach: one that provides for a straightforward rule expressly recognizing legal aid as an exception to the general prohibition and setting out all the conditions for such activity.

* *Cite as* Karina Mae P. Garcia, *Combating the Motivational Constraint Barrier in Legal Aid Participation by Lawyers in the Judiciary*, 96 PHIL. L.J. 764, [page cited] (2023).

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I. INTRODUCTION

On April 11, 2023, the Supreme Court promulgated the Code of Professional Responsibility and Accountability ("CPRA"),[1] which updates, modernizes, and supersedes the 34-year-old Code of Professional Responsibility. The CPRA establishes the norms of conduct and ethical standards in the Philippine legal profession.[2]

Among the provisions introduced by the CPRA is Section 21, Canon III, which generally prohibits government lawyers from engaging in the private practice of law. It states that:

> A lawyer currently serving in the government shall not practice law privately, unless otherwise authorized by the Constitution, the law or applicable Civil Service rules and regulations. If allowed, private practice shall be upon the express authority of the lawyer's superior, for a stated specified purpose or engagement, and only during an approved leave of absence. However, the lawyer shall not represent an interest adverse to the government.[3]

This adds to the body of existing rules that generally prohibits government employees from engaging in the private practice of their profession. These rules, in turn, are meant to prevent any conflict of interest[4] and to promote full-time devotion to public service.[5]

This Article examines the current approach to private practice by lawyers in the government—particularly those in the judiciary—as drawn from the new CPRA provision and related laws, rules, and jurisprudence. It demonstrates how this approach engenders a motivational constraint[6] that discourages such lawyers from undertaking activities that would otherwise be permitted, like providing legal aid. Particularly, it shows how the vague rules on private practice, coupled

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[1] CODE OF PROF'L RESPONSIBILITY & ACCOUNTABILITY [hereinafter "CPRA"], pmbl.

[2] *SC Unanimously Approves the Code of Professional Responsibility and Accountability*, SUPREME COURT OF THE PHIL. WEBSITE, Apr. 12, 2023, *at* https://sc.judiciary.gov.ph/sc-unanimously-approves-the-code-of-professional-responsibility-and-accountability (last checked Oct. 14, 2023).

[3] CPRA, canon III, § 21.

[4] Cases v. Delani, A.C. No. 10730, slip op. at 5, July 28, 2020.

[5] *See, e.g.*, the prohibition against judiciary officials and employees working as insurance agents, Supreme Court A.C. No. 5 (1988); the duty of fidelity requiring devotion to the client's cause, Ziga v. Arejola, A.M. No. MTJ-99-1203, 403 SCRA 361, June 10, 2003.

[6] This denotes the lack of desire or discouragement of lawyers to take on *pro bono* cases. *See* LATHAM & WATKINS LLP [hereinafter, "LATHAM & WATKINS"], PRO BONO INST., A SURVEY OF PRO BONO PRACTICES AND OPPORTUNITIES IN 84 JURISDICTIONS 693–694 (2016), *available at* https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/A-Survey-of-Pro-Bono-Practices-and-Opportunities.pdf.

with the broad definition of "practice of law" in *Cayetano v. Monsod*[7] and in Section 1, Canon III of the CPRA, creates uncertainty on what is allowed, thereby unintendedly serving as a barrier to legal aid participation in the country.

To combat such problem, the Article considers the corresponding approach of the United States, a jurisdiction that employs comparable rules on outside practice of law, and which faced the same impediment in the past. It concludes that by adopting a similar approach, the motivational constraint may be reduced, if not eliminated, and more lawyers in the Philippine judiciary may be enabled and encouraged to participate in legal aid.

The Article is divided into six parts. Part I introduces the topic, while Part II limits the scope of the study. Part III discusses the need to tap government lawyers, particularly lawyers in the judiciary, for legal aid, and Part IV lays out the Philippine framework on prohibited private practice of law and examines the motivational constraint triggered by the said approach. Part V looks at the corresponding US framework and analyzes its applicability in the Philippine context, and Part VI concludes the Article. It is hoped that the study will contribute to the development of judicial reforms in the country, particularly reforms in legal aid.

II. SCOPE

The limitations of this Article's analysis are summarized in five key points.

First, it is limited to lawyers in the judiciary. Although it would be ideal to extend the examination to lawyers serving in other government branches, it would be difficult to conduct a uniform analysis due to significant differences in applicable rules and regulations. For instance, unlike lawyers in the judiciary, certain lawyers in the legislative and executive branches are allowed to engage in the private practice of law, albeit in a limited capacity.[8] This difference calls for a more nuanced approach, which may more appropriately be the subject of a separate study.

Second, the Article does not cover the rules specifically applicable to members of the Philippine bench. Significantly, there are separate rules applicable only to judges, such as those found in the New Code of Judicial

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[7] [Hereinafter "*Cayetano*"], G.R. No. 100113, 201 SCRA 210, 214, Sept. 3, 1991.

[8] For instance, in the Exec. Dep't., *see* OP Mem. Circ. No. 17 (1986). This revokes OP Mem. Circ. No. 1025 (1977).

Conduct for the Philippine Judiciary.[9] These rules materially differ from the rules applicable to other lawyers like clerks and court attorneys. Similar to the first limitation, the difference in these rules necessitates a more calibrated approach to the matter.

Third, the rationales for the broad definitions of legal practice in *Cayetano* and in the CPRA are not dwelled upon in this Article. It is recognized that in crafting such definitions, the Court weighs in on important considerations like protecting the legal profession, among others. Accordingly, the Article does not attempt to limit or redefine the practice of law. It merely suggests another approach in laying out the rules on private practice as a special effort to promote legal aid.

Fourth, this Article does not consider the other factors that affect a lawyer's decision to participate in legal aid, such as professional growth, sense of duty, and personal satisfaction, among others. The idea of encouraging government lawyers, particularly those in the judiciary, to participate in legal aid proceeds from the fact that there is not enough legal aid in the country, as will be discussed below. While it may also be important to look at the other factors to further drive lawyer participation in legal aid, the study focuses solely on the motivational constraint aspect triggered by the existing rules on private practice.

Finally, the Article does not cover the separate rules applicable to lawyers who formerly served in the government[10] and focuses only on those pertaining to lawyers in current government service.

III. NEED FOR LEGAL AID

As used in this Article, "legal aid" refers to legal assistance or service rendered by a lawyer without charge to an indigent or a person of limited means.[11] In this sense, it is synonymous with *pro bono*, short for the Latin phrase *pro bono publico,* which translates to "for the public good."[12] Legal aid or *pro bono*

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[9] CODE OF JUD. CONDUCT, pmbl.

[10] *See* CPRA, canon II, § 29.

[11] *See* CLAS RULE (2017), § 4(b). *See also Access to Legal Aid*, UNITED NATIONS OFF. ON DRUGS & CRIME WEBSITE, *at* https://www.unodc.org/unodc/en/justice-and-prison-reform/legal-aid.html (last modified May 23, 2023).

[12] *See* Scott Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO

services play an important role in promoting access to justice by enabling persons of limited means to obtain legal assistance.

Through the years, the government has undertaken several measures to strengthen legal aid in the country. In the legislative branch, Congress has enacted Republic Act No. 9999,[13] otherwise known as the Free Legal Assistance Act of 2010, which provides tax incentives to lawyers who render free legal services.[14] It has also mandated, through Republic Act No. 9406,[15] the creation of the Public Attorney's Office, which is tasked with rendering free legal representation, assistance, and counseling to indigent persons in criminal, civil, labor, administrative, and other quasi-judicial cases in the country.[16]

On the part of the judiciary, the Supreme Court has promulgated rules on legal aid, such as the Rule on Mandatory Legal Aid Service for Practicing Lawyers ("MLAS Rule"), which requires practicing lawyers to render free legal aid services to indigent litigants,[17] and the Rule on Community Legal Aid Service ("CLAS Rule"), which mandates recent Bar passers to render *pro bono* legal aid services to qualified litigants.[18] It has also revised the existing Rule 138-A or the Law Student Practice Rule to promote the Clinical Legal Education Program in Philippine law schools.[19] However, a member of the Court noted that the MLAS Rule was never implemented, and the CLAS Rule was suspended in 2019 due to many difficulties. Thus, "only [….] the Law Student Practice Rule […] supplement[s] the legal aid programs undertaken by the [Integrated Bar of the Philippines], which are, in turn, funded through the Court."[20]

BONO IN THE LEGAL PROFESSION 183 (Robert Granfield & Lynn Mather eds.) (2009). "*Pro bono*" is primarily used in citing American rules, and is defined as legal services rendered without fee or expectation of fee to (1) persons of limited means; or (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means. A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 6.1(a). Although "*pro bono*" may also refer to legal services rendered with substantially reduced fee, as provided in Rule 6.1(b), in this article, it is limited only to services rendered completely free of charge.

[13] Rep. Act No. 9999 (2010).

[14] § 5.

[15] Rep. Act No. 9406 (2007).

[16] § 2.

[17] B.M. No. 2012, § 5 (2009).

[18] CLAS RULE (2017), § 5.

[19] RULES OF COURT, RULE 138-A *as amended by* A.M. No. 19-03-24-SC (2019). Law Student Practice Rule.

[20] *Justice Caguioa: Legal Aid Must Be Continuous and Sustainable*, SUPREME COURT OF THE PHIL. WEBSITE, Dec. 2, 2022, *at* https://sc.judiciary.gov.ph/justice-caguioa-legal-aid-must-be-continuous-and-sustainable/.

Key organizations have also been involved in the advancement of legal aid. These include the Integrated Bar of the Philippines, the Philippine Bar Association, the Free Legal Assistance Group, the Alternative Law Groups, the National Union of People's Lawyers, the legal aid clinics of Philippine law schools, law firms, and many other organizations that have been rendering free legal assistance to qualified persons.[21]

Despite the foregoing measures, access to justice—which legal aid seeks to address—remains elusive in the country. According to a 2019 World Justice Project report,[22] only 20% of the Philippine respondents who experienced a legal problem were able to obtain information, advice, or representation. Of those who obtained legal assistance, 72% received it from family or friends. Only 15% of Philippine respondents received it from a lawyer or professional advice service, and only 9% received it from a government legal aid office.[23] As recognized by the Court itself, this data indicates the breadth of the legal aid needs of the public and their access to competent legal service providers.[24]

Compared to other countries, the Philippines also performed poorly in the World Justice Project Rule of Law Index for 2022, in which it ranked 97th out of 140 countries in terms of accessibility and affordability of civil justice. The country scored 0.47 (with 1.0 as having access to justice and 0 as having no access), falling below the global average of 0.55. In terms of the overall parameter for civil justice, which includes accessibility and affordability of civil justice, among other factors, the Philippines ranked 104th and scored 0.45, likewise below the global average of 0.54.[25]

In view of this reality, every measure to promote legal aid deserves to be considered. This includes identifying ways to improve the current framework, to

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[21] *Id.*

[22] *Global Insights on Access to Justice 2019*, WORLD JUSTICE PROJECT WEBSITE, *at* https://worldjusticeproject.org/our-work/research-and-data/global-insights-access-justice-2019 (last modified May 23, 2023). The *Global Insights on Access to Justice 2019* "presents data on how ordinary people around the world navigate their everyday legal problems, highlighting the most common legal problems, respondents' assessment of their legal capability, and sources of help. The study also highlights information on the status of people's problems, the resolution process, and the impact of their justice problems on their life." *Id.*

[23] WORLD JUSTICE PROJECT, GLOBAL INSIGHTS ON ACCESS TO JUSTICE 85 (2019), *at* https://worldjusticeproject.org/sites/default/files/documents/WJP-A2J-2019.pdf.

[24] SUPREME COURT OF THE PHIL., STRATEGIC PLAN FOR JUDICIAL INNOVATIONS 2022-2027 24–25 (2022) [hereinafter "SPJI 2022–2027"], *at* https://sc.judiciary.gov.ph/spji/.

[25] *WJP Rule of Law Index: Philippines*, WORLD JUSTICE PROJECT, *at* https://worldjusticeproject.org/rule-of-law-index/country/2022/Philippines/ (last modified May 24, 2023). Although there is already a 2022 World Justice Project Rule of Law Index, the 2019 Global Insights on Access to Justice is the latest publication containing specific data on access to civil justice.

encourage the widest voluntary participation not just by private practitioners, but also by government lawyers, particularly lawyers in the judiciary. This is in addition to the current reforms already being undertaken by the Court to address the problem.[26]

Significantly, efforts to encourage government lawyers to participate in legal aid are already being undertaken worldwide. In many jurisdictions where legal aid remains insufficient, participation by government lawyers has been widely encouraged. For instance, in the US, there have been efforts to enable and encourage federal and state attorneys to render *pro bono* work since the 1970s.[27] As a result of these efforts, such lawyers represent a large pool of volunteers in the country today.[28] In Australia, government lawyers are also tapped for *pro bono* work. They even have structured *pro bono* programs for government lawyers who wish to undertake such activity.[29] In Canada, crown counsels, who were previously restricted from providing *pro bono* services, may now do so outside their regular hours in specific clinics and in specific areas of law that the government has screened to minimize conflicts.[30] In Scotland, there is a network that allows government lawyers to be involved in a number of *pro bono* activities, including providing advice at their local citizens' bureau.[31] In Argentina, although to a lesser extent, the bar association has developed *pro bono* programs for government lawyers in partnership with global law firms.[32]

These global developments, considered with the reality that legal aid remains lacking in the Philippines, strengthen the need to examine the barriers to lawyer participation, particularly the motivational constraint engendered by the current framework.

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[26] *See* SPJI 2022–2027, *supra* note 24, at 24–26.

[27] *Pro Bono Program*, U.S. DEP'T OF JUSTICE WEBSITE, *at* https://www.justice.gov/atj/pro-bono-program (last modified May 23, 2023). Although efforts to promote legal aid date back to the 1970s, it was in 1996 that Exec. Order No. 12 was issued, directing federal agencies to encourage attorneys to do *pro bono* legal work. *See also* Laura Klein, *The Federal Government Pro Bono Program: Making it Easy for Federal Government Attorneys to Volunteer*, THE FEDERAL LAWYER (Sept. 2018) at 18, *available at* https://www.fedbar.org/wp-content/uploads/2018/09/In-The-Legal-Community-pdf-1.pdf.

[28] *See Government Attorneys*, ABA WEBSITE, *at* https://www.americanbar.org/groups/center-pro-bono/resources/pro-bono-role/government_attorneys/ (last modified March 2020). *See also* Klein, *supra* note 27, at 18.

[29] AUSTRALIAN PRO BONO CENTRE, A GUIDE FOR GOVERNMENT LAWYERS 25 (2019), *at* https://www.probonocentre.org.au/wp-content/uploads/2019/03/APB_Guide-for-Government-Lawyers-2019.pdf. *See* LATHAM & WATKINS, *supra* note 6, at 48.

[30] LATHAM & WATKINS, *supra* note 6, at 120.

[31] *Id.* at 559.

[32] *Id.* at 32.

IV. PHILIPPINE FRAMEWORK ON PRIVATE PRACTICE OF LAW BY LAWYERS IN THE JUDICIARY

A. Practice of Law in General

Practice of law encompasses a broad range of activities. As early as 1959, the Court has held that practice of law is not limited to litigation in court. It covers activities even outside of court, such as the preparation of pleadings and incidental documents, as well as the advising of clients in legal matters.[33]

In 1991, the Court advanced a particular definition of practice of law in the landmark case of *Cayetano v. Monsod*. There, the Court was confronted with the question of whether Atty. Christian Monsod's past work experience as an economist, manager, entrepreneur, negotiator, and legislator may be considered as practice of law for his appointment requirements as Chair of the Commission of Election.[34]

In ruling in the affirmative, the Court considered the modern concept of law practice and the liberal construction intended by the framers of the Constitution on the "practice of law" requirement for appointments. Drawing from the different definitions of practice of law, it held:

> Practice of law means any activity, in or out of court, which requires the application of law, legal procedure, knowledge, training and experience. "To engage in the practice of law is to perform those acts which are characteristics of the profession. Generally, to practice law is to give notice or render any kind of service, which device or service requires the use in any degree of legal knowledge or skill."
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> Interpreted in the light of the various definitions of the term "practice of law", particularly the modern concept of law practice, and taking into consideration the liberal construction intended by the framers of the Constitution, Atty. Monsod's past work experiences as a lawyer-economist, a lawyer-manager, a lawyer-entrepreneur of industry, a lawyer-negotiator of contracts, and a lawyer-legislator of both the rich and the poor—verily more than satisfy the constitutional

[33] Phil. Lawyer's Ass'n v. Agrava, G.R. No. 12426, 106 Phil. 173, 176, Feb. 16, 1959.
[34] *Cayetano*, 201 SCRA at 223–25.

> requirement—that he has been engaged in the practice of law for at least ten years.[35]

Significantly, *Cayetano* is not a unanimous decision. Four justices sharply disagreed, with three of them writing their own dissenting opinions. Justice Isagani Cruz found the majority's definition of practice of law to be "too sweeping…as to render the qualification practically toothless." For him, the effect is that every lawyer will be considered engaged in the practice of law even if they do not earn as a lawyer. It is enough that the activities engaged in are incidentally connected with some law, ordinance, or regulation for such to be considered a practice of law.[36]

Justices Teodoro Padilla and Hugo Gutierrez, Jr. also did not agree with the majority's definition. For Justice Padilla, practice of law connotes an "active, habitual, repeated, or customary action," as opposed to a mere "isolated appearance." He referred to the factors of habituality, compensation, application of law, and attorney-client relationship as determinative of practice of law.[37] For Justice Gutierrez, Jr., whose dissent was joined by Justice Abdulwahid Bidin, practice of law contemplates an action that is "active and regular," not "isolated, occasional, accidental, intermittent, incidental, seasonal, or extemporaneous."[38]

Nevertheless, through the years, the Court has continued to use the *Cayetano* definition in deciding cases where practice of law is concerned. Thus, it has found the following activities to constitute practice of law: attending a public auction on behalf of clients and negotiating related matters,[39] teaching,[40] and working in the government when it requires the use of legal knowledge,[41] among others.

The Court's latest effort to further clarify the matter appears in the CPRA itself, in which the definition has been codified. Section 1, Canon III provides:

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[35] *Id.* at 214, 225–26. In applying the definition, the Court considered the following aspects of Atty. Monsod's work experience: (1) that he worked in the law office of his father; (2) that he worked as an operations officer for about two years in Costa Rica and Panama; (3) that he served various companies as a legal and economic consultant or chief executive officer; (4) that he was knowledgeable in election law, having previously worked for NAMFREL; and (5) that he was a member of the Davide Commission and the Constitutional Commission.

[36] *Id.* at 234 (Cruz, *J.*, *dissenting*).

[37] *Id.* at 231 (Padilla, *J.*, *dissenting*).

[38] *Id.* at 237 (Gutierrez, Jr., *J.*, *dissenting*).

[39] Bonifacio v. Era, A.C. No. 11754, 841 SCRA 487, Oct. 3, 2017.

[40] *In re* U.P. Law Faculty, A.M. No. 10-10-4-SC, 633 SCRA 543, Mar. 8, 2011.

[41] Lingan v. Calubaquib, A.C. No. 5377, 727 SCRA 341, June 30, 2014.

> The practice of law is the rendition of legal service or performance of acts or the application of law, legal principles, and judgment, in or out of court, with regard to the circumstances or objectives of a person or a cause, and pursuant to a lawyer-client relationship or other engagement governed by the CPRA. It includes employment in the public service or private sector and requires membership in the Philippine bar as a qualification.[42]

Notably, the key features of the *Cayetano* definition have been largely retained. Practice of law is still not limited to court-related activities and still encompasses acts that require the application of legal knowledge. Further, employment in the public service or the private sector has also been explicitly recognized as a form of law practice. However, additional parameters have been introduced, such as the presence of a lawyer-client relationship, due regard to circumstances or objectives for services rendered, and membership in the Philippine bar as a qualification. These appear to be more concrete and objective tests in determining whether an act or service constitutes law practice, but their full application and treatment are better left to future cases.

B. Laws and Rules on Private Practice

In general, government employees are prohibited from the private practice of their profession outside government work. Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees provides:

> In addition to acts and omissions of public officials and employees now prescribed in the Constitution and existing laws, the following shall constitute prohibited acts and transactions of any public official and employee and are hereby declared to be unlawful:
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> * * *
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> *(b) Outside employment and other activities related thereto.* — Public officials and employees during their incumbency shall not:
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> (2) Engage in the private practice of their profession unless authorized by the Constitution or law, provided, that such practice will not conflict or tend to conflict with their official functions.[43]

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[42] CPRA, canon III, § 1.

[43] CODE OF CONDUCT OF PUB. OFF. § 7(b). (Emphasis supplied.)

The foregoing rule is grounded on the principle that public office is a public trust, which requires the efficient use of office hours to serve the public.[44] Further, it aims to avoid any conflict of interest on the part of the official or employee who may wittingly or unwittingly use confidential information acquired from such employment.[45]

For lawyers in government service, Section 21, Canon III of the CPRA echoes the same general prohibition, with added conditions before private practice would be allowed.[46]

Although not entirely dealing with the regulation of private practice, the prohibition may also be found in the Code of Conduct for Court Personnel,[47] which generally prohibits court employees from being employed outside of their current judicial work, including any employment that requires the practice of law, except for teaching:

> The full-time position in the Judiciary of every court personnel shall be the personnel's primary employment. For purposes of this Code, "primary employment" means the position that consumes the entire normal working hours of the court personnel and requires the personnel's exclusive attention in performing official duties.
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> Outside employment may be allowed by the head of office provided it complies with all of the following requirements:
>
> (a) The outside employment is not with a person or entity that practices law before the courts or conducts business with the Judiciary;
>
> (b) The outside employment can be performed outside of normal working hours and is not incompatible with the performance of the court personnel's duties and responsibilities;
>
> (c) *The outside employment does not require the practice of law*; *Provided, however*, that court personnel may render services as professor, lecturer, or resource person in law schools, review or continuing education centers or similar institutions;
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> (d) The outside employment does not require or induce the court personnel to disclose confidential information acquired while performing official duties; and

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[44] Cases v. Delani, A.C. No. 10730, slip op. at 5, July 28, 2020.

[45] *In re* Silverio-Buffe, A.M. No. 08-6-352-RTC, 596 SCRA 378, 390–93, Aug. 19, 2009.

[46] CPRA, canon III, § 21.

[47] *See* A.M. No. 03-06-13-SC (2004), pmbl. ¶ ¶ 2–4.

> (e) The outside employment shall not be with the legislative or executive branch of government, unless specifically authorized by the Supreme Court.
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> Where a conflict of interest exists, may reasonably appear to exist, or where the outside employment reflects adversely on the integrity of the Judiciary, the court personnel shall not accept the outside employment.[48]

The sanction for the general prohibited private practice of one's profession is found in the Civil Service Commission's Resolution No. 1701077 or the 2017 Rules on Administrative Cases in the Civil Service, which classifies the act as "a light offense punishable by reprimand for the first offense; suspension of one (1) to thirty (30) days for the second offense; and dismissal from the service for the third offense."[49]

However, for lawyers, such a violation may come within the purview of the CPRA as an intentional violation of conflict of interest rules, classified as a serious offense[50] and punishable by disbarment, suspension from the practice of law exceeding six months, revocation of notarial commission and disqualification as a notary public for not less than two years, and/or fine exceeding Php100,000.00.[51]

Aside from the foregoing, there are no other rules or laws on private practice specifically governing lawyers in the judiciary. Thus, for guidance, one must turn to jurisprudence, first, on private practice in general, and second, as applied to lawyers in the judiciary.

In the 1965 case of *People v. Villanueva*,[52] a city attorney appeared in court as a private prosecutor for a friend. Before appearing, he was able to secure the permission of the Secretary of Justice upon the condition that he would not be compensated and that he would be on leave. In deciding whether the city attorney engaged in prohibited private practice, the Court considered the fact that (1) the appearance was an isolated act, and (2) there was no demand for payment. The Court held:

> We believe that the isolated appearance of City Attorney Fule did not constitute private practice, within the meaning and contemplation of the Rules. Practice is more than an isolated appearance, for it consists

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[48] CT. PERSONNEL CODE OF CONDUCT, canon III, § 5. (Emphasis supplied.)
[49] Civil Serv. Comm'n Res. No. 1701077 (2017), r. 10, § 50, ¶ F(15).
[50] CPRA, canon VI, § 33(q).
[51] Canon VI, § 37(a).
[52] [Hereinafter "*Villanueva*"], G.R. No. 19450, 121 Phil. 894, 894, May 27, 1965.

> in frequent or customary action, a succession of acts of the same kind. In other words, it is frequent habitual exercise (State *vs.* Cotner, 127, p. 1, 87 Kan. 864, 42 LRA, N.S. 768). *Practice of law to fall within the prohibition of statute has been interpreted as customarily or habitually holding one's self out to the public, as a lawyer and demanding payment for such services* (State vs. Bryan, 4 S. E. 522, 98 N. C. 644, 647). The appearance as counsel on one occasion, is not conclusive as determinative of engagement in the private practice of law. The following observation of the Solicitor General is noteworthy:
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> > Essentially, the word private practice of law implies that one must have presented himself to be in the active and continued practice of the legal profession and that his professional services are available to the public for a compensation, as a source of his livelihood or in consideration of his said services.[53]

Succeeding cases would apply *Villanueva*'s twin elements of "succession of acts" and "demand for payment" to determine whether a government lawyer engaged in the prohibited private practice of law.[54] In *Lorenzana v. Fajardo*,[55] the Court held that a government lawyer's act of maintaining a law office and signing as "counsel" for his clients constituted private practice because they were not isolated acts and because there was a demand for payment. The Court reiterated:

> Private practice of law contemplates a succession of acts of the same nature habitually or customarily holding one's self to the public as a lawyer. Practice is more than an isolated appearance for it consists in frequent or customary action a succession of acts of the same kind. *The practice of law by attorneys employed in the government, to fall within the prohibition of statutes has been interpreted as customarily habitually holding one's self out to the public, as a lawyer and demanding payment for such services.*[56]

These twin elements would also be applied to cases involving lawyers in the judiciary. In *Office of the Court Administrator v. Ladaga,*[57] the Court held that a clerk of court's act of appearing as counsel for his cousin does not constitute private practice because the appearance was isolated and *pro bono* in nature. Similarly, in *Maderada v. Mediodea*,[58] the Court held that a court officer who

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[53] *Id.* at 112–13. (Emphasis supplied.)

[54] *See, e.g.,* Off. of the Ct. Adm. v. Ladaga, A.M. No. P-99-1287, 350 SCRA 326, Jan. 26, 2001; Maderada v. Mediodea*,* A.M. No. MTJ-02-1459, 413 SCRA 313, Oct. 14, 2003; Lorenzana v. Fajardo*,* A.C. No. 5712, 462 SCRA 1, June 29, 2005; Busilac Builders, Inc. v. Aguilar, A.M. No. RTJ-03-1809, 504 SCRA 585, Oct. 17, 2006; *and* Angeles v. Gutierrez, G.R. No. 189161, 668 SCRA 803, Mar. 21, 2012.

[55] A.C. No. 5712, 462 SCRA 1, 7–8, June 29, 2005.

[56] *Id.* (Emphasis supplied.)

[57] A.M. No. P-99-1287, 350 SCRA 326, 332, Jan. 26, 2001.

[58] A.M. No. MTJ-02-1459, 413 SCRA 313, 325–26, Oct. 14, 2003.

appeared *pro se* or for herself did not violate the rule on prohibited private practice because she did not customarily or habitually hold herself out to the public as a lawyer, and there was no demand for payment:

> The practice of law, though impossible to define exactly, involves the exercise of a profession or vocation usually for gain, mainly as *attorney* by acting in a representative capacity and as *counsel* by rendering legal advise [sic] to others. Private practice has been defined by this Court as follows:
>
> > [P]ractice is more than an isolated appearance, for it consists in frequent or customary action, a succession of acts of the same kind. In other words, it is frequent habitual exercise. *Practice of law to fall within the prohibition of statute* [referring to the prohibition for judges and other officials or employees of the superior courts or of the Office of the Solicitor General from engaging in private practice*] has been interpreted as customarily or habitually holding one's self out to the public, as a lawyer and demanding payment for such services*[.]
>
> Clearly, in appearing for herself, complainant was not customarily or habitually holding herself out to the public as a lawyer. Neither was she demanding payment for such services. Hence, she cannot be said to be in the practice of law.[59]

Aside from the foregoing cases, there is also a line of decisions traceable to *Villanueva* that focuses solely on the element of habituality or succession of acts as determinative of private practice of law.[60] In these cases, the Court no longer looked at the element of compensation or demand for payment and merely determined whether the alleged private practice constituted a succession of acts or was merely isolated in nature.[61]

Taking the law, rules, and jurisprudence on private practice, the current framework on the matter as applied to members of the judiciary may be summarized as follows:

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[59] *Id.* at 325, *citing Villanueva,* 121 Phil. at 897. (Emphasis supplied.)

[60] *See* Borja v. Sulyap Inc., G.R. No. 150718, 399 SCRA 601, Mar. 26, 2003; Lim-Santiago v. Sagucio, A.C. No. 6705, 486 SCRA 10, Mar. 31, 2006; Office of the Court of Administrator v. Floro, A.M. No. RTJ-99-1460, 486 SCRA 66, Mar. 31, 2006; *and* Tan-Yap v. Patricio, A.M. No. MTJ-19-1925, June 3, 2019.

[61] *Id.*

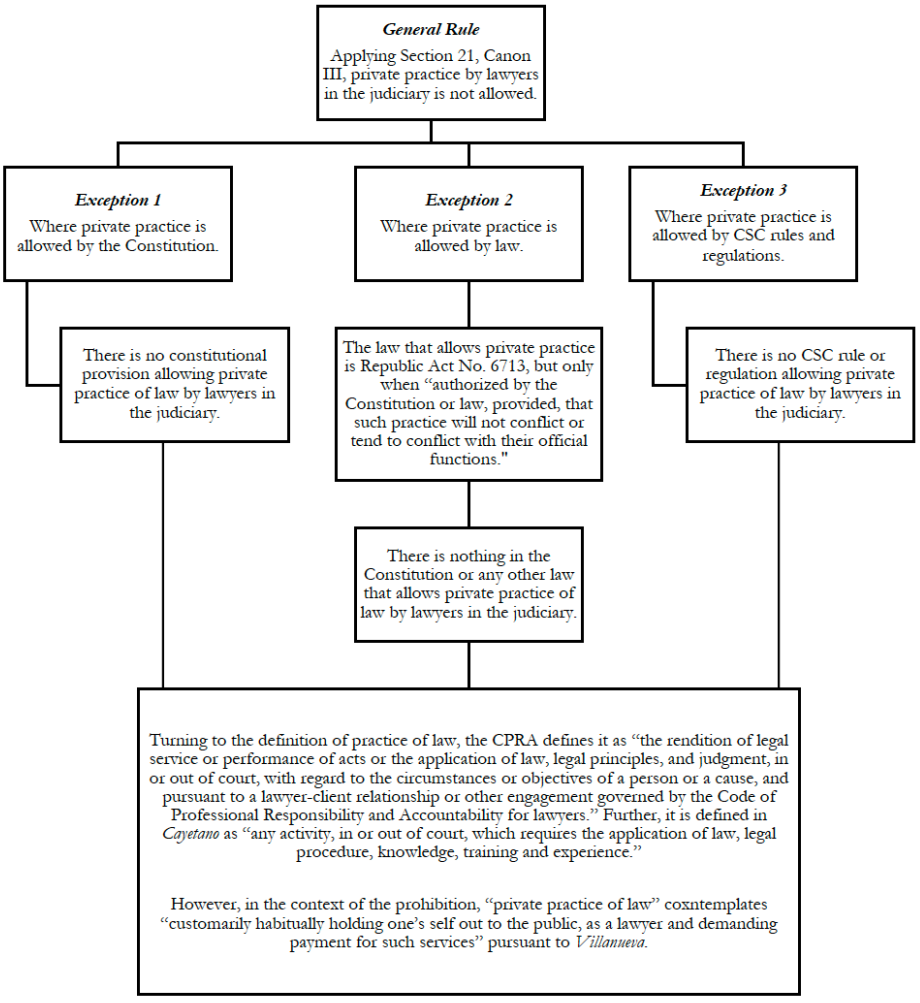

Figure 1. Framework on the private practice of law by lawyers in the judiciary.

C. The Motivational Constraint Under the Current Framework

In a 2016 survey on *pro bono* cases by the global firm Latham & Watkins LLP, the phrase "motivational constraint" was used to denote the lack of desire or discouragement of lawyers to take on *pro bono* cases. Such constraint was considered as a barrier to *pro bono* work in the US, together with other barriers such as the lawyer's lack of time, family commitments, competing billable hours, lack of skills, lack of information on opportunities, and lack of administrative support, among others.[62]

[62] LATHAM & WATKINS, *supra* note 6, at 693–94.

Institutional obstacles in the form of statutory prohibitions or restrictions, whether actual or perceived,[63] contribute substantially to motivational constraint.[64] In an early US study, it was found that non-participation by government lawyers in *pro bono* work is not because of lack of desire, but because of broad restrictions scattered across different laws and rules. To motivate government lawyers to undertake *pro bono* work, the study found that a written policy that clearly delineates permissible activity was essential. Government lawyers needed "clear examples of the types of *pro bono* matters that would be permissible."[65]

That institutional obstacles play a significant role in discouraging *pro bono* work has also been observed by the American Bar Association (ABA):

> It is a widely-held belief that government attorneys are prohibited from doing pro bono work, either because of bar rules or because of perceived conflicts of interest. This is a myth, albeit a particularly persistent one. In actuality, while they must comply with some special rules and restrictions, thousands of federal, state and local government lawyers have contributed their time and talents to pro bono service, and they are actively encouraged to do so.[66]

Although many reforms have since been implemented in the US, the role of institutional obstacles in perpetuating the belief that *pro bono* work by government lawyers is not allowed has been substantial.[67]

In the same way that statutory prohibitions or restrictions used to be a barrier to *pro bono* work participation in the US, the current Philippine approach to private practice by lawyers in the judiciary—characterized by vagueness and lack of clear rules that are further aggravated by the broad *Cayetano* and CPRA definitions—engenders a motivational constraint to legal aid participation. This may be demonstrated in two ways.

First, the current system breeds uncertainty on what is allowed and not allowed. A textual analysis of Section 21, Canon III as applied to lawyers in the judiciary does not point to any apparent instance when private practice is permitted. While there are exceptions ("unless otherwise authorized by the

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[63] *See A Guide For Government Lawyers*, *supra* note 29, at 9.

[64] *See* Cheryl Zalenski, *Government Lawyer Pro Bono: How Much is Being Done, and How Can We Improve,* 16 PUB. LAW. 14, 15 (2008).

[65] *Id.*

[66] Am. Bar Ass'n Res. 121-A at 12 (2006), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/annual2006/2006_am_121a.pdf.

[67] *Id.* at 8. *See also* Zalenski, *supra* note 64, at 15.

Constitution, the law or applicable Civil Service rules and regulations"), such exceptions afford little guidance since the only current applicable law on the matter, Republic Act No. 6713, simply refers back to the same exceptions, i.e., "unless authorized by the Constitution or law."[68] Unfortunately, there is no other law or constitutional provision that permits private practice of law by judiciary lawyers. Thus, unless a new law is passed on the subject matter, the exceptions are practically of no use.

Turning to jurisprudence would yield two lines of cases: (1) the one using the oft-quoted *Cayetano* definition of "practice of law," and (2) the one using the *Villanueva* definition of "private practice of law." While the second line provides the more specific definition and should thus control pursuant to the rules of statutory construction, the continued use of the *Cayetano* definition creates confusion since its broad characterization of practice of law is patently inconsistent with the *Villanueva* elements of "succession of acts" and "demand for payment." Why "practice of law" and "private practice of law" would differ as to how often the practice is done and as to whether it is compensated for is inexplicable given that the only textual difference between the two is the word "private."

The new CPRA provision on practice of law does not provide clarification on this specific matter either, as it substantially adopts the *Cayetano* definition of practice of law, only with the added elements of (1) specificity of circumstances or objectives of a person or a case and (2) a lawyer-client relationship or other engagement government by the CPRA. Besides, the CPRA only expressly defines "practice of law" and not "private practice of law," although the latter is contemplated in some of its prohibitory rules.

To be clear, jurisprudence, particularly *Villanueva* and the succeeding cases, supports the conclusion that government lawyers may engage in legal aid activities. Although this is not expressed in the CPRA or any other rule, the lack of compensation associated with legal aid excludes it from the ambit of

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[68] Code of Conduct of Pub. Off. § 7. For ease of reference, the provision reads:

SECTION 7. Prohibited Acts and Transactions. — In addition to acts and omissions of public officials and employees now prescribed in the Constitution and existing laws, the following shall constitute prohibited acts and transactions of any public official and employee and are hereby declared to be unlawful:

* * *

(b) Outside employment and other activities related thereto. — Public officials and employees during their incumbency shall not:

* * *

(2) Engage in the private practice of their profession unless authorized by the Constitution or law, provided, that such practice will not conflict or tend to conflict with their official functions.

prohibited private practice of law.[69] Unfortunately, this is not immediately clear from the current framework.

Part of the problem may lie in the use of the phrases "private practice" and "private practice of law" in the Rules of Court and CPRA, rather than "practice of law" in stating what a lawyer in the judiciary may not undertake. Strictly speaking, "private practice of law" already *excludes* legal aid, pursuant to the *Villanueva* definition. Hence, it need not be spelled out in Section 21, Canon III since technically it is an exclusion, and not an exception. However, because of the intertwined relationship between "practice of law" and "private practice of law," and because of the import of the "practice of law" definition in legal ethics, it is difficult not to construe the Rules of Court and the CPRA rule without referring to *Cayetano*. As discussed, this breeds confusion rather than clarity.

Second, the current approach tends to encourage self-censoring, with respect to legal information. Drawing from an article published in 2020, Mendoza and Fortun's discussion of the *Cayetano* definition shows that the current approach fosters an environment where lawyers are restrained from giving legal information or advice that may constitute as legal aid, for fear of such act being considered as practice of law.[70] Although Mendoza and Fortun's discussion focuses on a different aspect of the *Cayetano* definition, their discussion on its chilling effect is relevant:

> The broad definition of "practice of law" has the effect of an unlawful prior restraint against a speaker, whether or not a lawyer, by preventing him from speaking about the law, regardless of whether such statement was made in the course of or with a view to professional employment or purely for informational purposes. Because of such a broad definition, a non-member of the Bar may opt to keep silent, for fear of being punished for unauthorized practice of law. This has a chilling effect on academic discussions—such as a college accounting professor who cites BIR rulings or issuances to support his lectures—or even on speeches of and debates among candidates for President of the Republic, where not all of said candidates may be lawyers, since being a member of the Bar is not a constitutional qualification. These discussions and debates may end up being uploaded on social media or on learning platforms, leading to further discussions and debates. The effect of Cayetano is to put a stop all of these [sic]. The speakers' substantiated defenses of good faith may fall in light of the definitions

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[69] *Villanueva*, 121 Phil. at 894. This line of jurisprudence considers the element of compensation, along with succession of acts, as determinative of private practice of law.

[70] Emir-Deogene Mendoza & Maria Selena Golda Fortun, *Setting Boundaries on the Definition of "Practice of Law" in Philippine Jurisprudence*, 93 PHIL. L.J. 192 (2020).

> given in Cayetano. Similarly, a member of the Bar, by simply giving legal information, is already engaged in the practice of law because of Cayetano. Since he is engaged in the practice of law, he can already be held liable for impermissible advertising, as earlier discussed.[71]

As noted by the authors, the broad definition of "practice of law" has the effect of prior restraint against a speaker by preventing him or her from speaking about the law. Under jurisprudence, only the presence of a clear and present danger may justify such content-based restraint.[72] Thus, for the restriction to be sustained, the government must prove that the act of speaking about the law, as a form of legal aid, creates a clear and present danger of a substantive evil that Congress has a right to prevent. Unless there is an apparent conflict of interest or improper use of government time or resources, such evil may be difficult to conceive or prove.

To some degree, the CPRA attempts to remedy this uncertainty by including the existence of a lawyer-client relationship as a factor for determining the practice of law,[73] and by fixing standards on when such a relationship arises. It was clarified that in a lawyer-client relationship, (1) the client must consciously, voluntarily, and in good faith vest the lawyer with confidence for the rendition of legal services, and (2) the lawyer must accept, whether expressly or impliedly.[74] As earlier mentioned, how the Court will treat these new standards remains to be seen in future cases, but the inherent tension in providing legal information persists.

Interestingly, in the US, the Supreme Court has found litigation to be a form of expression and has recognized that laws prohibiting government lawyers from litigating place a significant burden on government employees engaging in *pro bono* work.[75] In *NAACP v. Button*,[76] the National Association for the Advancement of Colored People, a corporation dedicated to the elimination of racial discrimination, formed a team of lawyers to direct actions pertaining to racial discrimination and offered services to clients in relation to such litigation. The Court, confronted with the constitutionality of Virginia Bar's restrictions against solicitation of legal business that prevented groups or third-party entities from litigating on behalf of potential clients, held that litigation in the context of associational activity for the purpose of protecting civil rights constitutes as speech protected by the First Amendment. The Court distinguished between

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[71] *Id.* at 211.

[72] Chavez v. Gonzales, G.R. No. 168338, 545 SCRA 441, Feb. 15, 2008.

[73] CPRA, canon III, § 1.

[74] Canon III, § 3.

[75] *See* James Feroli, *When Pro Bono Work is a Crime: The Government Lawyer and 18 USC 205*, 9 PUB. LAW. 2, 5-8 (2001).

[76] 371 U.S. 415 (1963).

litigation involving private gain, serving no public interest, and *pro bono* litigation aimed at achieving lawful objectives. The Court noted that the state has a greater interest in regulating litigation for profit as opposed to *pro bono* litigation.[77]

In the same way that a prohibition on government lawyers to litigate in the US may place a significant burden on government employees to engage in *pro bono* work, the broad definition of practice of law, coupled with the lack of clear guidelines on the matter, may discourage lawyers in the judiciary here in the Philippines to participate in legal aid.

V. US FRAMEWORK ON PRACTICE OF LAW BY LAWYERS IN THE JUDICIARY

A. Overview of the US Judiciary

The US has federal and state judiciary systems, which are separate and distinct from each other. Although they share similarities, these systems employ different rules and laws. The federal judiciary is administered by the US Supreme Court, and embraces the Court itself, the US Court of Appeals, and the US District Courts. On the other hand, the structure of the state courts differs from state to state. Similar to the federal judiciary, there is a "highest" court, and such court administers the state judiciary system.[78]

As to licensing, lawyers in the US are licensed per state. In most states, lawyers must pass the bar examination to obtain a license. A few states permit residents who have completed their legal education at particular institutions to become licensed without taking the bar exam. Bar associations vary per state as well,[79] although there are national bar associations that lawyers may join, including the ABA, the nation's largest voluntary legal association.[80]

B. Practice of Law in the US in General

In the US, there is no specific or uniform definition for the practice of law.[81] The general sentiment is that "practice of law" is impossible to define.[82]

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[77] *Id. See* Feroli, *supra* note 75, at 5–6.

[78] LATHAM & WATKINS, *supra* note 6, at 686–87.

[79] *Id.* at 688.

[80] *About the American Bar Association,* ABA WEBSITE, *at* https://www.americanbar.org/about_the_aba/ (last modified May 24, 2023).

[81] Soha Turfler, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach To Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903, 1907 (2004). *See also* Mendoza & Fortun, *supra* note 70, at 202.

[82] *Id.* at 1908.

While there have been attempts in the past to provide for such definition, these were met with criticism and were thus unsuccessful.[83] Instead, states have adopted varying definitions.[84]

The ABA's Model Rules of Professional Conduct, which governs the ethical standards of lawyers in virtually all states,[85] does not define practice of law either. Its predecessor recognized that "[i]t is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law."[86]

Similar to the Philippines, every department in the US has different rules on practice of law by government lawyers, although there is a general law that prohibits representation by federal government attorneys in matters where the US is a party or has a substantial interest.[87] In the judicial branch, federal and state courts have different rules on outside practice of law by judicial employees.

At the federal level, practice of law is generally governed by the Code of Conduct for Judicial Employees. The Code applies to all employees of the judiciary, including interns, externs, and other volunteer court employees, but does not apply to justices, judges, and employees of particular courts and offices.[88]

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[83] *Id. See also* Mendoza & Fortun, *supra* note 70, at 203.

[84] Turfler, *supra* note 81, at 1907, n. 19. *See also Comment on Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law*, ABA WEBSITE, *at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/comment_on_rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/ (last modified May 24, 2023).

[85] *See* Robert M. Buchholz, et al., *Regulation of the legal profession in the United States: overview*, *in* THOMSON REUTERS PRACTICAL LAW, at question 5, May 31, 2021, *at* https://uk.practicallaw.thomsonreuters.com/2-633-6340.

[86] A.B.A. MODEL CODE OF PROF'L RESPONSIBILITY (1969), canon 3, EC 3-5.

[87] US CODE, tit. 18, ch. 11, § 203.

[88] US CODE OF CONDUCT FOR JUD. EMP., § 310.10(a). The code does not apply to employees of the US Supreme Court, the Administrative Office of the US Courts, the Federal Judicial Center, the Sentencing Commission, and federal public defender offices, which may adopt their own sets of rules. As of writing, the US Supreme Court has yet to adopt its own code of conduct, although the Justices of the Supreme Court consult the Code of Conduct for Judicial Employees, along with other sources, for guidance when performing their judicial duties. *See* JOANNA R. LAMPE CONGRESSIONAL RESEARCH SERVICE, A CODE OF CONDUCT FOR THE SUPREME COURT? LEGAL QUESTIONS AND CONSIDERATIONS 1 (2022), *available at* https://sgp.fas.org/crs/misc/LSB10255.pdf.

Canon 4(D) of the US Code of Conduct for Judicial Employees states that a judicial employee should not engage in the practice of law,[89] except in three instances: (1) in case of personal or family legal work; (2) in case of *pro bono* work in civil matters; and (3) during employment in the military reserves. In all these instances, the general and specific conditions for practice of law are provided.

The canon reads:

> A judicial employee should not engage in the practice of law except that a judicial employee may act pro se, may perform routine legal work incident to the management of the personal affairs of the judicial employee or a member of the judicial employee's family, may perform legal work during the course of the judicial employee's service in the military reserves, and may provide pro bono legal services in civil matters, so long as such pro se, family, military, or pro bono legal work does not present an appearance of impropriety, does not take place while on duty or in the judicial employee's workplace, and does not interfere with the judicial employee's primary responsibility to the office in which the judicial employee serves, and further provided that:
>
> (1) in the case of pro se legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings);
>
> (2) in the case of family legal work, such work is done without compensation (other than such compensation as may be allowed by statute or court rule in probate proceedings) and does not involve the entry of an appearance in a federal court;
>
> (3) in the case of pro bono legal services, such work (a) is done without compensation; (b) does not involve the entry of an appearance in any federal, state, or local court or administrative agency; (c) does not involve a matter of public controversy, an issue likely to come before the judicial employee's court, or litigation against federal, state or local government; and (d) is reviewed in advance with the appointing authority to determine whether the proposed services are consistent with the foregoing standards and the other provisions of this code; and
>
> (4) in the case of legal work during the course of service in the military reserves, such work (a) does not involve the entry of an appearance in any civilian federal, state, or local court or administrative

[89] US CODE OF CONDUCT FOR JUD. EMP., canon IV(D). Although the Code refers to "employee" in general, it is implied that the employee is a "lawyer."

> agency; and (b) does not involve a matter of public controversy, or an issue likely to come before the judicial employee's court.[90]

The three observations can be made from the foregoing approach.

First, it is straightforward. It readily lays out the three exceptions to the general rule that the practice of law by federal judiciary lawyers is not allowed.

Second, it is comprehensive as to the conditions for permitted practice. Beyond setting out the three instances when practice of law is allowed, the rule provides for the general conditions that apply in all three instances, as well as the specific conditions that are particular to each and every instance. The general conditions require that the legal work does not present an appearance of impropriety; does not take place while on duty or in the judicial employee's workplace; and does not interfere with the judicial employee's primary responsibility. The specific conditions, on the other hand, pertain to matters of compensation, entry of an appearance, public controversy or related issues likely to come before the judicial employee's court, and prior review with the appointing authority.

Third, it uses the phrase "practice of law," rather than "private practice of law." In doing so, it makes it unnecessary to differentiate between what may be "practice of law" in general and "private practice of law" in particular, and implicitly recognizes *pro bono* work as simply "practice of law," albeit considered as an exception to the general rule.

On the state level, many state courts follow the general structure presented above. The ABA Website lists some examples of states that allow their attorney employees to do *pro bono* work:[91]

(1) In Iowa, the general rule is that outside employment is not permissible, unless the employment is not with an entity that regularly appears in court or conducts business with the court system; the employment does not require the employee to have frequent contact with attorneys who regularly appear in the court system; the outside employment is capable of being fulfilled outside working hours and is not incompatible, inconsistent, or in conflict with the performance of the employee's duty; and the outside employment does not require or induce the employee to disclose confidential information.[92]

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[90] *Id.*

[91] *Employee Rules*, ABA WEBSITE, Apr. 2020, *at* https://www.americanbar.org/groups/probono_public_service/policy/judicial-participation/employee-rules/.

[92] *Id.*, *citing* IOWA COURTS EMP. CODE OF ETHICS, Rule 11.3.

(2) In Massachusetts, a clerk-magistrate is not allowed to engage in practice of law. However, they may participate in civic and charitable activities that do not reflect adversely on the clerk-magistrate's impartiality or interfere with the performance of his or her official duties.[93]

(3) In Minnesota, the general rule is that no state court employee shall engage in the practice of law. However, an attorney employed by the judicial branch may perform *pro bono* legal services involving uncontested matters or matters not pending before any court or government agency. An attorney employee providing *pro bono* legal services may not appear in court, give legal advice pertaining to, or draft or review documents for matters that may come before any court or government agency as a contested matter.[94]

(4) In Nevada, a full-time judicial employee may provide *pro bono* legal services in civil matters, so long as such legal work does not present an appearance of impropriety, does not take place while on duty or in the judicial employee's workplace, and does not interfere with the judicial employee's primary responsibility to the office in which the judicial employee serves. Further, the *pro bono* work must be done without compensation; must not involve the entry of an appearance in any federal, state, or court or administrative agency; must not involve a matter of public controversy, an issue likely to come before the judicial employee's court, or litigation against the federal, state, or local government; and must be reviewed in advance by the appointing authority to determine whether the proposed services are consistent with the Nevada Code of Judicial Conduct.[95]

(5) In Pennsylvania, appellate court law clerks are prohibited from practicing law without prior approval of the judge on whose staff such person is employed or of the president judge if such person is not so employed. However, the rule does not apply to *pro bono* activities, which are allowed as long as they are performed without compensation; do not involve the entry of an appearance before any court or tribunal; do not involve a matter of public controversy, an issue likely to come before the person's court, or litigation against federal, state, or local government; and are undertaken after written approval of the justice or judge for whom the person is employed and the chief justice, or the president judge of the superior court or commonwealth court, depending on which court employs the person.[96]

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[93] *Id.*, *citing* MASS. SUPREME JUD. COURT RULES, canon 3.
[94] *Id.*, *citing* MINN. JUD. COUNCIL, pol'y 307.
[95] *Id.*, *citing* NEV. MODEL CODE OF CONDUCT FOR JUD. EMP., canon 3.2(A).
[96] *Id.*, *citing* PA. RULES OF APP. PROC., r. 3121.

(6) In South Carolina, a staff attorney or law clerk shall not practice law in any federal, state, or local court, except in his or her official capacity as a staff attorney or law clerk, or undertake to perform legal services for any private client in return for remuneration.[97] However, they may participate in civic and charitable activities that do not detract from the dignity of the office or interfere with the performance of official duties.[98]

(7) In Tennessee, a law clerk may act *pro se* and perform routine legal work incident to the management of the personal affairs of the assistant or a member of the assistant's family, and may provide *pro bono* legal services in civil matters, so long as such *pro se*, family, or *pro bono* legal work does not present an appearance of impropriety, does not take place while on duty or in the assistant's workplace, and does not interfere with the assistant's primary responsibility to the judge or justice whom the assistant serves.[99]

The ABA notes that courts can set an example for the bar by encouraging their own attorney employees to do *pro bono* work through similar rules and policies that expressly allow such activity.[100] Today, as a result of the substantial efforts by bar associations and federal and state agencies to encourage *pro bono* participation, federal and state lawyers (including those who work in the judiciary) substantially contribute to *pro bono* work.[101] Support for *pro bono* participation is at the highest level, and the institution of clear rules and policies on the matter has eased many former barriers to *pro bono* participation.[102]

C. Application to the Philippines

It is not suggested that the specific US rules on practice of law be applied in the Philippines. The difference in our court structure, laws, and experience necessarily requires specialized rules that fit our own particular needs. The value of examining the US framework lies in finding an approach that may help address the motivational constraint barrier to legal aid participation by judiciary lawyers in our country. As gathered from the American experience, a straightforward and comprehensive approach may be a potential solution.

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[97] *Id.*, *citing* S.C. CODE OF CONDUCT FOR STAFF ATTORNEYS AND LAW CLERKS, canon 5(d).

[98] *Id.*, *citing* S.C. CODE OF JUD. CONDUCT, canons 4(A), 4(B), 5(B).

[99] *Id.*, *citing* TENN. SUPREME COURT, r. 5.

[100] *Id.*

[101] *See Government Attorneys*, *supra* note 28 and Klein, *supra* note 27, at 18. *See also* Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know — and Should Know — About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 94 (2013).

[102] *See Government Attorneys*, supra note 28. *See also Pro Bono Program*, *supra* note 27.

Following such approach, the exception of legal aid should already be expressly stated in the rule on private practice to enable and encourage lawyers to render legal aid. Along with other exceptions, like personal or family legal work, which may also be excluded from "private practice of law" based on its jurisprudential definition, legal aid should already be expressed to eliminate the motivational constraint caused by the vague rules on the matter, which are further aggravated by the broad *Cayetano* definition. Although practice of law is broadly defined, and although there are no clear guidelines on the matter, applying jurisprudence would yield the conclusion that legal aid does not constitute private practice as long as no compensation and/or succession of acts are involved.[103] There is thus no reason why the same should not be expressed in the rule.

To be sure, matters of conflict of interest, confidentiality, and full-time devotion to public service, among others, must be considered in legal aid participation, especially considering the sensitive role that judiciary lawyers play in the administration of justice. However, these special considerations should not prevent lawyers from participating in legal aid. The ABA notes:

> [A]lthough government attorneys are subject to some special limitations, those limitations do not preclude them from engaging in pro bono work. Once they have determined that they are in compliance with agency policies, they can participate in a wide range of pro bono activities, from family law and housing cases to employment and probate matters that fit their interests and requirements. Some of the opportunities do not require any work during business hours, such as the clinics which operate during lunch or on weekends or matters which involve meeting with the client at a mutually convenient time.[104]

Specifically for lawyers in the judiciary:

> [M]any judicial branch attorneys are interested in performing some sort of pro bono service within the particular limits imposed by their employment. With careful planning and prudent execution, such service can be performed without compromising the integrity of the

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[103] Depending on which line of cases traceable to *Villanueva* is used, i.e., the line that relies on *both* elements of succession of acts and demand for payment, or the line that relies *only* on the element of succession of acts.

[104] Am. Bar Ass'n. Res. 121-A, (2006), *at* http://www.americanbar.org/content/dam/aba/directories/policy/annual2006/2006_am_121a.pdf.

> attorney, the employing court system, or the pro bono engagement itself.[105]

Legal aid is the responsibility of the legal profession as a whole. The CPRA states that all lawyers are mandated to "participate in the development of the legal system by initiating or supporting efforts in law reform, the improvement of the administration of justice, strengthening the judicial and legal system, and advocacies in areas of special concern like the environment, indigenous peoples' rights, human rights, and *access to justice*."[106] This applies not just to private practitioners, but to government lawyers as well.

In any case, the special considerations unique to government lawyers may be adequately addressed by safeguards in the form of comprehensive rules that account for each and every condition of permitted practice. There are already similar rules in other agencies, like the Commission on Human Rights Resolution No. (III) A2002-133, which authorizes its lawyers to engage in private practice subject to the following conditions:

> 1. It shall not entail any conflict of interest insofar as the functions of the Commission are concerned;
> 2. It shall not be in representation of a client whose cause of action is against the government;
> 3. It shall not involve the use of government funds or property;
> 4. It shall not impair the lawyer's efficiency in the discharge of his/her regular functions in the office, and absences incurred, if any, shall be covered by duly approved vacation leaves and pass slips;
> 5. It shall be subject to the provisions of RA No. 6713 and such other relevant Civil Service Laws and Rules;
> 6. The lawyers can appear only in courts of law, offices of state prosecutors (Department of Justice), Office of the Ombudsman and quasi-judicial agencies decisions of which are rendered by presidential appointees;
> 7. Authority is for one year subject to renewal after review of the lawyer's office performance;
> 8. Provided, that, the commission reserves its right to revoke the said authority.[107]

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[105] *See* ABA CENTER FOR PRO BONO, *Tab 2: Relevant Legal Constraints, Barriers and Solutions*, *in* A DESKBOOK FOR GOVERNMENT AND PUBLIC SECTOR LAWYERS [hereinafter "GOV'T LAWYERS DESKBOOK"] 10 (1998), *available at* https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/as/gvtattylowresfnl.pdf.

[106] CPRA, canon III, § 34.

[107] CHR Res. No. (III) A2002-133 (2002), *cited in* Yumol v. Ferrer, A.C. No. 6585, 456 SCRA 475, 487–88, Apr. 21, 2005.

There are also comparable rules for court employees. Among these is the rule governing outside employment found in Section 5, Canon III of the Code of Conduct for Court Personnel, which requires that outside employment not be performed during normal working hours; that the employment does not require the person to disclose confidential information; that the employment not be with the other branches of government, etc.[108] Another is Section 21, Canon III of the CPRA, which requires that the private practice be upon the express authority of the lawyer's superior; for a stated specified purpose or engagement; and only during an approved leave of absence.[109] Unfortunately, these provisions shy away from addressing legal aid activities by lawyers in the judiciary. What we need is a specialized rule that not only expressly permits legal aid participation, but also sets out all the conditions for such permitted practice.

Beyond setting out such a specialized rule, the adoption of formal policies institutionalizing *pro bono* work in government organizations, particularly in the judiciary, may further help strengthen legal aid in our country. These policies inspire judiciary lawyers to render such aid and highlight the Supreme Court's recognition of the importance of participation. It reflects support from the top and gives the lawyer's initiative credibility, which is an effective step in developing a *pro bono* culture. Ultimately, it enhances the judiciary's public service mission and improves its public image.[110]

VI. CONCLUSION

In its 2022 – 2027 blueprint for judicial reforms, the Supreme Court recognized the need to strengthen legal aid in the country as a way to widen access to justice.[111] Noting that access to courts is the bedrock of effective legal representation, the Court outlined measures to further institutionalize legal aid. These include strengthening the clinical legal education program in law schools, conducting summits on legal education, and posting a database of free legal aid providers, among others.[112] In this list, a potential source of legal aid may be added: participation by government lawyers, particularly, lawyers in the judiciary.

As demonstrated in this Article, the current Philippine approach to private practice of law by judiciary lawyers creates uncertainty on whether legal

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[108] CT. PERSONNEL CODE OF CONDUCT, canon III, § 5.

[109] CPRA, canon III, § 21.

[110] *See Tab 5: Developing a Policy on Pro Bono*, *in* GOV'T LAWYERS DESKBOOK, *supra* note 105, at 16.

[111] SPJI 2022–2027, *supra* note 24, at 25.

[112] *Id.* at 25–26.

aid is allowed. The vague rules on private practice, coupled with the broad definition of "practice of law" in *Cayetano* and in the CPRA, trigger a motivational constraint that serves as a barrier to the much-needed legal aid participation in the country. To overcome this problem, the American experience is instructive: a straightforward rule that expressly recognizes legal aid as an exception to the general rule on prohibited outside practice, and which sets out all the conditions for such activity, enables and encourages government lawyers to render legal aid.

Latham & Watkins LLP notes that legal aid systems are only effective for those who are sufficiently well-informed regarding the availability of services.[113] The opposite, though, is also true: legal aid systems are effective when the lawyers who may render such aid are well-informed about what they can do.

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[113] LATHAM & WATKINS, *supra* note 6, at 6.