Monograph on Conflicts of Interest in Legal and Judicial Ethics

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I. CONFLICT OF INTEREST IN LEGAL ETHICS

A PERVASIVE PROBLEM

No person, it is taught, can serve two masters at a time, for when one tries to do so, he serves one well and does a disservice to the other. Singularity of purpose is a Christian virtue, but it is also a sound management principle. More importantly, for our purposes, it is an imperative of ethical conduct in the legal profession.

The legal profession is fraught with conflicts of interest and Wolfram points out that the relationship with a client commences with a conflict of interest. The client endeavors to minimize the costs of representation. The lawyer for his part desires to maximize the amount of the fee.[1] This is only symptomatic of the tenuousness of the relationship of

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[1] Wolfram, MODERN LEGAL ETHICS, 313 (1986).

confidence that exists – and ought to exist – between a lawyer and his client.

As human activity expands, so does the law; as the law covers wider ground, so does the need to for the expertise of the lawyer who becomes more expansive. To be sure, a lawyer's engagement with his client becomes significantly more forms than court representation. In some instances, there may be no court representation at all. But precisely because of the increasing number of engagements of a lawyer's client has in personal, professional, civic, and commercial spheres, fertile ground is laid for conflicts of interest cases.

The Supreme Court finds in the trust that the client reposes in his lawyer the reason for the rule against the representation of conflicting interests. Because a client trusts his lawyer, the latter must not betray the client's trust by opposing through another case and a different engagement what he is duty-bound to advocate for and in behalf of his client.[2]

The very dynamics of the adversarial process also provides us with reason for the rule against conflicts of interest. This ground is not of course totally unrelated to the first. One of the assumptions of the adversarial method is the zeal with which counsel, as officer of the court and agent of his client, will bring before the court the evidence and the arguments most favorable to his client's cause.[3] This zeal is at least tempered if not compromised outright by the representation of conflicting interests. Seen this way, the canons that bond a lawyer against a conflict of interest are a way of guaranteeing the efficiency, predictability, and credibility of the adversarial process. It then becomes correct also to say that a breach of ethical norms in this regard is not only a violation of his client's trust but also a transgression against the obligation of the lawyer owes the court as its officer.

Yet a third reason may be found in the reciprocity of expectations between lawyer and client. The lawyer has a right to demand of his client candor and forthrightness. In fact, a lawyer may correctly withdraw from representation when his client is lacking in candor towards him. However, the demand of candor on the part of the client must be met with a

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[2] Abaqueta v. Florido, A.C. No. 5948, 395 SCRA 596, Jan. 23, 2003.
[3] Farrar & Dugdale, INTRODUCTION TO LEGAL METHOD, 59-60 (1984).

concomitant commitment on the part of the counsel to protect the confidences as well as safeguard the interests of the client.

THE CONCEPT OF CONFLICT OF INTEREST

The *Abaqueta* case cited earlier is one among others that summarizes the concept of "conflict of interest".

There is a conflict of interest if there is inconsistency in the interests of two or more opposing parties. The test is whether or not in behalf of one client, it is the lawyer's duty to fight for an issue or claim but it is his duty to oppose it for the other client. In short, if he argues for one client, this argument will be opposed by him when he argues for the other client. There is a representation of conflicting interests if the acceptance of the new retainer will require the attorney to do something which will injuriously affect his first client in any matter in which he represents him and also whether he will be called upon in his new relation, to use against his first client any knowledge acquired through their connection.

The basic notion underlying conflict of interest rules is that because of a lawyer's allegiance to his client whose confidence the lawyer has received, he cannot act both for his client and for one whose interest is adverse to or conflicting with that of his client in the same general matter. It makes no difference therefore how slight the adverse interest may be, and how honest the intentions of the lawyer are.[4] Quite clearly, the rule has to do with the allegiance the attorney owes, not the client personally, but the cause of the client in the matter in which his services are engaged. This distinction is necessary because the rule against conflict of interest does not really prohibit a lawyer from accepting an engagement against a client or a former client in an unrelated case.[5]

Understanding the fiduciary basis of the rule makes its corollaries uncomplicated. *First*, it is an attorney's duty to terminate a relationship to a

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[4] 7 Am. Jur. 2d *Attorneys at Law*, § 184.

[5] In Rosacia v. Bulalacao (A.C. No. 3745, 248 SCRA 664, Oct. 2, 1995), the Court expresses its displeasure at the practice of accepting an engagement against a former client. However, it confines its disapproval to labeling it "not good practice".

new client when he has reason to believe that it may conflict with the fulfillment of his duties to another client.

Second, the attorney must likewise terminate the attorney-client relationship with the client on whose behalf the attorney would be unable to devote his entire energy when he finds himself confronted with a situation of having to represent claims inconsistent with his client's.

Third, for greater reason must the lawyer terminate the professional relation with the client whom he would not be able to fully represent when he represents the conflicting claims of two clients.[6]

Does the existence of a conflict of interest situation however depend on the *belief* of a lawyer about his ability to represent the interests of a client fully and with undivided loyalty? In several cases, the posture of our Supreme Court is unmistakable: It is not so much what a lawyer believes he may or may not be able to do, but what his engagements with different clients call on him to do that determines whether a conflict of interest situation exists.[7] This is the question of the standard by which a conflict of interest is to be reckoned. While stricter applications rely on the appearance of impropriety test, it is clear why such an overly broad standard is unsatisfactory. Appearances readily come to fault-finders! On the other hand, overly restrictive standards – such as those that require a quasi-mathematical demonstration of a conflict are not only impractical but also unrealistic, because the improprieties that take place in the real world follow not mathematical proportion. So it is urged that the "reasonable probability" standard be used. That is, there will be a reasonable probability of the material impairment of loyalty or confidentiality exists.[8]

In one case, the Supreme Court went so far as to find actionable conflict of interest in a lawyer's membership in the board of directors of a corporation that ousted the very client who had engaged the lawyer to help him form the corporation. The collusion that the Supreme Court found between the members of the board and the respondent lawyer which resulted in the ouster of the board member who had engaged the lawyer's services constituted "conflict of interest".[9] The moral lesson seems to be

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[6] 7 Cal. Jur. 3d, *Attorneys at Law*, § 93.

[7] *See, e.g.*, Nakpil v. Valdes, A.C. No. 2040, 286 SCRA 758, Mar. 4, 1998.

[8] Wolfram, *supra* note 1, at 324.

[9] De Guzman v. De Dios, A.C. No. 4943, 350 SCRA 320, Jan. 26, 2001.

that the Court will be less willing to confine itself to the narrow parameters of restrictive definitions of "conflicts of interest" and willingly expand the intendment of the rule to include other forms of violation of trust and expectation of allegiance. In this respect, however, the Court is not breaking new ground because American cases hold that "the nature of the relationship between attorney and client is not reconcilable with antagonism which would convert an attorney from a representative of his or her client into a rival or competitor. Thus, an attorney must not buy an interest in the thing in controversy, adverse to that of his or her client. Nor may the attorney, having acquired control over property in which his or her client has an interest, use that property adversely to the client's interest.[10]

THE RULES

The two rules in the Code of Professional Responsibility that deal with conflicts of interest are:

> Rule 15.01: A lawyer, in conferring with a prospective client, shall ascertain as soon as practicable whether the matter would involve a conflict with another client or his own interest, and if so, shall forthwith inform the prospective client.
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> Rule 15.03: A lawyer shall not represent conflicting interests except by written consent of all concerned given after a full disclosure of the facts.

There can clearly be no obligation to foresee every possible conflict situation. Therefore the duty to disclose is limited by the rule to what can be ascertained "as soon as practicable". When the lawyer feels that he should not disclose, then the only other option is to decline retainer.

Interestingly, however, Rule 15.04 allows a lawyer – with a written consent of all concerned – to act as mediator, conciliator, or arbitrator in settling disputes. The mediator for one must take a neutral position in regard to the claims of both parties, and an arbitrator may propose to the parties what may even be against the position of the client. Furthermore, it is relying on fiction, to say the least, to expect a lawyer acting as mediator or

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[10] 7 Cal. Jur. 3d, *Attorneys at Law*, § 93.

arbitrator, to set aside whatever he has learned from his professional relationship with a client. As mediator or arbitrator his interest is the settlement of a dispute – not the client's – and in pursuit of this end it is difficult to see how he can effectively blot out whatever information he may have had access to in his professional relationship with one of the parties.

The permissiveness of the rules in this regard, however, can be understood from the vantage point of the premium we presently put on court-diversion, considering the horrendous back-log of undecided cases. The rules on pre-trial in several respects call the attention of the judge to his obligation to do what he can so that the case is taken off the judicial mill.

So obnoxious is the acceptance of conflicting commitments and so crucial the values the prohibition protects that the unethical conduct of a lawyer in this regard is also an indictable offense under criminal law. Article 209 of the Revised Penal Code[11] prescribes the penalty of *prision correccional* in its maximum period for either of the following:

> 1. Prejudicing a client or revealing a client's secrets learned in a professional capacity by a malicious breach of professional duty or inexcusable negligence or ignorance.
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> 2. Undertaking the defense of the opposing party in the same case after having undertaken the defense of a client or after having received confidential information.

It should be pointed out however that while the elements of the crime are restricted to those set forth in the Revised Penal Code, consonant with the general principles of criminal law, misconduct relative to conflicts of interest that is administratively actionable against a member of the Bar is considerably broader than the crime for which one may be indicted.

The case of *Nakpil v. Valdes*[12] lays down an important rule that it is the probability, not the certainty of conflict, that determines whether or not a lawyer has committed an actionable wrong. Thus does the Court adopt the rule of "reasonable probability" introduced earlier. Very aptly then has it been taught that "the rule is designed not only to prevent the dishonest practitioner from fraudulent conduct, but also to preclude the honest

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[11] Act No. 3815 (1930). This is the Revised Penal Code of the Philippines.
[12] A.C. No. 2040, 286 SCRA 758, Mar. 4, 1998.

practitioner from putting himself or herself in a position in which he or she may be required to choose between conflicting interests, or may be forced to attempt to reconcile conflicting interests".[13] To hold an attorney liable for representing conflicting interests, it is not necessary to prove actual injury.

> The classic indicia of a conflict of interest are well known:
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> 1. When a lawyer advocates or argues for the claim of one client which by reason of hos engagement with another client he must oppose;
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> 2. When, because of a new retainer, a lawyer must act adversely against the interests of an earlier client relative to the very matter for which the lawyer's services were earlier engaged;
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> 3. When the acceptance of a new relation impedes the undivided attention and unqualified allegiance of a lawyer, and invites suspicion of double-dealing.[14]

The *Hormilla* case raised an interesting issue. Whether a lawyer is engaged as counsel of a corporation, and a derivative suit is later brought by individual shareholders against erring members of the Board of Directors, will the lawyer be liable for representing conflicting interests should he enter his appearance for the defendant members of the Board of Directors? Arguing from the nature of a derivative suit, principally from the procedural doctrine that the corporation is in fact the party-in-interest and must be impleaded, the Court ruled that the corporate lawyer's loyalty is to the corporation. A derivative suit brought against erring members of the Board of Directors is brought in favor and in behalf of the corporation. It is therefore wrong for the corporate lawyer to represent the members of the Board of Directors who are sued precisely for having wronged the corporation.

What result follows then when the conflict arises not from the practice of a legal profession alone but the exercise of some other profession? American courts have not hesitated to hold that there is a conflict between the role of a lawyer once played as a non-lawyer patent

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[13] *Supra* note 10.

[14] Hormilla v. Ricafort, A.C. No. 5804, 405 SCRA 220, Jul. 1, 2003.

agent and his subsequent role as a lawyer, or between his commitment as a non-lawyer adjuster for an insurance company and his commitment as lawyer to a claimant against the insurance company.[15] These rulings are instructive when one examines the doctrine in *Nakpil.* In this case, a lawyer was tasked to represent as estate, even while his accounting firm aided the creditors in preparing their claim against the estate. In ruling that there was actionable conflict of interest, Mr. Justice Reynato Puno, writing for the Court, taught:

> Respondent advances the defense that assuming there was conflict of interest, he could not be charged before this Court as his alleged misconduct pertains to his accounting practice.
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> We do not agree. Respondent is a CPA-lawyer who is actively practicing both professions. He is the senior partner of his law and accounting firms which carry his name. In the case at bar, complainant is not charging respondent with breach of ethics for being the common accountant of the estate and the two creditors. He is charged for allowing his accounting firm to represent two creditors of the estate and, at the same time, allowing his law firm to represent the estate in the proceedings where these claims were presented. The act is a breach of professional ethics and undesirable as it placed respondent's and his law firm's loyalty under a cloud of doubt. Even granting that respondent's misconduct refers to his accountancy practice, it would not prevent this Court from disciplining him as a member of the Bar. The rule is settled that a lawyer may be suspended or disbarred for ANY misconduct, even if it pertains to his private activities, as long as it shows him to be wanting in moral character, honesty, probity or good demeanor. Possession of good moral character is not only a prerequisite to admission to the bar but also a continuing requirement to the practice of law.[16]

In this case, the "conflict of interest" is a case of misconduct insofar as the respondent lawyer allowed his firm to do under one title what he was bound to oppose under another.

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[15] Wolfram, *supra* note 1, at 324, *citing* American Roller v. Budigner, 513 F.2d 982 (3rd Cir. 1975) and Hovel v. Minneapolis, 165 Minn. 449, 206 N.W. 710 (1926).

[16] A.C. No. 2040, 286 SCRA 758, 774, Mar. 4, 1998.

CONFLICT SITUATIONS AND NON-SITUATIONS

Simultaneous representation

It often happens that co-plaintiffs, co-defendants, or co-accused prefer representation by one counsel rather than fighting their battles singly and separately. That the parties can freely elect single representation is clear. That the lawyer can accept to represent multiple parties is also clear. However, a conflict of interest arises when the advocacy of one party's claim compromises the advocacy of the claim of a co-party. This is obviously the case when one party makes a cross-claim against another, or invokes a theory antagonistic to the interests of the other party. This is likewise the case when the lawyer adopts a posture in behalf of one plaintiff or defendant that limits his advocacy of a co-plaintiff or co-defendant's case. The same conflict arises when a lawyer represents several accused in one criminal case where the latter have conflicting defenses.

While the simultaneous representation of two adverse parties is patently wrong – and so clearly ridiculous that it is inconceivable that two antagonistic parties engage the services of the same counsel – there are more subtle variants of this scenario. When the defendant's lawyer for example, proffers unsolicited advice to the plaintiff and somehow succeeds in convincing the trusting but unwary plaintiff about pursuing a course of action, and the plaintiff acts in accordance with the advice to the plaintiff's own detriment, then there is at least *actionable impropriety* or *actionable conduct* on the part of the lawyer.

Another subtle form of conflict of interests consists of what has been called "issue conflict. In these cases, the same lawyer contends for a legal result that, if accepted, would operate against the interests of another client in a pending suit. The attorney who, in behalf of his client Q, has prayed for the garnishment of the defendant Z's bank account, cannot act as Y's counsel in a different case against Z where Y lays claim to the same bank account, for success in this suit will be adverse to the garnishment that the attorney seeks in behalf of Q.[17]

On the other hand, what if parties apparently pitted against each other – or designated as antagonistic parties only for the purpose of

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[17] Wolfram, *supra* note 1, at 355.

complying with procedural requirements – in fact have the same objective? Then between the two parties adverse to each other, there is no real adversity. One can imagine this to be the case when a couple desires the declaration of the nullity of marriage, or its annulment. Since the Family Code maintains a strong policy against collusion and assures that genuine adversarial proceedings take place,[18] then the lawyer simultaneously representing petitioner and respondent would in fact be wrongfully abetting collusion. In fact, this should be simultaneous representation of opposing parties is always unethical because the practice negates the genuine adversity that the rules call for. However, in this case, is not the lawyer bound by allegiance to his client? The riposte need not be belabored: The allegiance a lawyer owes his client should in no case contravene the allegiance due him as an officer of the court.

May a lawyer who counsels or represents a corporation also represent the wife of a director who has filed a petition for legal separation against such a director? A first impression suggests totally unrelated actions with no impediment standing in the way of accepting retainer in the legal separation proceedings. However, when it is recalled that the dissolution of the community regime entails valuation of the holding of the director in the corporation, then there is a "reasonable probability" that in representing the interests of the director's wife, the lawyer will make use of information accessible to him as a corporate counsel which he may not have a right to disclose.[19]

May the counsel of Mr. X plaintiff in one case, accept retainer with Mr. A in a totally different, unrelated case to sue Mr. X? No argument can be made against retainer on the basis of a breach of confidentiality or the use of privileged information. However, aside from feelings of queasiness that a sensitive lawyer may have against suing an actual client in another case, an argument can be made on the basis of the confidence and trust that a client should have for his lawyer and on which is grounded the lawyer-client relationship. Mr. X who is supposed to trust and confide in his lawyer

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[18] The FAMILY CODE in Article 48 provides:

"In all cases of annulment or declaration of absolute nullity of marriage, the Court shall order the prosecuting attorney or fiscal assigned to it to appear on behalf of the State to take steps to prevent collusion between the parties and to take care that evidence is not fabricated or suppressed.

In the cases referred to in the preceding paragraph, no judgment shall be based upon a stipulation of facts or confession of judgment."

[19] Wolfram, *supra* note 1, at 351.

fully will, quite expectedly, have second thoughts about reposing confidence completely in one who sued him in another case. One can then understand the attitude of the Supreme Court in the *Rosacia*[20] case. The respondent lawyer in the case was engaged as a lawyer of a corporation. After termination of retainer, some employees of the corporation engaged the services of the respondent to represent him in a labor case against the corporation filed with the NLRC. The respondent had argued that the illegal dismissal case was unrelated to the advice he gave the corporation as its counsel in regard to its corporate affairs, but the Court would not be convinced, and was not even inclined to be lenient. The Court reiterated that "an attorney owes loyalty to his client not only in the case in which he has represented him but also after the relation of attorney and client has terminated as it is not good practice to permit him afterwards to defend in another case other person against the former client under the pretext that the case is distinct from and independent of the former case."[21]

This brings us to the question of conflict of interest in respect to former clients. The general principles in this case are clear: *First*, an attorney cannot represent one whose interest in the transaction is adverse to that of a former client, even though, while acting for his former client, he acquired no knowledge which could operate to the client's disadvantage in the subsequent adverse employment.

Second, there is in general no prohibition of representation in a suit against a former client where the duties required of a lawyer do not conflict with those required in the first employment. As to when are the first client's interests are impaired is determined by referring to the matter formerly represented by the lawyer himself. When the new engagement of the lawyer results in prejudicing a matter for which the lawyer antecedently represented an earlier client, then there is a clear case of conflict of interest.[22] Nothing then prohibits an attorney from accepting employment adverse to a former client if the matter has no relationship to confidential information acquired by reason of or in the course of his or her employment by the former client.[23]

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[20] A.C. No. 3745, 248 SCRA 664, Oct. 2, 1995.
[21] *Id.*
[22] 7 Am.Jur. 2d, *Attorneys at Law*, § 186.
[23] 7 Cal.Jur. 3d, *Attorneys at Law*, § 94.

In this respect, the Court's pronouncement in *Rosacia* must be read in the context of the fact-pattern of the particular case: the respondent lawyer was counsel of the corporation that its employees now sought to sue in an illegal dismissal case, for which the lawyer's services were being engaged by the suing employees. There is no question that the Court's holding in this case is not easy to reconcile with the doctrine espoused above. A strict application of the *Rosacia* ruling is, however, impracticable. In towns of the Philippines where the clientele is severely limited it would severely restrict the lawyer's practice where he to be completely disqualified from representing any interest adverse to that of all former clients. Interestingly, though, the Court in the *Rosacia* ruling may have limited the applicability of its pronouncement in this case by arguing on the basis of the confidentiality and use of confidential information from a former client, although there was no allegation in this case of the use of information confidentially obtained. As corporate counsel, however, the respondent in this case had access to information relative to hiring and termination policies and practices that was surely material to the case of illegal dismissal his new clients brought against his former client.

A similar case involved a lawyer who was corporate counsel and one of its managers. Subsequently, he resigned and accepted retainer as counsel for one accused of estafa against the corporation. The Court, however, found that the respondent lawyer, while corporate counsel, had investigated the case of estafa. The Court found actionable wrong and suspended the resident lawyer.[24]

The test employed to determine whether or not a lawyer is disqualified from advocating the cause of a new client because of a former lawyer-client relationship is referred to in some literature as the "substantial relationship standard". Two questions must be answered affirmatively: *First*, Are the former representation and the present one adverse in some material way? *Second*, Are the matters substantially related?

A lawyer who represents one passenger in a claim against a common carrier and succeeds is not disqualified from representing another client against the same common carrier in a second case. There is a substantial relation between the two cases, but no adverseness. Similarly, it is difficult to understand how one can object to representing the oppositor

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[24] Lorenzana Food Corporation v. Daria, A.C. No. 2736, 197 SCRA 428, May 27, 1991.

in a patent-application case on the sole ground that the applicant – adverse-party – was the same lawyer's client in the case of the probate will of her father's will. There is adverseness, but no substantial relation.[25]

Is it an effective defense to argue that a conflicting advocacy of the lawyer has yielded substantial returns for his former client, or for an aggrieved client? "Interest" does not only refer to the financial or monetary interest of the client but to the interest of all parties – including the profiting party – in the credibility and reliability of the adversarial process, and so material returns do not negate a finding that a lawyer has acted adversely against the interests of a former or a current client.[26]

What is true in respect to the protection of the interests and confidences of private individuals is no less true for the State. It is for this reason that Rule 6.03 of the Code of professional Responsibility prohibits a lawyer from accepting employment as an advocate in any matter in which he had intervened while in the government service.

THE RULE OF DISCLOSURE

When a conflict of interest arises in the practice of a lawyer, one of his options – aside from terminating retainer or withdrawing representation – is to comply with the requirement of the rule of disclosure. This rule is summarized in *Nakpil*:

First, there must be full disclosure of facts by counsel. The lawyer must explain the full extant of the conflict of interest and its consequences for the parties. *Second*, the lawyer must receive the informed consent of the party concerned.

Under American rules, full disclosure includes: *First*, full disclosure of the possible effects of such representation on the exercise of the lawyer's independent professional judgment on behalf of each client. *Second*, all important interests of the client being adverse should be fully explained with particular attention to content, optional and tactical considerations. The avenues and strategies compromised or prejudiced because of the

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[25] Wolfram, *supra* note 1, at 358-359.

[26] *See* 5 Paras, RULES OF COURT ANNOTATED, 1992 ed., at 537.

conflict should be explained. *Third*, the interests of the lawyer or other clients that provide conflict should also be explained. *Fourth*, the lawyer must also explain the nature of representation the parties can expect to receive from him in case they consent. *Lastly*, the lawyer is likewise obligated to explain the consequences of a future withdrawal of consent especially in respect to time wasted, legal fees, etc.[27]

In this regard, it should be noted that doctrines that hold that a client has waived his right to object to counsel's representation even when there is a conflict of interest[28] apply to the prosecution or defense of a client's cause, but do not affect whatever administrative liabilities a lawyer may have.

II. CONFLICT OF INTEREST IN JUDICIAL ETHICS

CONCEPT OF CONFLICT OF INTEREST IN JUDICIAL ETHICS

A conflict of interest arises when the personal interest of a judge or of the members of his family conflicts with the judge's duty to adjudicate impartially. There are two kinds: actual conflict and perceived conflict of interest. While actual conflict of interest is a matter of fact, perceived conflict of interest is the perception of a conflict of interest by a reasonable, fair minded and informed person.

Perrell[29] expresses the view that a common unifying theme for the various classes of conflict of interest is the theme of divided loyalties and duties. The rule which prohibits a judge to act upon a case when there is an actual or perceived conflict of interest springs from the principle of judicial impartiality. When a judge has a personal interest (or that of any member of his family) which conflicts with that of a party's interest in a litigation or when he has an interest in the subject of a litigation, he is naturally under a reasonable suspicion that he cannot act upon the case with the cold objectivity of an impartial judge.

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[27] Wolfram, *supra* note 1, at 345-347.
[28] 7 Am.Jur. 2d, *Attorneys at Law*, § 187; 7 Cal.Jur. 3d, *Attorneys at Law*, § 97.
[29] Perell, CONFLICT OF INTEREST IN THE LEGAL PROFESSION, 5 (1945).

The Honorable J.O.Wilson in his Book for Judges[30] identifies some of the conflict of interest situations involving a judge: (a) judge's pecuniary interest in the outcome of a litigation, (b) a close family, personal, or professional relationship with a litigant, counsel or witness, or (c) the judge having expressed his views evidencing bias regarding a litigant or his cause.

As stated, the concern is with actual conflict of interest as well as reasonable perception of conflict of interest. The conflict of interest rule applies whether the interest is itself the subject matter of the controversy or where the outcome of the case could substantially affect the value of any interest or property owned by the judge, the judge's family or close associates. It will not apply where the judge's interest is limited to one shared by citizens generally.[31]

This broadly formulated rule cannot be strictly applied, however. Owning an insurance policy, having a bank account, using a credit card or owning shares in a corporation through a mutual fund would not, in normal circumstances, give rise to conflict or the appearance of conflict of interest unless the outcome of the proceedings before the judge could substantially affect such holdings. Nor should small holdings, such as those contemplated by the *de minimis* provisions of the American Bar Association Model Code (1990) give rise to any reasonable question concerning the judge's impartiality.[32] However, if the holding is more substantial, the judge should not sit, subject to considerations of necessity.

Should interests of members of the judge's family, close friends, or associates be considered as giving rise to a perception of conflict of interest? As a matter of broad general principle, one can imagine circumstances in which the interests of the judge's family, close friends, or associates in matters before the judge could give rise to a reasonable apprehension of conflicting interest and duty. To attempt to define these matters with greater precision, however, is another matter.

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[30] J.O. Wilson, A BOOK FOR JUDGES, 23 (1980).

[31] J. Shaman, 'Bias on the Bench: Judicial Conflict of Interest', 3 GEORGETOWN JOURNAL OF LEGAL ETHICS 245 (1989) at 136; the language is modeled on that of Rand, *J.* in Szilard v. Szasz, (1965) S.C.R. 3 at 4.

[32] *See* the ABA Model Code's Note 289, *de minimis* is defined as being "an insignificant interest that could not raise a reasonable question as to the judge's impartiality".

Section 1, Rule 137 of the Rules of Court[33] and Rule 3.12, Canon 3 set the rule on disqualification of judges. Rule 3.12 provides, thus:

> Rule 3.12. – A judge should take no part in a proceeding where the judge's impartiality might reasonably questioned. These cases include, among others, proceedings where:
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> (a) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;
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> (b) the judge served as executor, administrator, guardian, trustee, or lawyer in the case or matters in controversy, or a former associate of the judge served as counsel during their association, or the judge or lawyer was a material witness therein;
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> (c) the judge's ruling in a lower court is the subject of review;
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> (d) the judge is related by consanguinity or affinity to a party litigant within the sixth degree or to counsel within the fourth degree;
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> (e) the judge knows that the judge's spouse or child has a financial interest as heir, legatee, creditor, fiduciary, or otherwise, in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.
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> In every instance, the judge shall indicate the legal reason for inhibition.

The Code of Judicial Conduct[34] in Rule 3.13, Canon 3, provides:

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[33] RULES OF COURT, Rule 137, § 1 provides: No judge or judicial officer shall sit in any case in which he, or his wife or child, is pecuniarily interested as heir, legatee, creditor or otherwise, or in which he is related to either party within the sixth degree of consanguinity or affinity, or to counsel within the fourth degree, computed according to the rules of the civil law, or in which he has been executor, administrator, guardian, trustee or counsel, or in which he has presided in any inferior court when his ruling or decision is the subject of review, without the written consent of all parties in interest, signed by them and entered upon the record.

A judge may, in the exercise of his sound discretion, disqualify himself from sitting in a case, for just or valid reasons other than those mentioned above.

> Rule 3.13 – A judge disqualified by the terms of Rule 3.12 may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If, based on such disclosure, the parties and lawyers independently of the judge's participation, all agree in writing that the reason for the inhibition is immaterial or unsubstantial, the judge may then participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

The foregoing rules are complimented by the general principle that the judge should disqualify himself if he is aware of any interest or relationship which to a reasonable, fair minded and informed person would give rise to a reasoned suspicion of lack of impartiality.

There are, however, constellations of facts which seem to give rise to conflict of interest but which do not exist or there are really conflicts of interest but which are not easy to discern. The examples given below emanated from foreign jurisdictions.

Article 234 (1) and (9) of the Code of Civil Procedure define precisely the degree of family relationship with parties or counsel which requires recusal. Article 235 refers to the personal interest of the judge or his "consort" as justifying recusal. The ABA Model Code (1990) defines the degree of family relationship which should lead to disqualification.[35]

Personal insolvency and bankruptcy give rise to a variety of potential difficulties for judges. Whether and if so in what circumstances, these difficulties will provide grounds for removal of a judge is not an issue

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[34] The penultimate paragraph of the New Code of Judicial Conduct of the Philippine Judiciary provides that in case of deficiency or absence of specific provision in the New Code, the Canons of Judicial Ethics and the Code of Judicial Conduct shall be applicable suppletorily.

[35] *See, e.g.,* the Model Code's Canon 3E (d), which provides:

> (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person; [i] is a party to a proceeding, or an officer, director, or trustee of a party; [ii] is acting as a lawyer in the proceeding [iii] is known by the judge to have a more than de minimis interest that could be substantially affected by the outcome of the proceeding [iv] is to the judge's knowledge likely to be a material witness in the proceeding
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> "Third degree of relationship" – The following persons are relatives within the third degree of relationship: great-grandparents, grandparents, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

that falls within the range of questions addressed by these Principles. As the Bankruptcy Act, Section 175, recognizes, bankruptcy may occur by misfortune and without misconduct. For instance, a judge could be held liable for a defalcation of a former law partner or for an accident involving the judge's vehicle driven by his or her spouse or child. Having regard to this fact, no general rule can, or should be formulated.

The judge who is in financial difficulty will have to be particularly vigilant for conflicts of interest, both actual and perceived. There will be difficulties in the judge presiding over matters involving any of his or her creditors or, perhaps, other matters raising similar issues. Serious questions arise if any aspect of the judge's financial difficulties become contentions. In this event, the possibility of the judge appearing before a judicial colleague as a party or a witness would arise. The actual day-to-day impact of the financial difficulties on the judge's ability to perform the job will obviously vary considerably depending on the circumstances and the size of the jurisdiction. Circumstances that may cause very minor inconvenience of a large court might nonetheless have significant practical impact on a smaller court. Once again, however, it seems impossible and unwise to try to deal with the scores of possibilities other than through the application of the general principle that, where a reasonable, fair-minded and informed person would have a reasonable suspicion that the judge will not be impartial, the judge should not sit. In certain circumstances, the principles relating to diligence might also be relevant if the judge's conflicts are so extensive that they effectively prevent the judge from carrying out his or her duties. A judge's bankruptcy may raise many of these issues in acute form. When judges become aware of financial or other similar circumstances likely to affect public perception of their impartiality, they should draw them to the attention of their chief justices.

Canon 4 of the New Code of Judicial Conduct for the Philippine Judiciary deals with the rules on conflict of interest involving judges. Thus, the introductory sentence of the Canon states that "propriety and the appearance of propriety are essential to the performance of all the activities of a judge". The same Canon provides the rules on actual conflicts of interest and those of perceived conflicts of interest.

Actual Conflicts of Interest (New Code)

1. Section 4 – Judges shall not participate in the determination of a case in which any member of their family represents a litigant or is associated in any manner with the case.

2. Section 8 – Judges shall not use or lend the prestige of their judicial office to advance their private interests, or those of a member of their family or of anyone else.

Perceived Conflicts of Interest (New Code)

1. Section 9 – "x x x Judges shall not convey or permit others to convey the impression that anyone is in a special position improperly to influence them in the performance of judicial duties."

2. Section 13 – Judges and members of their families shall neither ask for nor accept any gift, bequest, loan or favor in relation to anything done or to be done or omitted to be done by him or her in connection with the performance of judicial duties.

3. Section 14 – Judges shall not knowingly permit court staff or others subject to their influence, dlirection, or authority, to ask for, or accept, any gift, bequest, loan, or favor in relation to anything done or to be done or omitted to be done by him in connection with their duties and functions.

Agpalo[36] in his book highlights the judicial pronouncements of the Supreme Court regarding conflicts of interest.

The personal behavior of the judge not only upon the bench but also in his everyday life, should be above reproach and free from the appearance of impropriety.[37] He should maintain high ethical principles and sense of propriety without which he cannot preserve the faith of the people in the judiciary, which is so indispensable in an orderly society.[38] For the

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[36] Agpalo, COMMENTS ON THE CODE OF PROFESSIONAL RESPONSIBILITY, 489, 494 (2001 ed.).

[37] CANONS OF JUDICIAL ETHICS, Canon 3.

[38] Candia v. Tagabucha, A.C. No. 561-MJ, 79 SCRA 51, Dec. 29, 1976. *See also* Barja v. Becasio, A.C. No. 561-MJ 74 SCRA 355, Dec. 29, 1976.

judicial office circumscribes the personal conduct of a judge and imposes a number of restrictions thereon, which he has to observe faithfully as the price he has to pay for accepting and occupying an exalted position in the administration of justice.[39]

A judge should not accept inconsistent duties,[40] nor incur obligations, pecuniary or otherwise, which will in any way interfere with his devotion to the expeditious and proper administration of his official functions. He should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to enhance his personal self-interest[41] or to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises.[42]

He should not enter into such private business or pursue such a course of conduct as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relations which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.[43] He should not, in any event, engage in private business without the written permission of the Supreme Court.[44] He should not willfully refuse to pay his debt.[45]

The restriction against a public official from using his public position as a vehicle to promote or advance his private interests extends beyond his tenure on certain matters in which he intervened as a public official. Thus "a lawyer shall not, after leaving government service, accept engagement or employment in connection with any matter in which he had intervened while in said service."[46] The qualifying words or phrases that define the prohibition are, *first*, "any matter" and *second*, "he had intervened" thereon while he was in the government service. These are very broad

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[39] Apiag v. Cantero, A.M. No. MTJ-95-1070, 268 SCRA 47, 62, Feb. 12, 1997; Jugueat v. Boncaros, A.M. No.440-CFI, 60 SCRA 271, Sep. 30, 1974.

[40] Tuazon v. Zaldivar, L-23476, 14 SCRA 1067, Aug. 31, 1965.

[41] Candia v. Tagabucha, A.C. No. 561-MJ, 79 SCRA 51, Dec. 29, 1976.

[42] CANONS OF JUDICIAL ETHICS, Canon 24.

[43] *Id.;* Buenaventure v. Benedicto, A.C. No. 137-J, 38 SCRA 71, Mar. 27, 1971.

[44] Borre v. Maya, A.M. No. 1765-CFI, 100 SCRA 314, Oct. 17, 1980.

[45] Gayar de Julio v. Vega, A.M. No.RTJ-89-406, 199 SCRA 315, Jul. 18, 1991.

[46] CODE OF PROFESSIONAL RESPONSIBILITY, Rule 6.03.

terms, which include any conceivable subject in which he acted in his official capacity. The restriction covers "engagement or employment", which means that he cannot accept any work or employment from anyone that will involve or relate to the matter in which he intervened as a public official, except on behalf of the body or authority which he served during his public employment.[47]

In connection with the foregoing, mention may be made that one of the corrupt practices of public officials which the Anti-Graft and Corrupt Practices Act prohibits is "accepting or having any member of his family accept employment in a private enterprise which has pending official business with him during the pendency thereof or within one year after its termination". Section 7 (b) of Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials, prohibits any former public official or employee for a period of one year after retirement or suspicion from office to "practice his profession in connection with any matter before the office he used to be with". Section 1 of Republic Act No. 910, or the Act to Provide for the Retirement of Justices of the Supreme Court and of the Court of Appeals, as amended, provides that "it is a condition of the pension provided for herein that no retiring Justice during the time that he is receiving said pension shall appear as counsel before any court in any civil case wherein the Government or any subdivision or instrumentality thereof is the adverse party, or in any criminal case wherein and officer or employee of the Government is accused of an offense committed in relation to his office, or collect any fee for his appearance in any administrative proceedings to maintain an interest adverse to the Government, insular, provincial or municipal, or to any of its legally constituted offices"

Since the law does not allow a judge to practice his profession, he should not do so indirectly by being a silent partner in a law firm or by securing legal business for a friend or former associate in the active practice of law and receiving a share in the attorney's fees for his efforts.[48]

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[47] Agpalo, *supra* note 36, at 71-72.
[48] Agpalo, LEGAL ETHICS, 70-71 (1997 ed.).

ILLUSTRATIVE CASES

There are a couple of conflict of interest cases which are most instructive. In *Perez v. Judge Suller,*[49] the Supreme Court called to task the respondent judge from participating in the preliminary investigation involving his nephew. In considering the act of Judge Suller as a violation of specific rules in the Code of Judicial Conduct, the Court said:

> We have declared often enough that the behavior of judges and court personnel, must at all times, not only be characterized by propriety and decorum, but must also be above suspicion. Due process cannot be satisfied in the absence of that degree of objectivity on the part of a judge sufficient to reassure litigants of his being fair and just. Canon 2 of the Code of Judicial Conduct, moreover, mandates that a judge should avoid, not merely impropriety in all his acts but even the appearance of impropriety.[50]

In *Macariola v. Judge E.B. Asuncion,*[51] the judge acquired the property which was a subject of litigation in his court after the same was finally terminated. The judge's defense was, he did not violate Article 1491 of the Civil Code[52] because his acquisition took place after finality of judgment.

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[49] A.M. No. MIJ-94-936, 249 SCRA 665, Nov. 6, 1995.

[50] *Id.* at 672-673.

[51] A.M. No. 133-J, 199 Phil. 295, May 31, 1982.

[52] Art. 1491. The following persons cannot acquire by purchase, even at a public or judicial auction, either in person or through the mediation of another:

(1) The guardian, the property of the person or persons who may be under his guardianship;

(2) Agents, the property whose administration or sale may have been entrusted to them, unless the consent of the principal has been given;

(3) Executors and administrators, the property of the estate under administration;

(4) Public officers and employees, the property of the State or of any subdivision thereof, or of any government-owned or controlled corporation, or institution, the administration of which has been intrusted to them; this provision shall apply to judges and government experts who, in any manner whatsoever, take part in the sale;

(5) Justices, judges, prosecuting attorneys, clerks of superior and inferior courts, and other officers and employees connected with the administration of justice, the property and rights in litigation or levied upon an execution before the court within whose jurisdiction or territory they exercise their respective functions; this prohibition includes the act of acquiring by assignment and shall apply to lawyers, with respect to the property and rights which may be the object of any litigation in which they may take part by virtue of their profession.

The Supreme Court held that the judge may have violated Canon 3 of the Canons of Judicial Ethics, and pronounced:

> A judge's official conduct should be free from the appearance of impropriety, and his personal behavior, not only upon the bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach. Even if respondent honestly believed that Lot 1184-E was no longer in litigation in his court and that he was purchasing it from a third person and not from the parties to the litigation, he should nonetheless have refrained from buying it for himself and transferring it to a corporation in which he and his wife were financially involved, to avoid possible suspicion that his acquisition was related in one way or another to his official actuations in civil case 3010. The conduct of respondent gave cause for the litigants in civil case 3010, the lawyers practising in his court, and the public in general to doubt the honesty and fairness of his actuations and the integrity of our courts of justice.[53]

In *Villaluz v. Mijares,*[54] a judge was sanctioned by the Supreme Court for not disqualifying himself from trying a special proceeding being related to a party within the sixth degree of consanguinity. The Supreme Court ruled:

> The rule on compulsory disqualification of a judge to hear a case where, as in the instant case, the respondent judge is related to either party within the sixth degree of consanguinity or affinity rests on the salutary principle that no judge should preside in a case in which he is not wholly free, disinterested, impartial and independent. A judge has both the duty of rendering a just decision and the duty of doing it in a manner completely free from suspicion as to its fairness and as to his integrity. The law conclusively presumes that a judge cannot objectively or impartially sit in such a case and, for that reason, prohibits him and strikes at his authority to hear and decide it, in the absence of written consent of all parties concerned. The purpose is to

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(6) Any others specially disqualified by law.

[53] Macariola v. Judge E.B. Asuncion, A.M. No. 133-J, 199 Phil. 295, 313-314, May 31, 1982.
[54] A.M. No. RTJ-98-1402, 288 SCRA 594, Apr. 13, 1998.

preserve the people's faith and confidence in the courts of justice.[55]

DISCLOSURE OF CONFLICT OF INTEREST

Section 6, Canon 3 of the New Code of Judicial Conduct for the Philippine Judiciary provides that a judge disqualified as stated in the preceding section, instead of withdrawing from the proceeding, disclose on the records the basis of disqualification. If, based on such disclosure, the parties and lawyer independently of the judge's participation, all agree in writing the reason for the inhibition is immaterial and insubstantial, the judge may then participate in the proceeding. The agreement signed by all parties, and lawyers, shall be, incorporated in the record of the proceeding.

Commentaries on Judicial Conduct acknowledges the practical difficulty of attempting to cure a concern about disqualification by disclosure to and consent of the parties. The main concern is that such an approach puts counsel in an unfair position – as one respondent put it, to either consent or to risk being seen as a trouble maker.[56]

It is not suggested that consent of the parties would justify a judge continuing in a situation in which he or she felt that disqualification was the proper path. The issue of consent, therefore, arises only in those cases in which the judge believes that there is an arguable point about disqualification but in which the judge believes, at the end of the day, a reasonable person would not apprehend a lack of impartiality. Putting the matter this way perhaps highlights the difficult position in which counsel is placed. By disclosing the matter and seeking consent to continue, the judge is in essence saying that no reasonable person should apprehend a lack of impartiality. Therefore, if counsel fails to consent, counsel (or their clients) may appear to be taking an unreasonable position. A partial answer to this concern may be to adopt the English practice in which the judge is told that an objection was made by one of the parties without being told which side objected.[57]

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[55] *Id.* at 610.

[56] *See, e.g.,* S. Shetreet, JUDGES ON TRIAL (1976) at 305; J.B. Thomas, JUDICIAL ETHICS IN AUSTRALIA (1997, 2nd ed.) at 53-55; Canadian Judicial Council, COMMENTARIES ON JUDICIAL CONDUCT (1991) at 72; J.O. Wilson, A BOOK FOR JUDGES (1980) at 30-31.

[57] *See* Shetreet, *Id.* at 305.

The better approach is for the judge to make the decision without inviting consent. If the judge concludes that no reasonable, fair-minded and informed person, considering the matter, would have a reasonable suspicion of lack of impartiality, the matter should proceed before the judge. If the conclusion is the opposite, the judge should not sit.

The judge should make disclosure on the record and invite submissions from the parties in two situations. The first arises if the judge has any doubt about whether there are arguable grounds for disqualification. The second is if an unexpected issue arises shortly before or during a proceeding. The judge's request for submission should emphasize that it is not counsel's consent that is being sought but assistance on the question of whether arguable grounds exist for disqualification and whether, in the circumstances, the doctrine of necessity applies.

Rights of Judges and Non-Official Activities in Which They May Participate

1. Rule 4.06 – Judges, like any other citizen, are entitled to freedom of expression, belief, association, and assembly, but in exercising such rights, they shall always conduct themselves in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

2. Rule 4.10 – Subject to the proper performance of judicial duties, judges may:

a. Write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice, or related matters;

b. Appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

c. Engage in other activities if such do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

3. Rule 4.12 – Judges may form or join associations of judges or participate in other organizations representing the interests of judges.

4. Rule 4.15 – Subject to law and to any legal requirements of public disclosure, judges may receive a token, award, or benefit which might not be reasonably perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

COMMENT

Underlining the above-quoted rules is the provision of Rule 6.07 which states that judges shall not engage in conduct incompatible with the diligent discharge of judicial duties.

It is pretty obvious that a judge does not cease to be a citizen and a member of a community as a result of his appointment to the Bench. Ike any other citizen, judges enjoy freedom of expression, belief, association, and assembly. There is, however, a caveat: that in exercising such freedom and constitutional rights, judges shall not conduct themselves in such a manner as is inconsistent with the dignity of their judicial office and incompatible with judicial impartiality and independence.

Judges, of course, have private lives and should enjoy, as much as possible, the rights and freedoms of citizens generally. Moreover, an out of touch judge is less likely to be effective. Neither the judge's personal development nor the public interest is well served if judges are unduly isolated from the communities they serve. Legal standards frequently call for the application of the reasonable person test. Judicial fact-finding, an important part of a judge's work, calls for the evaluation of evidence in light of common sense and experience. Therefore, the judges should, to the extent consistent with their special role, remain closely in touch with the public.

A judge's conduct, both in and out of court, is bound to be the subject of public scrutiny and comment. Judges must therefore accept some restrictions on their activities – even activities that would not elicit adverse notice if carried out by other members of the community. Judges need to

strike a delicate balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development, and family.

In addition to judges' observing high standards of conduct personally they should also encourage and support their judicial colleagues to do the same as questionable conduct by one judge reflects on the judiciary as a whole.

Rule 6.03 states that judges shall take reasonable steps to maintain and enhance their knowledge, skills, and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose the training and other facilities which should be made available, under judicial control, to judges.

Rule 6.04 further provides that judges shall keep themselves informed about relevant development in international law, including international conventions and other instruments establishing human rights norms.

In furtherance of these codal admonitions, judges are encouraged – not only allowed – to write, teach, and participate in activities concerning the law, the legal system, the administration of justice, or related matters.

CONCLUSION

The rule on conflicts of interest is not principally a punitive weapon against lawyers, judges, and court personnel. Unfortunately, some members of the Bar and Bench run afoul of the rule in serious ways and are consequently disciplined by the Supreme Court. It is however a rule set in place to invite the confidence of litigants in their lawyers and judges. Like the strict theological prescription on the seal of the confession that is meant to encourage penitents to acknowledge the depths of their sinfulness to a priest, the rule fosters that degree of confidence and trust between a lawyer and his client that effective and competent representation can demand. Similarly, like the judges in the Holy Book, our judges today take an oath to conduct themselves at all times with the highest degree of rectitude and dignity. Any act or conduct which may give rise to suspicion of judicial perfidy should be avoided.

There is a social stake in these familiar and similar rules, for the peaceful, rational, and orderly settlement of disputes over "due and demandable rights" is a matter for concern of all society. When the people lose faith in the judicial process, then they will settle their disputes in ways most expedient to them, and many of these may not be conducive to keeping the public peace and safeguarding the Rule of Law.

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