TOWARDS RECOGNIZING AND ACCOMMODATING DIFFERENTIATION WITHIN THE LEGAL PROFESSION: A CRITIQUE OF THE CODE OF PROFESSIONAL RESPONSIBILITY'S TREATMENT OF THE NON-LITIGATION PRACTICE OF LAW*

*Ryan Hartzell C. Balisacan***

I. INTRODUCTION

An English author by the name of Owen Feltham once said: "To go to law, is for two persons to kindle a fire at their own cost, to warm others, and singe themselves to cinders: and because they cannot agree to what is truth and equity, they will both agree to unplume themselves, that others may be decorated with their feathers."[1] In a language both colorful and insightful, this verse effectively describes the nature of the lawyer's work as an advocate – a life of impassioned debate, sacrifice, and a constant offering of one's self to others.

Indeed, even today, the functions of Filipino lawyers are more readily associated with advocacy and counseling,[2] a perception reinforced by the proverbial image of the lawyer in the courtroom[3] as repeatedly seen in various channels of mass media. Is this view, however, still as accurate as it once was? Is the work of the lawyer in contemporary times still largely confined within the halls of the courtroom? If not, from what moral

---

* This article was awarded Second Place in the PHILIPPINE LAW JOURNAL's 2006-2007 Editorial Board Examination.

** Vice-Chair, Editorial Board, PHILIPPINE LAW JOURNAL (2006-2007). LL.B., University of the Philippines College of Law (2009 expected). B.A. Political Science, cum laude, College of Social Sciences and Philosophy, University of the Philippines Diliman (2005).

[1] From Owen Feltham's collection of essays, *Resolves, Divine, Moral, and Political*, published in 1620, cited in Jonathan Ingram, Allen Siddle and PG Distributed Proofreaders. 'The Mirror of Literature, Amusement, and Instruction' Available http://www.gutenberg.org/files/12552/12552-8.txt June 27 2006 [27].

[2] J. Coquia, LEGAL PROFESSION READINGS AND MATERIALS : FOR STUDENTS ON HOW TO BECOME A LAWYER AND YOUNG LAWYERS OF THE 21ST CENTURY 121 (2nd ed 2003), *citing* Irene Cortes, PUBLIC RESPONSIBILITY OF THE LAWYER.

[3] In *Salcedo v. Hernandez* [61 Phil. 74 (1935)], the lawyer is viewed as an officer of the court, whose intimate relations with the latter is described as being that of a "priest of justice".

compass do non-litigators take their bearings, given that Feltham's analogies, as described above, would no longer be applicable to them?

This paper's focal argument is that the Code of Professional Responsibility, the singular document laying down the fundamental imperatives of lawyers' conduct in the Philippines, does not sufficiently address the emergent exigencies of the legal profession, particularly with regard to the advent of non-litigation practice areas. Due to its focus on the lawyer's duties as an advocate, it fails to reflect the demographics of the local legal profession and the trends in the international legal community, both pointing to the pressing need to extend the regulatory arm of the bar to other practice areas. This paper will first examine the genesis, evolution, and content of the Code of Professional Responsibility, and then present the historical and legal bases for the argument aforementioned. By way of conclusion, this paper will forward short-term, medium-term, and long-term propositions geared towards the recognition and accommodation of a bar that has become increasingly differentiated.

II. DISCUSSION

THE LEGAL PROFESSION AND THE CODE OF PROFESSIONAL RESPONSIBILITY

The Supreme Court has repeatedly enunciated in no uncertain terms that practicing law is a profession,[4] one invested with public trust,[5] which has for its goal the rendering of public service and securing of justice for those who seek its aid.[6] As such, those allowed to practice in the legal profession are expected to continually possess all the qualifications

---

[4] In re Tagorda, 53 Phil. 37 (1929); People v. Daban, G.R. No. 31429, January 21, 1972.

[5] Abay v. Montesino, A.C. No. 5718, December 4, 2003; People v. Santocildes Jr., 378 Phil. 943 (1999); In re Petition for the Authority to Continue Use of the Firm Name "Ozaeta, Romulo, etc.," 92 SCRA 1 (1979).

[6] Docena v. Limon, 356 Phil. 570 (1998). *See also,* Pound, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953) where the term "profession" has been defined as a group of men [sic] pursuing a learned art as a common calling in the spirit of public service.

prescribed by law and to treat their practice not as a right but a privilege conferred to only a select few.[7]

However, the high regard with which lawyers are viewed from both within and without the profession is not a mere function of court pronouncements and the "whereases" of legal provisions. If one seeks to understand the legal profession and the rules and regulations that govern the conduct of its members, one must necessarily begin with the theoretical foundation of the professions.[8] In doing so, one is guided by the social and psychological factors that influence the creation and maintenance of the hallowed niche reserved for lawyers by society.

1. The Sociology of the Professions

In a most instructive scholarly work by Professor Richard Abel, an analysis of the nature and content of American lawyers' work was undertaken after taking off from the vantage point of occupational sociology.[9] By identifying three distinct theoretical traditions – the Weberian, Marxist, and Parsonian (as influenced by Durkheim) – Abel was able to show how and why the legal profession came into being and secured the social locus it occupies until today.

Weber and the Paradigm of the Market. For Weber and others in the same school of thought, the dominant theme in the creation of the professions is the notion of distribution.[10] In a society peopled by producers only marginally regulated by state mechanisms, all actors are induced to gain a competitive advantage over others. Those who offer services are in the same footing as those who sell commodities, and the ultimate endpoint of all social and economic enterprises is the attainment of a favorable distribution of society's resources in favor of oneself.[11] Social class is rendered irrelevant in such a setup, as competition ensues even within the same classes. The victors appropriate among themselves economic rewards and social status. For Abel, social status is partly a

---

[7] Eustaquio v. Rimorin, A.C. No. 5081, March 24, 2003; Sebastian v. Callis, 372 Phil. 673 (1999); Arrieta v. Ilosa, 346 Phil. 932 (1997).

[8] R. Abel, AMERICAN LAWYERS 14 (1989).

[9] *Id.*

[10] G. Roth and C. Wittich (eds), MAX WEBER'S ECONOMY AND SOCIETY (1978).

[11] *Id.* at 341.

consequence and partly the legitimation of wealth.[12] In the study of the legal profession, *status* gains a more meaningful dimension. Since lawyers are admonished to be public servants and not mere merchants in their calling, social status is something expected to be retained and enjoyed by *all* lawyers, regardless of whether or not such status is a consequence or a legitimizing factor of economic gain.[13] In this context, the professions came into existence as a group of actors more or less similarly situated whose market strategies coincide and converge.[14] As a consequence, these actors organize themselves into a group, aggregate their individual interests, and employ various means peculiar to their group with a view to enhancing their economic positions and hampering the intolerability of pure competition.[15]

Marx and Class Structures. Society from the Marxist point of view is defined by a continuous struggle between the classes along the lines of relations of production. Abel observed that, for some Marxists, the professionals are accorded only scant attention, and seem little more than "a historic residue of petty bourgeoisie artisans.[16] In Marx's society, the petty bourgeoisie are destined to vanish in the progressive polarization of labor and capital. However, Marx also recognized that the progressive concentration of capital required greater numbers of functionaries to mediate between the elite and the working class.[17] For this school of thought, the creation of the professions is a mere function of the differentiation between the uneducated and educated worker. As the cleavage between the two increasingly widens, the latter came to be clustered under a different stratum – the service class, the professional-managerial class, the "new class" or the black-coated workers. The primary concern of the Marxists, then, is not so much how the professions came into existence as how the professionals will position themselves in the class struggle, or what their considerations will be in either siding with the elite or proletariat or becoming a new and independent class altogether.[18] The Marxist discussion, though contributing only marginally to the discussion on the birth of the professions, highlighted the social importance of the professions in tilting the balance between labor and capital in either favor. This much is essential in understanding how a profession, the legal

---

[12] R. Abel, *supra* note 8, at 15.
[13] Pound, see *supra* note 5.
[14] *Supra* note 11.
[15] K. Polanyi, THE GREAT TRANSFORMATION (1957).
[16] *Supra* note 11.
[17] N. Abercrombie and J. Urry, CAPITAL, LABOUR, AND THE MIDDLE CLASSES (1983) at 49-51.
[18] R. Abel, *supra* note 8, at 16.

profession, for instance, came to be invested by powers, real or imagined, by society. By wielding such powers, members of the profession can either be a potent counterweight to the excesses of capital or the nemesis to the plight of labor.

Parsons and the Organization of the Professional Complex. The structural-functional school, of which Parsons was a part, was developed by the sociologist Emile Durkheim as a rejoinder to the age-old question: what keeps societies from degenerating into Hobbesian anarchy, given that human beings are inherently self-interested? The social order, as viewed from the structural-functionalist lenses, is composed of, indeed, egoistic individuals, but individuals nonetheless who have the capacity to identify with the interests of those they associate with.[19] This tendency of like-minded individuals[20] to group themselves together was brought about by two exigencies: (1) the need to counter the ill effects of unbridled egoism and (2) the need to protect the society from the deleterious consequences of having a group of educated individuals using their knowledge without some form of regulation.[21] The result is the creation of what Parsons called the professional complex, or that mass composed of different professional groups which identify themselves as against others by highlighting their respective distinguishing characteristics.[22] From the Parsonian view, then, was born the basic tenets of professional organization, the vestiges of which survived into contemporary times. These are: the power of discipline and regulation among members, mastery of a special field of knowledge, admission or initiation through a series of theoretical and practical training, duty of self-regulation, and avowed loyalty to one's clients.[23]

Integration. From the three theoretical traditions thus discussed, we are able to glean three elements of the professions which will facilitate in explaining the nature of the legal profession. First, from the Weberian perspective, the legal profession accords *social status* to its members. Such

---

[19] E. Durkheim, THE DIVISION OF LABOR IN SOCIETY (1933) and PROFESSIONAL ETHICS AND CIVIC RESPONSIBILITY (1957) cited in R. Abel, *supra* note 8, at 16-17.

[20] The discussion on the tendency of organization to be a precursor of the genesis of the professions is parallel to that of Weber, albeit Parson's was more concerned with the social, rather than the economic advantages, of organization.

[21] D. Rueschemeyer, PROFESSIONAL AUTONOMY AND THE SOCIAL CONTROL OF EXPERTISE (1983), *cited in* R. Abel, *supra* at 16.

[22] W. Moore, THE PROFESSIONS: ROLES AND RULES (1970) at 5-6, *cited in* R. Abel, *supra* note 8, at 16.

[23] Cited by R. Abel, *supra* note 8, at 16, from the English Royal Commission on Legal Services' definition of "the five main features of a profession".

status, rather than the opportunity to amass economic gains, is the common element that binds all lawyers. Second, Marxists imbued members of the legal profession with the *social power* to act as mediator between the classes. While such power may work to the advantage of the oppressed and the marginalized, it can also be wielded to ratify and reinforce the status quo. The seeming solution to such a dilemma was provided by the Parsonian structural-functionalist view, which treats the legal profession as an agent of *social organization*. By highlighting the singular position that lawyers enjoy in society, Parsons established the need to regulate the profession and orient its members with their integrative social functions. The vast knowledge that members of the legal profession possess must necessarily be tempered with firm and well-enforced standards of ethics and conduct.

2. Background of the Code of Professional Responsibility

The goal of regulating the legal profession and imposing discipline among its members is basically three-fold:

(1) to protect the public;[24]

(2) to protect the administration of justice;[25] and

(3) to preserve the public confidence in the legal profession.[26]

In protecting the interests of the public and the profession, a primary concern of both the courts and the bar has been to provide the public with sufficient safeguards against "the objectionable activities of persons unfit to practice law".[27] Similarly, in protecting the administration of justice, an important concern has been to protect the legal system from "lawyers who subvert the judicial process by misrepresenting the facts or law to the court, [commit or encourage] perjury, or ... engag[e] in conduct

---

[24] In re Imbriani, 694 A.2d 1030, 1035 (N.J. 1997); American Bar Association, STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 1.1 (1991).

[25] In re Bourcier, 939 P.2d 604, 608 (Or. 1997); American Bar Association, STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 1.1 (1991).

[26] In re Agostini, 632 A.2d 80, 81 (Del. 1993); In re Addams, 579 A.2d 190, 199 (D.C. 1990).

[27] K. Hopkins, *The Politics of Misconduct: Rethinking How We Regulate Politicians*, 57 RUTGERS L. REV. 839 (2005), citing In re Attorney Discipline System, 967 P.2d 49, 65 (Cal. 1998) (quoting 1 B.E. Witken, California Procedure § 623, at 737 (4th ed. 1996).

that unfairly interferes with the truth-seeking process of the courts or functioning of the legal system."[28] Finally, in preserving the public's confidence in the legal profession, the courts and the bar have recognized that because of the specific legal training of lawyers and their almost exclusive monopoly of the practice of law, the public has consistently viewed lawyers as the gatekeepers for access to the law and the courts.[29]

There are at least four ways to impose discipline among lawyers: professional codes of conduct, civility codes (which govern lawyer-to-lawyer relationships), continuing legal education requirements, and requests and pleas for lawyers to internalize self-regulating norms of behavior.[30] Lawyers' codes, in general, as the principal documents enunciating rules of conduct for members of the legal profession, seek primarily to resolve questions of duty and help minimize ethical delinquencies.[31] They lay down fundamental principles that are expected to aid the lawyer in resolving professional dilemmas, both foreseen and unforeseen.[32] It is a beacon to assist the lawyer in navigating an ethical course through the sometimes murky waters of professional conduct.[33]

The need to codify rules prescribing proper conduct for lawyers was first recognized by the ecclesiastical court system of England and other Western European countries.[34] During those times, legal advocates undertake oaths that invoke the aid of God and invite punishment by both human and divine authorities in case such is violated.[35] The oath was called the Oath of Saint Paul, after the London town where the council for

---

[28] K. Hopkins, *The Politics of Misconduct: Rethinking How We Regulate Politicians*, 57 RUTGERS L. REV. 839 (2005), citing L. Levin, *The Emperor's Clothes and Other Tales About the Standards For Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1 (1998).

[29] *Id.*

[30] J. Fischer, *External Control Over the American Bar*, 19 GEO. J. LEGAL ETHICS 59 (2006), *citing* H. Cohen, *Lawyer Certification, Civility, "Good Moral Character", and Pressures for Conformity*, 25 J. LEGAL PROF. 101 (2001); L. Grigg, *Note and Comment, The Mandatory Continuing Legal Education Debate: Is It Improving Lawyer Competence or Just Busy Work?*, 12 BYU J. PUB. L. 417, 425 (1998); A. Kronman, THE LOST LAWYER (1993).

[31] Phillips and McCoy, CONDUCT OF JUDGES AND LAWYERS 204 (1952), *cited in* R. Agpalo, COMMENTS ON THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE CODE OF JUDICIAL CONDUCT (2004) at 2.

[32] US. CODE OF PROFESSIONAL RESPONSIBILITY, Preamble. Adopted from *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1218 (1958).

[33] PCGG v. Sandiganbayan, G.R. Nos. 151809-12, April 12, 2005 (Callejo, *J.*, dissenting), *citing* General Motors Corp. v. City of New York, 501 F2d 639 (1974).

[34] C. Andrews, *Standards of Conduct for Lawyers: An 800-Year* Evolution, 57 SMU L. REV. 1385 (2004).

[35] P. Brand, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION (1992).

ecclesiastical courts promulgated and prescribed it in 1237 to all lawyers practicing litigation.[36] The barrister taking it swears to "plead faithfully, not to delay justice or to deprive the other party of it, but to defend his client both according to law and reason."[37]

The oath being administered to the lawyers of France during the beginning of the thirteenth century was similar to that in England.[38] It was promulgated for the French ecclesiastical courts by the Council of Rouen.[39] In turn, the French oath was adapted for the lawyers in Switzerland in 1816, and the same became the primary model for legal ethics standards in nineteenth century United States[40] This historical development is particularly important in our context because a substantial number of the provisions found in the Code of Professional Responsibility was adopted from its American counterpart.[41]

In 1905, the American Bar Association's (ABA) president, Henry St. George Tucker, suggested that the ABA explore "whether the ethics of our profession rise to the high standard which its position of influence in this country demands." The ABA, concluding that a code of ethics would "crystallize abstract ethical principles" and promote uniform standards on the state level, the ABA appointed a committee to draft a code. The ABA committee decided to follow the example of the 1887 Alabama Code, which was both the prevailing model of legal ethics standards and "a form which may be safely adopted." The committee prepared a draft structured around the 1887 Alabama Code, with commentary and reports of state variations. The ABA sent these materials, along with a special printing of Sharswood's essay, to the entire ABA membership and to each state bar association, soliciting comments. After receiving more than 1000 letters of comment, the committee transformed the Alabama code into a new form called "Canons of Ethics." In 1908, the ABA formally adopted the canons, with limited debate.[42] Since then, the Canons were enforced as the principal code of conduct for lawyers, until it was revised in 1964 by the Special

---

[36] J. H. Benton, THE LAWYER'S OFFICIAL OATH AND OFFICE (1909).
[37] *Id.*
[38] *Id.* at 20-21.
[39] *Id.* at 21-22.
[40] C. Andrews, *supra* note 34.
[41] In re Tagorda, 53 Phil. 37 (1929).
[42] C. Andrews, *supra* note 34.

Committee on Evaluation of Ethical Standards formed by ABA President Lewis F. Powell, Jr.[43]

Canons 1 to 32 of the 1908 Canons of Professional Ethics of the United States was adopted by the Philippine Bar Association in 1917.[44] In 1946, Canons 33 to 47 of the same Code was adopted in the Philippines. In 1980, the Integrated Bar of the Philippines adopted the proposed Code of Professional Responsibility[45] and submitted it to the Supreme Court for approval. It was approved on June 21 1988.[46] Now on its eighteenth year, the Code of Professional Responsibility remains the single most comprehensive document that lays down fundamental ethical principles for Filipino lawyers' guidance. As Justice Malcolm wrote, the Code of Professional responsibility is a codification of legal ethics, that "body of principles by which conduct of members of the legal profession is controlled. More specifically and practically considered, legal ethics may be defined as that branch of moral science which treats of the duties which the attorney-at-law owes to his clients, to the courts, to the bar, and to the public.[47]

3. Content and Comparative Analysis

The Code of Professional Responsibility (hereinafter referred to as "The Code") consists of 22 Canons with corresponding implementing rules (77 in all), and divided into four chapters: The Lawyer and Society; The Lawyer and the Legal Profession; The Lawyer and the Courts; and The

---

[43] American Bar Association, FINAL DRAFT OF THE CODE OF PROFESSIONAL RESPONSIBILITY (1969).

[44] In re Tagorda, 53 Phil. 37 (1929).

[45] The proposed code was drafted by the Committee on Professional Responsibility, Discipline and Disbarment of the Integrated Bar of the Philippines. It was headed by Dr. Irene Cortes as Chair, with Judge Carolina Griño-Aquino, Prof. Jose Espinosa, Atty. Marcelo Fernan, Atty. Gonzalo Gonzalez, Atty. Camilo Quiason, and Prof. Carmelo Sison as members, Chief Justice Roberto Concepcion and Justice Jose B.L. Reyes as consultants, and Prof. Myrna Feliciano and Atty. Concepcion Lim-Jardeleza as resource persons. The principal sources of the provisions of the draft code are the American Bar association's Code of Professional Responsibility (1970), the Canadian Bar Association's Code of Professional Conduct (1974), The Philippine Bar Association's Canons of Professional Ethics (1917, 1946), the District of Columbia's Code of Professional Responsibility, and the California State Bar's Rules of Professional Conduct.

[46] In re Integration of the Philippine Bar, 49 SCRA 22 (1973).

[47] PCGG v. Sandiganbayan, G.R. Nos. 151809-12, April 12, 2005 (Callejo, *J.*, dissenting), *citing* Malcolm, LEGAL AND JUDICIAL ETHICS ADAPTED FOR THE REPUBLIC OF THE PHILIPPINES 8 (1949).

Lawyer and the Clients. The sequential arrangement of the provisions of The Code is representative of the hierarchy of duties that the lawyer must fulfill: first, and indubitably the most important, is his/ her duty to society as a whole; then, he/ she must see to it that the integrity of the legal profession of which he/ she is a member must be constantly upheld; at the more practical level, his/ her duties to the court and his/ her client comes in.

Even a cursory survey of the provisions of The Code would reveal that it has a bias in favor of the litigation practice of law. This may well be merely reflective of the prevailing conditions at the time it was drafted – principal of which is the still-intact perception that the practice of law is the rendering of service to a person, natural or juridical, in a court of justice on any matter pending therein through its various stages and in accordance with established rules of procedure.[48] The devotion of an entire chapter in The Code for rules and regulations governing trial practice while none is reserved for practice areas not involved in litigation is indicative of the legal profession's continued subscription to the traditional view of the work of the lawyer. There are 19 implementing rules under Chapter III[49] of The Code, which is a quarter of all the rules combined for all the four chapters. This does not even include Rule 1.04[50] which presupposes an adversarial court proceeding where a client is made to oppose a conflicting claim by an adverse party and Rule 6.01[51] which refers to advocates in the employ of the State. Although the rest of The Code contains rules of universal applicability, none specifically address any of the emergent practice areas in law (as will be discussed later on in this paper) in the same manner that litigation practice is treated. This is not to deny the indispensability of the office of the attorney in the administration of justice and its vital relation to the well-being of the court.[52] It is, however, inevitable that The Code's disparate treatment of the different areas of law practice will be rendered apparent.

---

[48] In re Matthews, 62 P2d 578, 111 ALR 13 (1936); Agran v. Shapiro, 127 Cal. App 2d 807, 273 P2d 619 (1954).

[49] "The Lawyer and The Courts".

[50] "A lawyer shall encourage his clients to avoid, end or settle a controversy if it will admit of a fair settlement".

[51] "The primary duty of a lawyer engaged in public prosecution is not to convict but to see that justice is done. The suppression of facts or the concealment of witnesses capable of establishing the innocence of the accused is highly reprehensible and is cause for disciplinary action".

[52] Salcedo v. Hernandez, 61 Phil. 724 (1935).

Unfortunately, the trend is seemingly consistent worldwide. With a notable exception, most of the lawyers' codes in operation today still put singular emphasis on the litigation practice of law and neglect all the other areas of practice, especially those not involved in court trials. As an illustration, the United States Code of Professional Responsibility[53] does not have a separate canon devoted entirely for trial lawyers. Its only reference to the conduct of lawyers in litigation practice are in Disciplinary Rules 5-102,[54] 5-103,[55] 7-103,[56] 7-106,[57] 7-107,[58] 7-108,[59] 7-109,[60] 7-110.[61] The majority of the provisions of the United States Code of Professional Responsibility are couched in general terms and are of universal applicability.

However, parallel to The Code, Canada's Code of Professional Conduct[62] also has a special provision exclusively for litigation lawyers – Chapter IX, which governs the conduct of lawyers in the capacity of an advocate.[63] This is also the case with the recently amended Code of Conduct for Lawyers in the European Union[64] which has a special chapter on the lawyer's relations with the courts.[65] Chapter 5[66] of the California State Bar's Rules of Professional Conduct[67] has nine sub-rules pertaining to trial litigators. In the Code of Conduct of the Bar of Hong Kong,[68] there is a separate chapter especially for lawyers conducting their business in court.[69] Finally, perhaps the most bias for litigation practice can be

---

[53] United States of America, Code of Professional Conduct, adopted by the House of Delegates of the American Bar Association as amended August 1980<http://www.abanet.org>June 26, 2006.

[54] "Withdrawal as counsel when the lawyer becomes a witness".

[55] "Avoiding acquisition of interest in litigation".

[56] "Performing the duty of public prosecutor or other government lawyer".

[57] "Trial conduct".

[58] "Trial publicity".

[59] "Communication with or investigation of jurors".

[60] "Contact with witnesses".

[61] "Contact with officials".

[62] CAN. CODE OF PROFESSIONAL CONDUCT (1987).

[63] "When acting as an advocate, the lawyer must treat the tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law."

[64] The European Union, Code of Conduct for Lawyers, adopted by the Council of the Bars and Law Societies in the European Union as amended December 2002< http://www.ccbe.org >June 25, 2006.

[65] *Id.*, Chapter 4, Sub-chapters 4.1 to 4.5.

[66] *Infra.*, "Advocacy and Representation".

[67] CAL. RULES OF PROFESSIONAL CONDUCT.

[68] HK. CONDUCT OF THE BAR OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION (1998).

[69] See, *e.g.*, sub-rules on "Dress in Court", "Duties When Defending a Person Accused of a Crime", "Duties When Prosecuting a Person Accused of a Crime".

observed in the lawyers' code of South Africa,[70] where there are two chapters devoted for rules governing the preparation and presentation of case briefs,[71] a chapter on the duties of counsel in connection with litigation[72], and sub-rules pertaining to trial conduct even under the general heading "General Professional Conduct".[73]

The foregoing observations may engender two rather incompatible inferences. First, it may be that, as of today, the impact of the emergent areas of law practice, particularly those in the non-litigation field, is still not as substantial as some scholars would proffer. The paucity or total absence of provisions in lawyers' codes that seek to recognize the advent of non-litigation practice in different jurisdictions may be indicative of the still-intact dominance of trial practice in the legal profession. On the other hand, it may also be said that the findings relayed earlier regarding different lawyers' codes point to the hypotheses that (a) the legal profession, or at least a conservative and influential part thereof, is not prepared to extend recognition to the prominence of non-litigation practitioners as yet, (b) the recognition of such development is not embodied in lawyers' codes by conscious election because of the relative difficulty in revising the codes (c) at the extreme, lawyers' codes are not regarded as instruments of much consequence, therefore the non-necessity of making them reflect the present profile of the legal profession in terms of practice areas.

III. CRITIQUE

THE PRACTICE OF LAW AS AN EVOLVING AND EXPANDING PROFESSION

Taking off from the thesis that The Code has no room for recognizing emergent practice areas in law other than litigation, this paper will now proceed to lay down the premises of the argument. This critique shall undertake to bolster the proposition on two dimensions: the historical and the legal-jurisprudential.

---

[70] S. AFRICA. UNIFORM RULES OF PROFESSIONAL CONDUCT.

[71] *Id.*, Chapter 2 "Duties of Counsel in Connection with Briefs" and Chapter 5 "Briefs".

[72] *Id.*, Chapter 3.

[73] *Id.*, Chapter 4; See, e.g., Rules 4.1 to 4.4 relating to the lawyer's relationship with the witnesses presented in court.

1. The Historical Dimension: Evolution of the Practice of Law

That litigation is the hallmark of lawyers is already established. Indeed, one theory of how lawyers came into being posits that the earliest lawsuit was a fight, the earliest adjudication a duel or trial by battle, and the earliest lawyer a "champion" or professional fighter.[74] The greatest lawyers in history have always been depicted as advocates. Trial lawyers in the early times are considered the finest of the legal profession.[75]

However, in recent times, the practice of law has changed dramatically, so that more complex client transactions are being undertaken requiring the application of a particular class of laws.[76] Lawyering as a craft shifted progressively away from the courtroom to the halls of corporations, where non-litigation practitioners contend more knowledge and expertise is required.[77] In the field of business, opportunities for employment began materializing for lawyers as even corporate transactions started to assume multifarious legal dimensions.[78] Indeed, as the present *corpus juris* of the world would indicate, extricating a client from highly technical legal conundrums would require a high degree of specialization, something that the general practitioner may not always be prepared to offer.[79] Indeed, training a law student to become a general practitioner may even be an extremely difficult task, given the sheer volume of laws that he/ she must not only be familiar with but functionally knowledgeable of.[80] However, the most convincing argument proffered in favor of specialization is that it permits legal service providers to make their services available in a more convenient and less expensive way. This pseudo-market model, aside from benefiting society by rendering the legal profession more accessible, also ensures that "bad lawyers" will be driven out. This scenario is ideal, especially given the fact that the goal of every lawyer is to serve the public.[81]

---

[74] E. Jenks, A SHORT HISTORY OF ENGLISH LAW cited in M. Orkin, LEGAL ETHICS: A STUDY OF PROFESSIONAL CONDUCT 3.

[75] C. Barrows, LAWYER, DIPLOMAT, STATEMAN (1941).

[76] Report of the American Bar Association's Commission on Multijurisdictional Practice.

[77] H. Tweed, THE CHANGING PRACTICE OF LAW 10 (1955).

[78] R. Pedrosa, *Challenges and Opportunities for New Lawyers: Business*, DIMENSIONS OF LAW PRACTICE: ADVOCACY-COUNSELING-PUBLIC SERVICE (1976).

[79] W. Wilson. *The Lawyer and the Community*. 192 N. AM. REV. 604 (1910).

[80] A. Reed, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921).

[81] W. Fisher, *Address at the Cincinnati Conference on Law and Lawyers in the Modern World*, 15 U. CIN. L. REV. 123, 158 (1941)

Differentiation within the legal profession as a phenomenon is increasingly gaining prominence. As an illustration, in the case of *Stewart v. Jackson and Nash,*[82] the United States Supreme Court upheld the validity of Victoria Stewart's claim that her being assigned in another department other than the environment desk (which she alleged was her specialization) of the law firm she works for entitled her to damages caused by the retardation of her professional development and undermining of her career objectives.[83] Surely, such a decision, if handed down a few decades before, would have caused an uproar among lawyers; the notion that there is an "environmental lawyer" who will be extremely prejudiced by practicing in an entirely different area is simply unheard of. However, today, the idea is quite widely accepted. In fact, the latest trends show not only a propensity of lawyers to specialize, but also the advent of multijurisdictional practice based on specialization. If a lawyer who holds himself out as an expert in a particular field handles the case of a client, he must necessarily be allowed to transact multiple matters in multiple jurisdictions as a function of his expertise (therefore eliminating the need to hire different lawyers to do different jobs by virtue of their different competencies).[84]

Indeed, the concept of a lawyer who specializes in a very narrow and compartmentalized field of practice is a far cry from the proverbial lawyer who knows all the law there is.[85] On the outset, specialization is but a logical consequence of the ever-increasing complexity and multiplication of laws.[86] Some scholars would even go further to say that the professional practice of law could only be maintained by specialization, due to the law's bulk and complexity.[87] Differentiation within the profession gains more merit when one considers that limiting one's expertise to a manageable area is an imperative of practicality and competence.[88] The American Bar Association's response to the clamor for the recognition of special areas of law practice resulted in the creation of a committee and a draft Model Code for Specialization.[89] During deliberations regarding the topic, however, the

---

[82] 976 F. 2d 86, 87 (2d Cir. 1992).

[83] M. Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C.L. REV. 1003 (1994).

[84] J. Merrill, *Multijurisdictional Practice of Law Under the Revised South Carolina Rules of Professional Conduct*, 57 S.C.L. REV. 549 (2006).

[85] *Id.*

[86] TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM 42 (1992)

[87] R. Smith, THE METROPOLIS IN MODERN LIFE (1955).

[88] *Id.*

[89] M. Ariens, *supra* note 83.

issue being propounded by opponents of the idea is that specialization will inevitably lead to the stratification of the legal profession. According to them, the formal recognition of specialized practitioners would only breed hierarchical divisions among lawyers based on the perceived primacy of one practice area over another.[90] Some critics maintain that area-specific legal experts are no lawyers at all, because they do not deal with the general, miscellaneous interests of society but are rather more concerned with understanding the minutest details of specific areas to the detriment of the broad, universal field of law.[91] All efforts were wasted, however, when the United States Supreme Court decided[92] that bar associations have no right to regulate claims of specialization.

The differentiation within the legal profession is even supported by empirical data. In the Philippines, in a survey conducted by the UP Law Center,[93] it was established that private practitioners (engaged in litigation or notarial law) comprise only 18% of all lawyers. In terms of this survey, then, the primacy of litigation practice as reflected in The Code has no solid basis. In fact, most of the respondents – 21% – reported being legal counsels of government corporations/ agencies, a practice area that is most likely not heavily in favor of litigation. About 9% of the respondents are lower ranking or elective government officials, 7% are legal counsels of private corporations, 7% are members of law firms, 6% are court employees, 6% are judges, 5% are businessmen, 4% are fiscals and 4% are officers in private corporations. The results of the survey, although not conclusive, serve to indicate that the bulk of lawyers do not necessarily gravitate toward litigation work, and that the legal profession is composed of many specialized practice areas.[94]

The findings of the survey find support in another empirical study, this time in the United States, serving to indicate that the trend of differentiation and gravitation away from litigation practice is as universal as statistically demonstrable. In a study made by the American Bar

---

[90] *Id.*

[91] W. Wilson, *supra* note 79.

[92] Peel v. Attorney Registration and Disciplinary Commission, 496 U.S. 91 (1990).

[93] M. Bonifacio and M. Magallona, SURVEY OF THE LEGAL PROFESSION (1982) reprinted in J. Coquia, *supra* note 2.

[94] A more comprehensive, although dated study was also undertaken by R. Abel, *op. cit.* note 8. His survey regarding the differentiation of the American legal profession presents data from 1980 to as far back as the pre-World War II years.

Foundation,[95] it was revealed that within a 20-year period (1980-2000), the highest registered employment growth rate in a specific practice area was posted in private industry (39%), followed by government (36%). While private practice[96] (standing at 74%) still predominates all other areas, the marked increase in employment in the latter is an indicator that the legal profession in the United States also follows the direction of differentiation and specialization, a fact that buttresses the argument against favoring litigation practice.

In sum, The Code's treatment of the non-litigation practice of law makes the former lag behind as far as historical developments are concerned. With its focus on trial practice, The Code neglects to create an impetus for the eventual extension of the regulatory arm of the bar to lawyers engaged in specialized fields within an increasingly differentiated legal profession. This writer proposes that specialization and differentiation are irreversible trends that the legal profession as a whole must cope with and address. This can be done by fine-tuning the lawyers' code or admonishing non-litigation practitioners to observe self-regulation even in the absence of specific standards of conduct as laid down by The Code.

2. The Legal-Jurisprudential Dimension: Expansion of the Meaning of the Practice of Law

Even assuming that the differentiation argument of the preceding section does not hold water, it is noteworthy that no less than the Supreme Court has expanded the meaning of the practice of law. This is so much so that the legal profession has become differentiated by default – not because its members have become very mobile with regard to practice areas, but because membership itself has been substantially expanded, based on a more liberal and inclusive definition of what constitutes practice of law.

---

[95] C. Carson and B. Curran, *Growth and Gender Diversity: A Statistical Profile of the Legal Profession in 2000*, 16 RESEARCHING LAW 8 (2004).

[96] For lack of more specific statistical parameters, it cannot be determined from the study whether private practice can reasonably be equated with litigation practice. However, even assuming this to be so, the more principal breakthrough lies in the fact that all other areas of law practice registered varying degrees of increase in employment, despite the continued, albeit declining predominance of private practice.

In the celebrated case of *Cayetano v. Monsod*,[97] the Supreme Court held that practice of law means any activity, in or out of court, which requires the application of law, legal procedure, knowledge, training and experience.[98] The practice of law is not limited to the conduct of cases in court,[99] and includes any and all activities geared towards advising persons of their rights, and representing them in any court, body, or agency to obtain, secure, and defend such rights.[100] One is engaged in the practice of law if one's work involves the determination by the trained legal mind of the legal effect of facts and conditions,[101] for although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation.[102] One may be a practicing attorney in following any line of employment in the profession. If what he/ she does exacts knowledge of the law and is of a kind usual for attorneys engaging in the active practice of their profession, and he/ she follows some one or more lines of employment such as this he/ she is a practicing attorney at law.[103] To engage in the practice of law is to perform those acts which are characteristic of the profession. Generally, to practice law is to give notice or render any kind of service, which device or service requires the use in any degree of legal knowledge or skill.[104]

Aside from invoking a long line of jurisprudence, the Court also cited pertinent passages from the Records of the Constitutional Convention wherein the term "practice of law" has been given a construction equivalent to what the Court enunciated. The Court also took pains to quote parts of a business periodical's article on Corporate Finance Law, wherein the practice of law was viewed as the application of legal principles and skills in the different stages of commercial transactions.[105]

---

[97] 201 SCRA 210 (1991).

[98] This was culled from the definition of "practice of law" as it appears in Black's Law Dictionary, 3rd edition, as well as from Philippine Lawyers Association v. Agrava [105 Phil. 173 (1959)]; and Omico Mining and Industrial Corp. v. Vallejos [63 SCRA 285 (1975)].

[99] Land Title Abstract and Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650.

[100] State ex. rel. Mckittrick v..C.S. Dudley and Co., 102 S.W. 2d 895, 340 Mo. 852.

[101] 5 Am. Jur. 262, 263.

[102] Moran, 3 COMMENTS ON THE RULES OF COURT, 665-666 (1953), citing In re Opinion of the Justices [Mass.], 194 N.E. 313, quoted in Rhode Is. Bar Assoc. v. Automobile Service Assoc., [R.I.] 179 A. 139,144.

[103] Barr v. Cardell, 155 NW 312.

[104] 111 ALR 23.

[105] The Court quoted heavily from 'Corporate Finance Law', an article which appeared in the January 11, 1989 issue of the *Business Star*.

The decision's *ponente*, Justice Paras, parrying the attacks emanating from strongly-worded dissents by Justices Padilla, Cruz, and Guttierez, countered that his seemingly over-inclusive definition does not mean any person marginally engaged in anything that has something to do with the law is in fact practicing law.[106] According to him, in light of the facts and circumstances of the case, one has to remember that being a member of the bar is a condition *sine qua non* to the application of the "practice of law" test as enunciated in the case; even if one is in the habit of applying legal knowledge, training, or skill, if one is not a lawyer to begin with, then the proposition that such person is in fact practicing law comes down to nil.

To say that the *Cayetano* ruling sent ripples down the supposedly calm waters of jurisprudence is almost an understatement. Judge Nitafan criticized it for being grounded on non-traditional extrinsic or secondary aids of statutory construction, instead of relying on the construction of the Constitution itself.[107] Nitafan pointed to constitutional provisions providing qualifications for the offices of the Supreme Court,[108] the Commission on Elections,[109] the Co mission on Audit,[110] the Ombudsman,[111] the Sandiganbayan,[112] and the Trial Courts[113] to illustrate how the term "practice of law" assumes a uniform construction all throughout the Constitution. According to him, such construction unquestionably refers to *practice in the courts.*[114]

American jurisprudence recognizes that whether a particular activity comes within the meaning of the term practice of law depends upon the circumstances of each case.[115] Here, in *In re Del Rosario,*[116] the Court had ruled that practice of law is equated with membership in the bar. In *In re David*[117] to engage in the practice of law is to do any acts which are

---

[106] 201 SCRA 210, 227 (1991).

[107] D. Nitafan, ANNOTATIONS ON PRACTICE OF LAW AS A QUALIFICATION TO OFFICE, 201 SCRA 244.

[108] CONST. art. VII, § 7(1).

[109] CONST. art. IX-C, § 1(1).

[110] CONST. art. IX-D, § 1(1).

[111] CONST. art. XI, § 8.

[112] Pres. Decree No. 1606, § 1.

[113] Batas Blg. 129, § 15 and 26. This is the Judiciary Reorganization Act of 1980.

[114] Nitafan's interpretation finds support in Robinson v. Villafuerte, 18 Phil. 121 (1911); Hightower v. Detroit Edison Co., 262 Mich. 1, 86 A.L.R. 509 (1933).

[115] Nelson v. Smith, 154 P2d 634, 157 A.L.R. 512 (1944); Creditor's Service Corp. v. Cummings, 57 R1 291, 190 A22 (1937).

[116] 52 Phil. 399.

[117] 93 Phil. 461 (1954); also Dia-Añonuevo v. Bercacro, [68 SCRA 81 (1975)].

characteristic of the legal profession. In a subsequent case, it was held that representing clients in the Patent Office is considered practice of law,[118] but an isolated appearance as a private prosecutor is not.[119]

The liberal definition of the practice of law as laid down in *Cayetano*[120] engenders at least two consequential implications:

First, it confuses the line that demarcates lawful and unlawful practice of law. Under the definition, many professionals (e.g., accountants, auditors, legal assistants) would qualify as practitioners of law because their profession also involves the application of legal knowledge, training and skill to some degree. True, the argument of Justice Paras, regarding the *sine qua non* condition of admission to the bar, has merits. However, it is also worth considering that the exclusion of non-lawyers as referred to in the *ponencia* works only when the practice of law is made a precondition for occupancy of an office. It does not in any way remedy the fact that, for all practical purposes, non-lawyers are actually performing the work of lawyers. This is inconsistent with the rationale for requiring prior admission to the bar before being able to practice. The rigid requirements and conditions are not intended to create a monopoly in the legal profession. Rather, to protect the public, the court, the client, and the bar from the incompetence and dishonesty of those who are unfit to become members of the legal profession.[121]

Second, and more relevant for purposes of this paper, the liberal definition of the practice of law operates as a tacit recognition of the Court of the changing nature of legal practice and the differentiation within the legal profession along the lines of specialized practice areas. The views espoused by the likes of Nitafan which restrict practice of law to actual engagement in the courts have been invalidated by the *Cayetano* ruling. As Monsod has been allowed to be appointed to the Commission on Elections, an office previously associated with extensive experience in the judicial branch, it became possible for other corporate lawyers to be treated as equals of litigation lawyers. The ruling acknowledged how, in

---

[118] Philippine Lawyers Asociation v. Agrava, 105 Phil 173 (1959).

[119] People v. Villanueva, 121 Phil 894.

[120] It is noteworthy that the doctrine is controlling to date; it has been applied fairly recently in Aguirre v. Rana, [403 SCRA 342 (2003)].

[121] J. Chan-Gonzaga, *Lawyering @ Century 21:Globalization, ICT, and the Legal Profession*, reprinted in J. Coquia, *supra* note 2.

contemporary times, the traditional notions of a lawyer may be inconsistent with the actual exigencies reshaping the legal profession and legal practice as a whole.

In sum, the treatment of the non-litigation practice of law by The Code and the Court are incompatible with each other. While the Code focuses on litigation work and does not acknowledge the need for regulation of other areas of practice, the Court has already recognized the advent of non-traditional practice areas. This recognition is essential in finally dismantling the shackles of traditional and restrictive views regarding the legal profession. By pronouncing that a corporate lawyer and a seasoned litigator have equal chances of being appointed to a public office which has for its requisite the continued practice of law, the Court established that engaging in non-litigation practice does not in any way diminish the value of a lawyer.

IV. RECOMMENDATION

RECOGNIZING AND ACCOMMODATING DIFFERENTIATION WITHIN THE LEGAL PROFESSION

Historical and empirical data already presents a clear and convincing picture of the present status of the legal profession: it is progressively veering away from the traditional conception of a lawyer as litigator; it is increasingly becoming differentiated, with non-litigation practice areas starting to assert themselves as equally legitimate forms of lawyering as far as public service is concerned; and its members who practice outside the courts are steadily growing in number, making it a practical necessity and a professional imperative to subject them to closer regulation.

Legal and jurisprudential fiat operates to complement and reinforce this historical-empirical proposition. In light of the ruling in *Cayetano v. Monsod*, there is already a legal basis to accord the non-litigation practice of law with recognition, acknowledgement, and accommodation. The liberal and inclusive definition of the practice of law is the equalizer that places all manner of lawyers on the same footing, tradition notwithstanding.

In light of this two-dimensional thesis, this paper will forward a three-pronged proposition. The proposition will be made with a view to instituting reforms in The Code to make it more reflective of the Philippine Legal Profession to whom its ethical admonitions are addressed.

For the short-term, the differentiation within the legal profession must be recognized. The intent of the Supreme Court in deciding on *Cayetano* must be isolated from all the other necessary and logical implications of the ruling, positive or otherwise. The Court sought not to demean the litigator but to elevate the non-litigator; to recognize the latter's latent potential as worthy of respect as the former's inherent advantage. The rest of the legal profession must emulate this stance by the Court, and hopefully influence society to follow suit.

For the medium-term, the integrated bar must consider convening a committee to inquire into the possibility of revising The Code to accommodate these new developments. It is, however, not envisioned that The Code will be able to provide specific rules governing every practice area foreseeable. The revision may take the form of inserting general provisions that lay down only basic frameworks of conduct for general practice areas, much the same as the provisions in Chapter III ("The Lawyer and the Courts") for trial lawyers. Any such revision should be made with the end in mind of not so much tempering the bias in favor of litigation practice as addressing the potential ill effects of unregulated legal practice in non-litigation fields. The revision committee, for example, may look into ethical considerations regarding the conduct of corporate lawyers who, by the nature of their positions, may be induced to act like corporate stockholders and businessmen rather than public servants, given their circumstances.

For the long-term, the integrated bar may look into the possibility of harnessing the organizational capabilities of members of different practice areas to codify their own rules of conduct. By analogy, the Code of Professional Responsibility shall become the Constitution of all lawyers – universal in its applicability and supreme in relation to other rules codified in consonance with it. The practice-specific rules of ethics and conduct shall serve as the municipal ordinances drafted and promulgated by those who will be directly affected them, and controlling only for those who

engage in the practice area that such rules regulate.[122] This should not be taken to mean, however, that this paper seeks to institutionalize a regime of compartmentalization and disunity in the bar. The practice-specific rules, as proposed, will only seek to define the parameters of proper conduct for any lawyer who wish to engage in such area – they will not operate to bar any lawyer from pursuing any practice or practices that he/ she wants to pursue during his/ her entire professional career. The proposed micro rules will only provide the moral and ethical roadmap invaluable to any lawyer who wishes to settle in an area permanently or simply plans to pass through.

V. CONCLUSION

The history of the legal profession is one replete with both moments of glory and periods of ignominy, with strokes of brilliance and leaps of logic. For every noble advocate, there is a fiendish foe, and oftentimes we will never know which is which until one or the other forgets to don the appropriate countenance required of a lawyer given the circumstances. The choices that lawyers have to make everyday usually lie on both extremes; between one alternative and the other is a space reserved for morality. The depth and the extent of that space is a matter between the lawyer and his/ her god.

If lawyers' codes like our very own Code of Professional Responsibility are to assume any consequence at all, their provisions must resonate not only in lawyers' minds as a matter of course but more importantly in lawyers' hearts as a matter of choice. The key to the efficacy of any regulatory mechanism lies in its relevance to the intended target. If it were to be effective, it would have to be relevant. If it were to be relevant, it would have to be meaningful; and meaning we can attain by letting The Code reflect reality.

---

[122] In this regard, it is worthy to note such initiatives as the Association of Trial Lawyers of America's Code of Conduct, the American College of Trial Lawyers' Codes of Pre-Trial and Trial Conduct, and the International Bar Association's International Code of Ethics.

The reality is: though there are many practice areas, there is only one moral cord which we attempt to strike in each and every lawyer when they are faced with ethical dilemmas. There is only one standard of morality against which the litigator, the corporate lawyer, the environmental lawyer, and the public defender will be measured. If we could fashion the Code of Professional Responsibility to function like such a universal crucible, then it would have served its purpose.

- o0o -