FROM COURTROOM TO BOARDROOM: EVOLVING CONFLICT OF INTEREST RULES TO GOVERN THE CORPORATE PRACTICE OF LAW*

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> *"No one can serve two masters. He will either hate one and love the other, or be devoted to one and despise the other. You cannot serve God and mammon."*
> *– Matthew 3:24*[1]

> *'Much of attorney conflict of interest doctrine is arcane, a subspecialty whose interpretation can seem as abstruse as explicating the Dead Sea Scrolls."*
> *– Stephen Gillers*[2]

I. INTRODUCTION

Christ's admonition that "no one can serve two masters" aptly sums up one of the central themes of legal ethics. The lawyer's calling is one of unswerving loyalty to his charge, and the stereotypical picture is one of an indefatigable courtroom gladiator, ready to stand for his client's cause to the last, even if the State's mighty hosts are marshaled against him.

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[1] NEW AMERICAN BIBLE.

[2] Stephen Gillers, Conflicts: Risky New Rules, AM. LAW., Sep. 1989, at 39.

However, this idealized depiction of loyalty, framed in that classic image of two wizened barristers locked in a mortal combat of eloquent discourse before a judge, is increasingly becoming less relevant and less realistic in modern-day practice.

Modern business today is transacted through corporations, creatures of legal fiction that have taken on lives of their own independent of the individuals behind them. They are able to marshal resources on a scale unimaginable for a lone entrepreneur. As corporations have reshaped modern economics, law firms have likewise grown and adapted themselves to suit their needs. These evolutions in business practice have given rise to a host of ethical dilemmas. The modern corporation's sheer size places it in contact with so many entities that the situation wherein its lawyer would have two of its clients coming into controversy with one another is not totally impossible. The same is true for the law firms that have grown precisely to be able to service these large corporations. Moreover, it is no longer realistic today for large corporations to retain a single law firm, nor for a firm to devote itself exclusively to the service of one corporate client. Moreover, the corporation's underlying organization itself gives rise to clear conflict-of-interest situations. Since a lawyer appointed as a corporate officer, often as corporate secretary, suddenly finds himself torn between the juridical person he ostensibly serves, and the majority shareholders that have appointed him. Indeed given these evolutions, even the attorney-client relationship can no longer be as intimate as traditional ethical rules would want them to be. Unfortunately, the Code of Professional Responsibility ("Code"), from which most if not all lawyers derive their ethical moorings, has failed to keep pace with these modern developments and has remained fixated on that idealized depiction of two lawyers battling against each other in a single case. The Code's undeniably antiquated frameworks are more pronounced particularly in light of modern conflict of interest issues.

The Philippine Supreme Court itself has observed that the Code must catch up with this reality particularly with respect to conflict of interest as well as breach of confidentiality rules. In the 2005 case of *PCGG v. Sandiganbayan*,[3] the Supreme Court declined to disqualify Atty. Estelito Mendoza from representing the Lucio Tan group in a case filed by the government against his client simply because he had formerly served as Solicitor General. The Court reasoned that it would be unrealistic to apply

[3] G.R. No. 151809, 455 SCRA 526, Apr. 12, 2005.

the conflict of interest rule in absolute terms. On the other hand, in *Regala vs. Sandiganbayan*,[4] ruling on the issue of confidentiality, the Court held that: "[c]ompelling disclosure of the client's name in circumstances such as the one which exists in the case at bench amounts to sanctioning fishing expeditions by lazy prosecutors and litigants which we cannot and will not countenance."[5] The Court further stated that "[w]hen the nature of the transaction would be revealed by disclosure of an attorney's retainer, such retainer is obviously protected by the privilege. It follows that petitioner attorneys in the instant case owe their client(s) a duty and an obligation not to disclose the latter's identity which in turn requires them to invoke the privilege."[6]

Applying the reasoning in the *PCGG* case to the classic courtroom context, the compelling need to rethink how the conflict of interest rule should be applied to the corporate law setting far removed from the traditional framework becomes imperative. *Regala*, however, appears to be on shakier ground, in a milieu punctuated by concerns about money laundering, terrorism and corporate fraud, the growing trend is towards greater disclosure of corporate wrong doing rather than steadfastly preserving iron-clad confidentiality. The impact of Enron, for example, cannot be overemphasized; its effects have been felt not only in corporate boardrooms but also in major accounting and law firms as well.

This paper is a modest attempt to critique the provisions of the Code of Professional Responsibility mainly focusing on provisions of the Code affecting the lawyer in corporate practice. It is submitted that many of the contemporary characteristics of the relationship of the Code to the non-litigation aspects of lawyering, or the criticisms concerning the adversarial and litigation focus of the Code of Professional Responsibility came about mainly because of the growth of two major areas: 1) the growing trend towards respect for client autonomy (as well as client self-determination); and 2) the growth of modern corporate practice. Primarily, criticisms against the litigation and adversarial focus of modern day codes grew out of the incompatibility of the growth and emergence of large global corporations with some of the arguably anachronistic provisions of the Code. It is observed that the development and evolution of rules governing the lawyer's conduct inevitably focused on the lawyer's demeanor in a

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[4] G.R. No. 105938, 262 SCRA 122, Sep. 20, 1996.
[5] *Id.* at 151.
[6] *Id.*

litigation setting because this is the area where most abuses naturally arise. However, the legal profession, and the Supreme Court must recognize the pressing need to balance concerns on litigation abuse with the demands of the newer forms of non-litigation practice that emerged because of the growing complexity of modern times. It is not that the ideals and principles embodied in the Code have become outdated and obsolete as a result of this growing complexity but that trapped in the provisions of the present Code, they have failed to find their appropriate application in these modern times.

This paper seeks to explore these dilemmas within the above described context in a threefold manner: First, it shall revisit the history of the conflict of interest rule, and articulate its underlying goals. Second, it shall explore situations in modern corporate law where conflict of interest situations have become increasingly commonplace but could not adequately be resolved using the classic framework of two lawyers battling in a courtroom. Third, it shall present recommendations to address ethical dilemmas within the present Code's framework. With the lines between two masters today becoming increasingly blurred, the corporate lawyer may have no choice but serve two masters and serve each of them well.

II. THE CONFLICT OF INTEREST RULE'S INCEPTION

A. CODE OF PROFESSIONAL RESPONSIBILITY: A HISTORY

Legal Ethics' 800-year evolution, as enshrined in the Code, has seen six core duties traditionally ascribed to lawyering: litigation fairness, competence, loyalty, confidentiality, reasonable fees and public service.[7] These core duties arose from the formal laws developed during the "dark ages"[8] of nineteenth century America.[9] *PCGG v. Sandiganbayan*[10] stated:

> Procedural law continued to directly, or indirectly, limit an attorney's litigation behavior. The developing law of agency recognized basic duties of competence, loyalty and safeguarding

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[7] Carol Andrews Rice, *Standards Of Conduct For Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1387 (2004).

[8] *Id.*

[9] *Id.*

[10] G.R. No. 151809, 455 SCRA 526, Apr. 12, 2005.

> of client property. Evidence law started to recognize with less equivocation the attorney-client privilege and its underlying theory of confidentiality.[11]

These standards, however, were isolated and failed to provide a comprehensive statement of a lawyer's duties.[12] Reformers, from David Dudley Field to Professors David Hoffman and George Sharswood, along with many other lawyers and educators, tried to address this inadequacy through their lectures in various law schools, journal articles, newspapers, books and even eulogies of prominent lawyers.[13] However, these various sources, while providing detailed standards on legal ethics, reflected only the author's view and carried no legal weight.[14]

It was at this time, at the turn of the nineteenth century, that a new form of ethical standard emerged, one which not only enhanced standards of conduct but is also binding in nature.[15] This new vehicle was the American Bar Association Code of Legal Ethics.[16] Formulated by lawyers for lawyers, these new codes were widely accepted and various states thus adopted them as binding rules of law.[17] These state ethical laws, most notably the 1887 Alabama Code of Ethics, served as the foundations for the 1908 American Bar Association (ABA) Canon of Ethics.[18] It was these canons which were adopted by the Philippine Bar in 1917, following the realization that the oath and broad descriptions of lawyers' duties were insufficient.[19]

The Philippine Bar continues to look up to the ABA's Canons of Ethics for guidance. In 1980, following changes in the ABA's Model Rules of Professional Responsibility, particularly with regard to conflicts of interest, the Integrated Bar of the Philippines (IBP) striving to conform to new realities, adopted a proposed code that incorporated local customs,

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[11] *Id.* at 567.
[12] Rice, *supra* note 7, at 1387.
[13] *Id.* at 1426-31.
[14] *Id.*at 1434.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 1387.
[18] *Id.*
[19] *Id., citing* Ruben Agpalo, LEGAL AND JUDICIAL ETHICS, 24-25 (2002).

traditions and practices.[20] On June 21, 1988, the Supreme Court promulgated the present Code of Professional Responsibility.[21]

B. CHANGING CONCEPTION OF A LAWYER: FROM GLADIATOR TO PROBLEM-SOLVER[22]

From the "do no falsehood" oaths[23] of medieval England to the present Philippine Code's twenty-two Canons,[24] those six core duties of a lawyer have remained largely unchanged over eight centuries. These duties and the ethical standards that have developed, including our own Code, all revolve around the concept of a lawyer defending a client's cause in adversarial proceedings. This stereotype of a lawyer primarily as a courtroom gladiator, however, fails to capture the nuances and facets of modern legal practice. The landmark case of *Cayetano v. Monsod*[25] reflect the Supreme Court's recognition of these other aspects, having expanded the definition of "practice of law" to include those characterized by advocacy, counseling and public service.[26] Thus:

> *Practice of law* under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. *Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation.* They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations.[27] (Emphasis supplied)

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[20] *Id.*

[21] *Id.*

[22] Susan Sturm, *From Gladiators To Problem-Solvers: Connecting Conversations About Women, The Academy, And The Legal Profession,* 4 DUKE J. GENDER L. & POL'Y 119 (1997).

[23] Rice, *supra* note 7, at 1415.

[24] Rice, *supra,* note 7, *citing* Agpalo, LEGAL AND JUDICIAL ETHICS, 24-25 (2002).

[25] G.R. No. 100113, 201 SCRA 210, Sep. 3, 1991.

[26] *Id.*

[27] *Id.* at 213-214, *citing* Philippine Lawyers Association v. Agrava, GR No. 12426, 105 Phil. 173,176-177, Feb. 16, 1959.

The practice of law, beyond the courtroom, has clearly broadened into a variety of acts that all involve translating legal rules into language and practices meaningful to those who must comply with and enforce those rules.[28] The lawyer has thus metamorphosed from an ordinary combatant into an earnest problem-solver, who is required to employ various skills and knowledge to solve his client's problems.[29] Professor Susan Sturm explained:

> Lawyers as problem-solvers face the challenge of reconciling norms of autonomy and integrity with the demands of operating as counselors, collaborators, facilitators of decision-making processes, and participants in managerial decision-making.[30]

Undeniably, the legal environment has changed since the Code's promulgation. Whereas before, a single lawyer or firm could ably attend to all the legal needs of its corporate clients, now, corporations' continued growth as well as the effects of globalization have made the once simple relationship between business clients and their lawyers far more complex.[31] At present, it is common, and even necessary, for a large corporation to be represented by several law firms, each handling a particular aspect of its business, corollarily, a single law firm may itself represent several companies and handle different aspects of their business.[32]

Thus, in *Analytica, Inc. v. NPD Research, Inc.*,[33] it was said that:

> The practice of law has changed dramatically in recent years, with many lawyers working in firms consisting of 20, 30, 60, 100 or even 300 or more attorneys, and with some firms having offices located throughout the country or even throughout the world. Additionally, the trend within law firms has been toward greater specialization and departmentalization.[34]

The complexity in the modern lawyer-client relationship gives rise to ethical questions not readily addressed by the Code. Worse, the Code's

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[28] Sturm, *supra* note 22, at 136.

[29] *Id.* at 137.

[30] *Id.*.

[31] Verita Gulati, *Effects of Legal Ethics in the Business World*, 17 ST. JOHN'S J. LEGAL COMMENT. 247 (2003).

[32] *Id.*.

[33] 708 F.2d 1263 (1983).

[34] *Id.* at 1274. (Coffey, *dissenting*).

absolutist provisions give rise to conduct that may technically be proper under the Code, but whose results completely collide with the Code's spirit.[35]

To cite an increasingly common occurrence in the United States for example, the abuse of legal ethics rules in disqualification motions has become a potent strategic weapon in litigation.[36] In *Manning v. Waring*,[37] where the disqualification of his counsel resulted in hardship for Waring, the US court held that:

> Unquestionably, the ability to deny one's opponent the services of capable counsel, is a potent weapon. Confronted with such a motion, courts must be sensitive to the competing public policy interests of preserving client confidences and of permitting a party to retain counsel of his choice.[38]

According to Amanda Morgan,[39] the effects of disqualification are that:

> [T]he client whose attorney has been disqualified is disadvantaged, not only because he loses his counsel of choice, but also because of the extra time, effort, and expense that goes into a change in representation; especially if the lawsuit is relatively far along.[40]

It therefore becomes necessary to reconsider the application and applicability of the rules on conflict of interest in light of such increasingly interconnected and diverse legal and business situations.

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[35] Gulati, *supra* note 31, at 249.

[36] Christopher Dunnigan, *The Art Formerly Known As The Chinese Wall: Screening In Law Firms: Why, When, Where, And How*, 11 GEO. J. LEGAL ETHICS 291, 296 (1998).

[37] 849 F.2d 222 (1988)

[38] *Id.* at 224.

[39] Amanda Kay Morgan, *Screening Out Conflict-Of-Interests Issues Involving Former Clients: Effectuating Client Choice And Lawyer Autonomy While Protecting Client Confidence*, 28 J. LEGAL PROF. 197 (2003-2004).

[40] *Id.* at 203.

III. CONFLICT OF INTEREST PROBLEM

Canon 15 of the Code of Professional Responsibility provides: "A lawyer shall observe candor, fairness and loyalty in all his dealings and transactions with his clients."[41]

Rule 15.03 articulates the conflict of interest rule: "A lawyer shall not represent conflicting interests except by written consent of all concerned given after a full disclosure of the facts."[42]

Amanda Kay Morgan posits that the substantial relationship test utilized by courts to decide whether or not to disqualify a lawyer based on conflicts of interest, involves two key policy concerns behind this rule, namely, client loyalty and client confidentiality.[43] This, according to *Tiania v. Ocampo*[44] springs from the duty of the attorney to "deserve the fullest confidence of his client and represent him with undivided loyalty"[45] and to avoid any "suspicion of unfaithfulness or double-dealing in the performance thereof."[46]

Given the nature of the practice of law as a profession and looking at the lawyer's basic duties to his client, the practitioner must in the words of Professor Paula Monopoli:[47]

> (1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation;
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> (2) act with reasonable competence and diligence;
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> (3) comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client; and

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[41] CODE OF PROFESSIONAL RESPONSIBILITY, Canon 15.
[42] CODE OF PROFESSIONAL RESPONSIBILITY, Rule 15.03.
[43] Morgan, *supra* note 39, at 198.
[44] A.C. No. 2285, Aug. 12, 1991, 200 SCRA 472.
[45] *Id.* at 479.
[46] *Id.*
[47] Paula Monopoli, *Drafting Attorneys As Fiduciaries: Fashioning An Optimal Ethical Rule for Conflicts of Interest*, 66 U. PITT. L. REV. 411, 417 (2005).

(4) fulfill valid contractual obligations to the client.[48]

There is no question that these policy concerns are at the heart of lawyering. After all a fiduciary relationship lies at the core of the lawyer-client relationship, a relationship in which client loyalty and confidentiality cannot altogether be disregarded. In maintaining these, however, it becomes fairly obvious that we cannot be satisfied merely with the Code in its present form. Changes in the business environment - and necessarily - changes in the legal environment have rendered Code inadequate to provide proper ethical tenets responsive to the modern practice of law.

IV. CONFLICT OF INTEREST SITUATIONS IN MODERN LEGAL PRACTICE

A. CORPORATE SECRETARY'S DILEMMA

The corporation's separate personality by legal fiction makes it the potent business vehicle that it has become today, yet this very strength is itself a fertile ground for a range of ethical dilemmas for which the litigation option would be inadequate.

A corporation, under the Corporation Code, is a juridical entity with a personality separate and distinct from the members or stockholders that compose it,[49] and a lawyer necessarily owes it a separate loyalty, serving all its shareholders only indirectly. In reality, however, a lawyer may be engaged through the votes of a majority shareholder bloc or appointed to a corporate officership; and he obviously owes these majority shareholders his fidelity, both on an ethical as well as on a practical level. This reality is not a problem when the shareholders' and the corporation's interests intertwine, since advancing one interest normally advances the other. Problems arise, however, when the majority shareholders find themselves at odds with other shareholders or, worse, when the controversy involves the determination of who the majority shareholders in fact are. Ideally, in an intracorporate controversy, the lawyer would inhibit himself and request the client to retain a new, disinterested lawyer solely for that controversy. This

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[48] *Id.*

[49] Batas Blg. 68 (1980). This is the Corporation Code of the Philippines.

is unrealistic, since it not only places an additional burden on the client shareholders but also places the lawyer in a situation which may lead to the termination of his services.

Further, let us suppose, for example, that a law firm partner is appointed as corporate secretary in a large corporation. If an intracorporate dispute eventually breaks out between the various stockholder groups in a fight for control of the corporation then a conflict of interest situation arises, an ethical dilemma which the corporate secretary has to face.

In one case, this was precisely the situation one corporate secretary found himself in. In *Abejo v. De la Cruz*[50] the corporate secretary, Norberto Bragas, although not a lawyer, refused to cancel the surrendered stock certificates and issue new certificates in the name of Telectronics and likewise refused to register these in the corporation books (which is a ministerial duty of the corporate secretary) as registration would deprive his family of the controlling share in the corporation and therefore the control of its business. This scenario is common in a good number of corporations and readily illustrates the conflict of interest between one's duty to the corporation and one's loyalty to the interests of (a block of) stock holders on the other (in Bragas' case, his own family).

In the event that the corporate secretary happens to be a law firm partner, a common practice in today's corporate environment, the corporate secretary should, again, ideally inhibit himself from the intracorporate controversy. Realistically, however, the compromise might be to appoint a separate team of lawyers from his firm to represent the majority stockholder group. This, however, is proscribed by the Code given that all the firm's members are generally barred from representing the stockholders in such a situation. This much was stated in *Hilado v. David* [51] where the Court extended the disqualification of a lawyer from appearing as counsel because of conflicts of interest to the law firm to which he belongs. The Court emphatically stated that:

> An information obtained from a client by a member or assistant of a law firm is information imparted to the firm. This is not a mere fiction or an arbitrary rule; for such member or assistant, as in our case, not only acts in the name and interest of the firm,

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[50] G.R. No. 63558, 149 SCRA 654, May 19, 1987.
[51] G.R. No. 961, 84 Phil. 569, Sep. 21, 1949.

> but his information by the nature of his connection with the firm is available to his associates or employers... No progress could be hoped for in 'the public policy that the client in consulting his legal adviser ought to be free from apprehension of disclosure of his confidence,' if the prohibition were not extended to the attorney's partners, employers or assistants.[52]

Further, whether the majority shareholders could validly procure the corporation's consent to have other members of the original lawyer's firm represent them despite the conflict of interest is a separate ethical dilemma in itself.

B. DISCLOSURE

In today's business and economic environment, the corporation is seen as "the main creator of the wealth that makes the works of civil society achievable."[53] However, with the evils that have come to be associated with corporations because of scandals such as Enron, it becomes even more important for "proper disclosures under a sound regime of corporate governance"[54] to actualize the potentially beneficial role of corporations.

In 2000, the Securities Regulation Code ("SRC")[55] was passed. Section 2 of said law provides that it is the policy of the State to "ensure full and fair disclosure about securities"[56] and to minimize and eliminate insider trading and other fraudulent devices. In both the SRC's Implementing Rules and Regulations; which was issued in December 2003, and the Code of Corporate Governance, adopted by the Securities and Exchange Commission ("SEC"), the importance of "full and timely disclosure of material information",[57] i.e., "any thing that could potentially affect share price,"[58] was underscored for the purpose of protecting investors. In addition to this, the Revised Disclosure Rules issued by the Philippine Stock Exchange provided three basic instances where disclosure is necessary:

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[52] *Id.* at 580.

[53] Esmeraldo Amistad, *Disclosure: The Corporate Striptease,* 79 PHIL. L. J. 315, 315-316 (2004), *citing* Michael Novak, *The Moral Heart of Capitalism* (2002).

[54] *Id.* at 316.

[55] Rep. Act No. 8799 (2000.)

[56] SECURITIES REGULATION CODE, § 2.

[57] Rule 2, Amended Implementing Rules and Regulations of the Securities Regulation Code (2003).

[58] Securities and Exchange Commission Memo. Circ. No. 2 (2002).

> (1) the information is necessary to enable the Issuer and the public to appraise their position or standing, such as but not limited to, those relating to the Issuer's financial condition, prospects, development projects, contracts entered into in the ordinary course of business or otherwise, mergers and acquisitions, dealings with employees, suppliers, customers and others, as well as information concerning a significant change in ownership of the Issuer's securities owned by insiders or those representing control of the Issuer; or
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> (2) such information is necessary to avoid the creation of a false market for its securities; or
>
> (3) where such information may reasonably be expected to materially affect market activity and the price of its securities.[59]

In the same vein, the Anti-Money Laundering Act of 2001,[60] which contains strict disclosure provisions for corporate officers and representatives, in Section 9 (c) thereof it is stated that:

> Covered institutions shall report to the AMLC all covered transactions within five (5) working days from occurrence thereof, unless the Supervising Authority concerned prescribes a longer period not exceeding ten (10) working days.
>
> ...
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> When reporting covered transactions to the AMLC, covered institutions and their officers, employees, representatives, agents, advisors, consultants or associates are prohibited from communicating, directly or indirectly, in any manner or by any means, to any person, entity, the media, the fact that a covered transaction report was made, the contents thereof, or any other information in relation thereto. Neither may such reporting be published or aired in any manner or form by the mass media, electronic mail, or other similar devices. In case of violation thereof, the concerned officer, employee, representative, agent, advisor, consultant or associate of the covered institution, or media shall be held criminally liable.[61]

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[59] REVISED DISCLOSURE RULES, § 4.3.
[60] Rep. Act No. 9160 (2000). This is the Anti-Money Laundering Act of 2001.
[61] *Id.*

As has been previously stated, it is a common practice for lawyers to serve as officers of a corporation, usually as corporate secretaries. As such corporate officer or retained counsel, a lawyer has access to information that may fall under the materiality test provided under the law. Given this scenario, how can the full disclosure requirement mandated by law be reconciled with the lawyer-client confidentiality privilege?

Canon 17 of the Code provides: "A lawyer owes fidelity to the cause of his client and he shall be mindful of the trust and confidence reposed in him."[62]

The attorney-client confidentiality privilege as provided for in Rule 130 of the Rules of Court, states that:

> Sec. 24. Disqualification by reason of privileged communication. - The following persons cannot testify as to matters learned in confidence in the following cases:
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> ...
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> (b). An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of, or with a view to, professional employment, can an attorney's secretary, stenographer, or clerk be examined, without the consent of the client and his employer, concerning any fact the knowledge of which has been acquired in such capacity[63]

Furthermore, Rule 138 of the Rules of Court provides:

> Sec. 20. It is the duty of an attorney:
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> ...
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> (e) to maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client, and to accept no compensation in connection with his client's business except from him or with his knowledge and approval.[64]

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[62] CODE OF PROFESSIONAL RESPONSIBILITY, Canon 17.
[63] RULES OF COURT, Rule 130, § 24(b).
[64] RULES OF COURT, Rule 138, § 20(e).

While it is true that in *Regala v. Sandiganbqyan,*[65] the Supreme Court recognized the importance of maintaining the lawyer-client privilege, to the point of keeping even the client's very identity confidential, [66] the factual circumstances in R*egala* however, differ greatly from the present situation. In that case, the lawyers of the ACCRA law firm were not corporate officers. Moreover, the laws requiring "full, fair, timely and accurate disclosures of material information"[67] have not yet been passed at the time of the promulgation of the said decision. Hence it is submitted that the Court's statement in *Regala* does not apply to lawyers serving as corporate officers.

1. Corporate Governance Trends in the US and Their Effects on Disclosure Rules

An ethical frontier has emerged from the United States' recent experiences with corporate fraud. Progressive new American laws such as the Sarbanes-Oxley Act of 2002, contain provisions protecting corporate whistleblowers including attorneys. However, Sarbanes-Oxley imposes strict duties to disclose evidence of corporate irregularities.[68] Under the Act, "there will be no cover under the mantle of attorney-client privilege"[69] since "[a]ll attorneys must report 'evidence of material violation of securities law or breach(es) of fiduciary duties or similar violation by the company or any agent thereof' to the company's chief legal counsel or chief executive officer."[70] Although Philippine corporate governance status has not reached the level of sophistication as that of the United States, the tenor behind Sarbanes-Oxley runs counter to the principles enunciated by our Supreme Court in *Regala.* Nevertheless, the influence of US Regulatory Laws

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[65] G.R. No. 105938, 262 SCRA 122, Sep. 20, 1996.

[66] Regala, 262 SCRA at 140-141. "Considerations favoring confidentiality in lawyer-client relationships are many and serve several constitutional and policy concerns. In the constitutional sphere, the privilege gives flesh to one of the most sacrosanct rights available to the accused, the right to counsel. If a client were made to choose between legal representation without effective communication and disclosure and legal representation with all his secrets revealed then he might be compelled, in some instances, to either opt to stay away from the judicial system or to lose the right to counsel. If the price of disclosure is too high, or if it amounts to self incrimination, then the flow of information would be curtailed thereby rendering the right practically nugatory. The threat this represents against another sacrosanct individual right, the right to be presumed innocent is at once self-evident."

[67] Amistad, *supra* note 53, at 321.

[68] *Id.* at 333.

[69] *Id.*

[70] *Id., citing* Sarbanes-Oxley Act, § 307 (2002).

particularly laws affecting corporations, trade and business do not bode well for cases similar to *Regala.*

C. INSOLVENCY CASES

Let us suppose there exists a situation where the client of a particular law firm is insolvent and in the course of the insolvency proceedings, a creditor of the insolvent entity also happens to be a client of the same law firm. Let us suppose that this law firm represents multiple creditors in an insolvency proceeding. There would then be a conflict of interest situation as contemplated by Rule 15.03 of the Code since the adverse interests of both the insolvent entity and his creditors, each wanting a situation beneficial to them at the expense of the other, is represented by the same law firm.

The situation contemplated here is analogous to the factual scenario in *Velayo v. Shell Co. of the Philippines.*[71] In *Velayo,* Commercial Air Lines, Inc. (CALI), knowing that it did not have enough assets to pay off its liabilities, called a meeting of its creditors where it announced that in case of non-agreement on a pro-rata distribution of its assets, including the C-54 plant in California, it would file insolvency proceedings. Shell Company of the Philippine Islands, one of its creditors, took advantage of this information and immediately made a telegraphic assignment of its credits in favor of its sister corporation in the United States. The latter thereupon promptly attached the plane in California and disposed of the same, thus depriving the other creditors of their proportionate share in its value. The Court declared that Shell had acted in bad faith and betrayed the trust of the other creditors of CALI. The said company was ordered to pay the other creditors compensatory damages in a sum equal to the value of the C-54 plane at the time it assigned its credit and exemplary damages in the sum of P25,000.00.[72]

Given the factual circumstances of this case, and applying the present Code, even if separate teams of lawyers from a single law firm would be assigned to handle the different clients, it would still be unethical,

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[71] G.R. No. 7817, 100 Phil. 186, Oct. 31, 1956.
[72] *Id.*

if not illegal, for the same law firm to continue representing of both the insolvent entity and his creditor/s in a single insolvency proceeding.

D. RETAINERS

Retainer agreements have become a major part of the practice of law in the Philippines. It is relied upon to pay the day to day expenses of firms both large and small. It has as its purpose the establishment of a relationship between the client and the law firm that is more than just a transitory relationship.

These agreements serve to govern the relationship between lawyer and client. Within these retainer agreements, clauses are inserted that seek to address and resolve conflicts that may arise in the course of the relationship between the retained law firm and its client. It a result of these retainers, taking advantage of the exception provided under the Code, that the conflict will not be absolutely applied.

1. Advanced Waiver of Conflicts[73]

In signing a retainer agreement, there is never any certainty that conflicts will not arise in the future since it is possible that there either was a flaw in the process of detecting the existence of a conflict early on or at the time of the detection, the conflict was not yet present. Rule 15.03 of the Code provides as a remedy to the prohibition against lawyers representing conflicting interests the execution of "written consent of all concerned after a full disclosure of facts."[74] Given the fact that most large law firms have hundreds of retainer clients, it is extremely impractical for one to expect the law firm to know all the details of its individual retainer clients which might give rise to possible conflicts of interest properly subject to disclosure.

Given this predicament, conflict-avoidance clauses are currently being inserted in retainer agreements in order to reasonably comply with written consent requirement stated in Rule 15.03 and to avoid possible complications. This then serves as a waiver by the client of his right to

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[73] Richard Painter, *Advanced Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289 (2000).
[74] CODE OF PROFESSIONAL RESPONSIBILITY, Rule 15.03.

object to any conflicts of interest that may arise from his lawyers' taking on clients with interests adverse to his own.[75] Commenting on these advanced waivers, Painter posits thus:

> In appropriate circumstances, advance waivers of conflicts avoid unnecessary and expensive ex-post litigation over disqualification. On the other hand, blanket waivers by unsophisticated clients may reflect asymmetry of information and unequal bargaining power between lawyers and clients.[76]

However, the fact that there is no criteria provided by law or jurisprudence to clarify the basis for determining the enforceability of advanced waivers leads to great uncertainty and calls into question not only the wisdom of its use but also its ethical appropriateness.

2. Compartmentalized Retainer

As earlier discussed, it is a common practice for corporations to farm out their legal needs to different law firms, engaging only specific departments of those law firms for their specific requirements. Thus it might happen that a corporation may have one law firm handling its corporate needs, while it may have another law firm handling its litigation cases and still another handling its labor cases.

In a situation such as this, it may happen that a dispute might arise between that corporation and its competitor, and yet, both corporations may have retained the same law firm for one or more of its legal needs. Given that different departments of the same law firm were retained by the two corporations, would a conflict of interest situation arise such that the law firm may not validly represent both clients?

Unfortunately, there is a dearth of law and jurisprudence on the matter. The solution will have to be derived from other sources until our Supreme Court rules on the matter or until such a practice is recognized, codified and included in the Code.

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[75] Alice Brown, *Advance Waivers Of Conflicts Of Interest: Are The ABA Formal Ethics Opinions Advanced Enough Themselves?*, 19 GEO. J. LEGAL ETHICS 567, 570 (2006).

[76] Painter, *supra* note 73.

3. Defensive Retainers

Defensive retainers are currently employed by corporations wherein these corporations maintain retainer agreements with several law firms while making use of only some these firms for its specific legal needs. The purpose of these multiple retainer agreements is to create conflicts within these law firms such that they will be prevented from representing other corporations or clients with interests adverse to their present clients thereby minimizing the possibility of cases being filed against the latter.

While it can be seen as a method by which conflicts can be avoided or minimized, retainers such as these are of dubious worth and pose serious ethical problems. Such retainers highlight the necessity of establishing ethical infrastructures in law firms as well as revisions in the Code proscribing such practices. These types of retainers take advantage of loopholes in the provisions of the Code on conflict of interest and use them in a way not obviously intended by the Code.[77]

E. AFFILIATED CORPORATIONS

Supposing that a law firm represents a particular company on a transactional basis and this company is a subsidiary of another company. Suppose further that this law firm also represents a different company in a litigation against the parent company. Given the conflict of interest provisions of the Code, would it be possible for this law firm to represent another company in a litigation against the parent company of its other client?

In *GEN-COR, LLC v. Buckeye Corrugated, Inc.*,[78] an American court denied a motion to disqualify counsel in a suit between a parent company and its subsidiary citing that disqualification of the counsel would result in delay and cost to the client. It recognized that, "[it is] the prerogative of a party to proceed with counsel of his choice."[79] However, in *Musheno v. Gensemer*,[80] the court recognized that "[A] lawyer employed or retained by

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[77] Dunnigan, *supra* note 36.
[78] 111 F. Supp.2d 1049 (2000).
[79] *Id.* at 1057.
[80] 897 F. Supp. 833 (1995).

an organization represents the organization acting through its duly authorized constituents, and when representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents."[81]

However, given the lack of any jurisprudence and guidelines on the matter, given that the Code provides only a general statement as to the disqualification caused by conflicts of interest subject only to the exception of a written consent, there is still uncertainty as to the validity of this practice in our country.

V. NEED FOR THE ESTABLISHMENT OF ETHICAL INFRASTRUCTURES[82]

With growing recognition that the current legal and business situation in the country potentially gives rise to instances of conflict of interest and given the fact that, no effort to amend the present Code is in sight, it becomes necessary for law firms to establish "ethical infrastructures" as would be necessary to comply with the provisions of the Code.[83] A key step in setting up an ethical infrastructure is the establishment of a system of detecting potential conflicts of interest at the time of engagement, in order to anticipate the existence and extent of possible conflict. Rule 15.01 of the Code states that:

> 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.[84]

The Supreme Court in *Northwestern University v. Arquillo*[85] provides the following tests for determining the existence of a conflict of interest:

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[81] *Id.* at 836.

[82] Susan Fortney & Jett Hanna, *Fortifying A Law Firm's Ethical Infrastructure: Avoiding Legal Malpractice Claims Based On Conflicts Of Interest*, 33 ST. MARY'S L.J. 669 (2002).

[83] *Id.*

[84] CODE OF PROFESSIONAL RESPONSIBILITY, Rule 15.01.

[85] A.C. No. 6632, 465 SCRA 513, Aug. 2, 2005.

> When a lawyer represents two or more opposing parties, there is a conflict of interests, the existence of which is determined by three separate tests: (1) when in representation of one client, a lawyer is required to fight for an issue or claim, but is also duty-bound to oppose it for another client; (2) when the acceptance of the new retainer will require an attorney to perform an act that may injuriously affect the first client or, when called upon in a new relation, to use against the first one any knowledge acquired through their professional connection; or (3) when the acceptance of a new relation would prevent the full discharge of an attorney's duty to give undivided fidelity and loyalty to the client or would invite suspicion of unfaithfulness or double dealing in the performance of that duty.[86]

Given the fact that the Code requires the disqualification of a law firm from accepting clients in case a conflict of interest exists, it therefore becomes imperative to consider these issues especially since such conflicts may not be readily identifiable or ascertainable.

A. SPECIES OF CONFLICTS SCREENING

Most law firms have adopted a number of methods used to check conflicts. According to Susan P. Shapiro[87] there are several "species" of lawyers and law firms depending upon the manner in which they respond to conflict situations. "Ostriches" do nothing but "bury their heads in the sand hoping that conflicts of interest will not arise."[88] "Elephants", mostly from smaller law firms, rely on their lawyers to perform a mental checklist and consult their own records before accepting any new matter.[89] "Herds", which comprise a majority of firm lawyers, are "elephant lawyers" which consult their colleagues as part of their conflicts check.[90] "Squirrels", on the other hand, differ from herds in that they accumulate and consult records as an institutional practice oftentimes supplementing a data check by circulating lists of new matters within the firm as a whole.[91] "Squirrels can

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[86] *Id.* at 517.

[87] Nancy Moore, *Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the "Mega Firm"*, 18 GEO. J. LEGAL ETHICS 521, 549 (2005), *citing* Susan Shapiro, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE (2002).

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

be further divided into the "common squirrel", which relies on paper records, and the "cyber squirrel" which uses electronic records.[92] In implementing whatever method of conflicts screening the law firm chooses to adapt (taking into consideration its client size, type, sophistication, amount of repeat business, the ongoing ties to the law firm and the size of the law firm),[93] the tests set forth by the Supreme Court in *Northwestern University* should be taken into consideration.

B. ADVANCED WAIVER OF CONFLICTS

Advanced waivers of conflict are based on the requirement of "written consent after full disclosure of facts". This idea of advanced waivers of conflict as a conflict-avoidance mechanism has found support in American jurisprudence[94] such as the cases of *Elliott v. McFarland Unified School District*[95] and *Worldspan v. Sabre Group.*[96] Richard Painter points out that:

> The majority of recent cases endorse a more flexible approach and give tacit support for advance waiver of conflicts. A few of these cases openly endorse ex-ante waivers, but many are fact-specific holdings that emphasize factors such as lack of confidential communications between the client agreeing to the waiver and the lawyer, lack of potential harm to the client agreeing to the waiver, and principles of estoppel. At least some courts, furthermore, adhere steadfastly to the view that contract principles cannot trump rules of professional responsibility and that an advance waiver is invalid if detailed information was not known at the time of the waiver about the specific conflict being waived.[97]

Advance waivers of conflict are important and useful both for the lawyer and the client since:

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[92] *Id.*
[93] *Id.*
[94] Painter, *supra* note 73, at 297.
[95] 165 Cal. App. 3d 562 (Cal. Ct. App. 1985).
[96] 5 F. Supp. 2d. 1356 (N.D. Ga. 1998).
[97] Painter, *supra* note 73, at 296-297.

> [A]llowing informed consent to conflicts of interest serves not only the interest of the lawyer, but those of his or her clients as well; the client who wants to hire the lawyer despite the lawyer's conflicting interests has an interest in being free to choose the representation of her choice. While a lawyer's loyalty to his clients is paramount, if the client who could be adversely affected by the lawyer's acceptance of a new client is willing to waive his objection to the representation, his interests are being protected as well.[98]

Such waivers are unique in that they are granted by a client or prospective client, usually at the beginning of the establishment of the attorney-client relationship, before any identifiable conflict arises and before the precise circumstances of that conflict (e.g. the adverse party or the specific matter involved) are actually known.[99]

Commenting on advanced waivers of conflict, the American Law Institute states that:

> Client consent to conflicts that might arise in the future is subject to special scrutiny, particularly if the consent is general. A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.... On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to the types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.[100]

Considering that lawyers are already using retention letters containing advanced waiver of conflict clauses to go around conflict rules,

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[98] Brown, *supra* note 75.

[99] *Id.*

[100] Painter, *supra* note 73 at 309, *citing* RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 202, cmt. d (Proposed Final Draft, 1996).

and given the dearth of Philippine jurisprudence and law on the matter, there is a need for clarification from the Courts as to when advanced waivers of conflict are enforceable.[101] This is essential since it is recognized that the uniform enforcement of advanced waiver of conflict clauses "will help lawyers and clients alike avoid unnecessary and expensive ex-post litigation over disqualification."[102]

It must be recognized, however, that according to Article 6 of the Civil Code: "Rights may waived, unless the waiver is contrary to law, public order, public policy, morals or good customs, or prejudicial to a third person with a right recognized by law." This provision on waivers would tend to restrict the validity and enforceability of such advanced waivers only to those waivers that have been fully explained to and understood by the clients as contemplated by the law. This situation is in itself another dilemma that needs to be resolved by the Supreme Court through a re-crafted Code if advanced waivers of conflict will become a useful and meaningful tool in conflict avoidance and resolution.

C. CHINESE WALL

With the burden that results from client switching and with the lawyer declining or being unable to represent a longtime client in specific cases, mechanisms and solutions in existence aimed at minimizing costs resulting from conflict of interest situations become even more imperative. One such mechanism is the Chinese Wall.

A "Chinese Wall" is a proverbial wall erected between lawyers of clients who may have potentially opposing interest. Chinese Walls are a logical and easy solution that fall within the framework of the Code of Professional Responsibility and are allowed under its rules.

It was previously discussed that large corporations usually engage different law firms to address their various legal needs.[103] If a dispute arises between two competitor corporations who are the clients of different departments of the same law firm, that same law firm would end up

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[101] *Id.* at 329.
[102] *Id.*
[103] Gulati, *supra* note 31.

representing both disputing corporations. In that instance, there must be full disclosure of the policy to both clients and the two departments, (i.e. corporate and litigation), representing the disputing corporations will be subject to what is termed as a "chinese wall" or "ethical wall".

In *LaSalle National Bank v. County of Lake,*[104] an American Court laid out the recommendations for the creation of an effective Chinese wall, thus:

> The attorney possessing confidential information relating to a former client cannot have access to files concerning the current case, cannot receive any fees or profits gained from the current case, and cannot be shown any of the documents concerning the current case. All meetings concerning the case in question should be formal--that is, the names of the attending attorneys should be in writing. Additional desirable requirements include "intra-firm education," whereby all other attorneys in the law firm must not speak with the disqualified attorney about the current case and must keep any related documents from him. Keeping the files for the case locked with access limited to one or two partners and only allowing other attorneys access on a "need to know" basis is another way of making a screen effective.[105]

LaSalle National Bank pointed out that it is not enough to claim that a wall has been erected, more importantly, specific requirements such as having all the attorneys at the law firm confirm, under oath, that the requirements were studiously met, have to be followed.[106] As such, Chinese Walls preserve the two stated policies and functions of the Rule, namely, client loyalty and confidentiality and avoidance of positions adverse to the client.[107]

While screening through a Chinese Wall is not specifically mentioned in the Code, it has been "debated and litigated and the acceptance of screening as a tool to avoid conflict-of-interest disqualification seems to be the trend."[108] This concept of screening grew out common contracts and practices among law firms having as its basis the

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[104] LaSalle National Bank v. County of Lake, 703 F.2d 252 (7th Cir. 1983).
[105] *Id.*
[106] *Id.*
[107] Gulati, *supra* note 31, at 271-272.
[108] Morgan, *supra* note 39, at 199.

consent of the client to the possibility of conflicts of interest arising out of interlocking client-lawyer relationships.

In the United States the practice of using Chinese Walls to avoid conflicts of interests in law practice has been recognized in *Kesselhaut v. United States.*[109] In ruling against the disqualification of the entire law firm in a case, the Court held:

> [A]n inexorable disqualification of an entire firm for the disqualification of a single member or associate, is entirely too harsh and should be mitigated by appropriate screening such as we now have here, when truly unethical conduct has not taken place and the matter is merely one of the superficial appearance of evil, which a knowledge of the facts will dissipate.[110]

In *PCGG v. Sandiganbayan,*[111] the Supreme Court indirectly applied this concept of screening. The Court in *PCGG* found "no inconsistency between respondent Mendoza's former function as Solicitor General and his employment as counsel of the Lucio Tan group,"[112] in rejecting claims of possible conflict of interest. The Court's decision was based on the fact that the "matter" involved in the liquidation and acquisition of GENBANK was not the same subject matter as the case before the Sandiganbayan.

PCGG v. Sandiganbayan provides a strong foundational basis for the acceptability of a "chinese" wall" solution in our setting. In part, the Court's liberal stance was aimed at preventing a "chilling effect on government recruitment of able legal talent."[113] Given that the basis for the non-disqualification of Estelito Mendoza in *PCGG* was his non-involvement in the "matter" of that case, there is no reason why that line of reasoning cannot be extended to the private practice of law under similar factual situations. Amanda Morgan puts it aptly:

> "Pure logic suggests that if screening is sufficient to protect client interests in the government-to-private hiring

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[109] 555 F.2d 791 (1977).
[110] *Id.* at 793.
[111] G.R. No. 151809, 455 SCRA 526, Apr. 12, 2005.
[112] *Id.* at 563.
[113] *Id.*at 581.

> context, it should be sufficient in the private-to-private hiring context as well."[114]

In recognizing that the "shared confidences presumption"[115] could be rebutted, *Analytica,* citing the ruling in *LaSalle National Bank* with approval, states that:

> [A] law firm defending against a disqualification motion *may* rebut the presumption of intra-firm sharing of confidences by demonstrating that a timely and effective "Chinese Wall" has been established to insulate against the flow of confidences from the tainted lawyer to his colleagues in the law firm.[116]

In *Nemours Foundation v. Gilbane,*[117] an American court did not grant the motion to disqualify defendant's law firm despite the fact that one of the associates in the firm had worked in a previous litigation concerning the same matter with the same parties. The court chose not to apply Delaware Rule 1.10 which would disqualify the entire firm as a result of the personal disqualification of the lawyer. Rather, the court applied screening as provided under Delaware Rule 1.11 solely for former government lawyers entering private practice. The court found no policy reason to apply different disqualification standards where lawyers from government or private practice join a firm. In doing so, the court ruled that:

> "There is no substantial reason against extending the exception to vicarious disqualification from the case of a former government attorney to private attorneys generally although the complex of policy factors differs somewhat in the two situations."[118]

In order to determine the effectiveness of a chinese wall in preventing a former or current client's secrets and confidences from being shared with the disqualified members of the firm, American courts have considered a number of factors, thus:

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[114] Morgan, *supra* note 39, at 202.
[115] *Id.* at 200.
[116] 708 F.2d 1263, 1271 (1983).
[117] 632 F. Supp. 418 (1986).
[118] *Id.* at 427-428.

> To determine whether a Chinese Wall would be effective in preventing a former client's secrets and confidences from being shared with the other members of the disqualified lawyer's new firm, courts in these cases have considered a number of factors. In addition to the size of the firm and the extent of its departmentalization, other elements considered have included whether the disqualified lawyer:
>
> (1) is able to gain access to the case files;
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> (2) shares in the profits or fees derived from the matter;
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> (3) has frequent contact with those personnel who are handling the lawsuit in the new firm; and
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> (4) is given an opportunity to review any of the case documents.
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> The number of tainted lawyers in the new firm, the similarity of the matters, and the extent of involvement of the tainted lawyer in the former representation also are among the factors that courts have weighed along with the hardship to the current client of the new firm and its ability to obtain other competent counsel to represent it. These and other factors are weighed on a case-by-case basis in jurisdictions where the Model Rules standard is not applied and a decision is reached by the court as to the likely effectiveness of the Chinese Wall.[119]

The timely and effective institution of a Chinese Wall, by safeguarding client loyalty and confidentiality and avoiding a position that can be adverse to the client, can be an effective ethical hedge avoiding possible disqualification from rules in codes of conduct addressing conflicts of interest. At this point, it must be stressed, however, that given the absence of guidelines, both in law and in jurisprudence on the proper use and implementation of Chinese Walls or the lack of any explicit recognition as to its validity, its use could be subject to future challenges. Unless the Chinese Wall is incorporated into a code of conduct, such as our Code of Professional Responsibility, its utility is at best speculative. It awaits the wisdom of a Court sympathetic to the myriad complications of laws

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[119] Peter Moser, *Chinese Walls: A Means Of Avoiding Law Firm Disqualification When A Personally Disqualified Lawyer Joins The Firm*, 3 GEO. J. LEGAL ETHICS 399 (1990).

affecting corporate practice and the foresight to see the Chinese wall as part of the solution, not the problem.

One problem that may arise out of its application is the fact that it may be quite difficult to monitor screening (or the use of the wall) within a firm. More often than not, both clients and the courts must rely on the integrity of the lawyers themselves to observe and enforce the proper screening procedures.[120] Apart from difficulty in monitoring the effectiveness of the screen, Moser describes another complication that may arise:

> [T]he possibility that proving an abuse of the confidentiality might result in disclosing the confidences sought to be protected, the economic incentive of the lawyer to disclose confidences of the opposing client, the risk that the newly hired lawyer will make inadvertent disclosures, and the need to apply a bright line rule in determining when a law firm is disqualified.[121]

Notwithstanding these limitations, writers agree that it is potentially a very useful tool in avoiding conflict of interest situations in modern-day law practice.[122]

VI. RECOMMENDATIONS

While the currently existing American codes keep US legal policy makers constantly grappling for solutions to the problem of creating effective mechanisms to deal with both litigation and non-litigation practice, our Philippine Code of Professional Responsibility has remained fairly stagnant since its adoption. To date, there are already mechanisms, such as advanced waivers of conflict clauses and Chinese Walls, that might provide solutions to problems arising out of the Code's strictures. These were developed primarily to address problems arising out of adversarial proceedings. The lure of separate Codes of Conduct- one for litigation and one for non-litigation practice might be enticing as an easy way out to the

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[120] Morgan, *supra* note 39, at 203.
[121] Moser, *supra* note 119, at 403.
[122] *See*, Moser, *supra* note 119; Morgan, *supra* note 39; Gulati, *supra* note 31; Moore, *supra* note 87.

problem, given the insistence by some quarters that that these two poles of practice are temperamentally and culturally incompatible. However, looking at the Canons found in the Code, the problems are neither intrinsic nor ingrown: both arise from the practice of law and are not polar opposites.

It is in this light that it is proposed that the Code be restructured, keeping in mind the foregoing discussion. In the general area of Code reform, it is suggested the Supreme Court in coordination with the Integrated Bar of the Philippines and the U.P. Law Center study and redraft the existing Code to address developments in modern corporate practice, the transnational practice of law and the newer technologies affecting the practice of law, among others. Additionally, either the Supreme Court or the Technical Committee on Legal Education under the Commission of Higher Education may look into the legal curriculum with the end of incorporating changes addressing the culture of law, creating a balance between the demands of litigation practice and the non-litigation alternatives. It, therefore, becomes necessary to look beyond the antiquated framework of the present Code in order for there to be a real change in the ethical environment of the legal profession both through education and practical experience. Specifically, some of the solutions discussed in this paper such as devices to avoid conflict of interest problems and their proper application may be incorporated in a modern and updated Code. Also, it might be advisable to break down the rules on conflicts of interest between current clients and former clients, similar what was done in the ABA Model Rules of Professional Conduct, and provide specific rules for each given the difference in the duties owed by the lawyer to each.

In the restructuring that is to be undertaken, while such an action is important for the continued growth of the legal profession, the purpose for which the Rules were adopted, the ideals and principles embodied in it, must always be kept in mind so that the integrity and protection provided by these Rules may never be compromised. However, it is submitted that the restructuring of the Rules, while very important, is not enough. The courts, whose task it will be to interpret these Rules, must not allow themselves to be trapped within the Rules but look beyond them and "make decisions that not only comport with the legal issues before them, but also serve important policy ends."[123] Ultimately, the hope is that by the

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[123] Andrew Drucker, *Explanations, Suggestions, And Solutions To Conflict Tracking And Prevention In Response To The Growth And Expansion Of The Larger Law Firm*, 24 DEL. J. CORP. L. 529 (1999).

restructuring of the Rules and with the support of the Judiciary, the "transition to a greater understanding of today's complex legal dilemmas"[124] will not only be possible but one day achieved.

VII. CONCLUSION

The paradox of most of the required changes in the Code, if adopted, is that they are at least as likely to be embraced as to be renounced. Change, after all either inspires wide spread acceptance or wide spread rejection. However, the growing complexity of corporate and other legal transactions demands that the profession respond immediately, embracing changes necessary to bring the practice of law into the modern era of technological change and multinational corporate legal problems. The complex challenges of legal regulation in the 21st century are with us.

The legal profession must go beyond the traditional depiction of lawyering and realize that serving two masters does not necessarily mean loving one and hating the other. And provided that new rules are properly laid down and with the use of appropriate ethical infrastructures, it must realize that lawyers can serve both masters and serve them well. The task that remains for the profession is to harmonize the existing Code with changing realities that require respect for client autonomy, individual self-determination and solutions that firmly address the demands of corporate lawyering as well as lawyering in general. These are the marching orders for an evolving and dynamic profession.

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[124] *Id.*