SHOTGUN VERSUS TOP GUN: CONFIDENTIALITY AND THE FILIPINO IN-HOUSE COUNSEL

Maria Carmen L. Jardeleza

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INTRODUCTION

In *Cayetano v. Monsod*,[1] the Supreme Court recognized Atty. Christian Monsod's past experiences as a "lawyer-economist, lawyer-manager, a lawyer-entrepreneur of industry, a lawyer-negotiator of contract, and a lawyer-legislator of both the rich and the poor"[2] as constituting the practice of law. In this landmark jurisprudence, the Court acknowledged that the practice of law has indeed expanded, and continues to expand, far beyond the traditional and stereotypical concept of litigation as the practice of law.

However, our existing laws and institutions which define and govern the Philippine legal profession have failed to sufficiently respond to the rapid expansion of the traditional practice areas of law. The current legal frameworks in place may have become inadequate to address some novel ethical situations that may arise as these new practice areas continue to evolve. This emerging reality affirms the immortal words of Justice Oliver Wendell Holmes: "the life of the law has not been logic; it has been experience. Any changes in the laws are brought about as reactions to various experiences."[3]

One of the emerging trends in the practice of law in the Philippines is the concept of an in-house counsel. The in-house counsel is a lawyer who represents a juridical entity, usually a corporation. While an in-house counsel generally encounters the same ethical restraints as any other lawyer i.e., loyalty, confidentiality, conflict of interest, client identity, and the duty not to

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* Awardee, Magno S. Gatmaitan Prize for Best Paper in Professional Responsibility (2008); *Cite as* Maria Carmen Jardeleza, *Shotgun versus Top Gun: Confidentiality and the Filipino In-House Counsel*, 83 PHIL. L.J. 95, (page cited) (2008).

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

[2] *Id.* at 225.

[3] OLIVER WENDELL HOLMES, EXCERPT FROM *The Common Law*, IN T. SEAGLE, MEN OF LAW, FROM HAMMURABI TO HOLMES, 335 (1947).

aid a client's fraudulent and criminal acts, what is peculiar about an in-house counsel is that he or she is directly employed, rather than retained, by the corporation itself.[4] The corporation, as the client, may thus exercise significant control over the in-house counsel's professional conduct as a lawyer-employee. This, in, turn, creates unique legal ethical dilemmas that only lawyers who practice law as in-house counsels face. As such, there is a need to formulate specific ethical rules that adequately address these special needs.

This paper aims to survey whether the Philippine Code of Professional Responsibility can effectively guide Filipino in-house counsels in dealing with ethical dilemmas unique to their practice of law. As a necessary step in addressing this question, this paper will make a comparative analysis of the pertinent provisions of the aforementioned code to its suggested counterparts found in the American Bar Association's Model Rules of Professional Conduct, which has already been calibrated over the years to respond to the peculiar circumstances surrounding in-house counsels. A discussion shall follow, illustrating how these two sets of Rules find application in hypothetical situations wherein in-house counsels face ethical issues concerning confidentiality. This discussion will then demonstrate how the Philippine Code of Professional Responsibility has become inadequate to address the ethical needs of in-house counsels and how this inadequacy stems from the highly litigious orientation of our Code of Responsibility. Finally, this paper will conclude with a proposal to amend these rules to include specific provisions that will instruct lawyers on how to deal with entity clients.

I. THE EMERGENCE OF CORPORATE LAW IN PHILIPPINE LAW PRACTICE

Cayetano v. Monsod[5] marked a turning point in Philippine jurisprudence. In this landmark case, the Supreme Court acknowledged that the practice areas of law have expanded beyond the traditional realm of litigation. Here, the practice of law has been defined as "any activity, in or out of court, which requires the application of law, legal procedure, knowledge, training and experience."[6] This definition is not confined to litigation, but encompasses all acts "which are characteristic of the

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[4] STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS, 541 (6TH ED., 2002).
[5] G.R. No. 100113, 201 SCRA 210, Sep. 3, 1991.
[6] *Id.* at 214.

profession," such as "giving notice or rendering any kind of service, which device or service requires the use in any degree of legal knowledge or skill."[7]

In his *ponencia*, Justice Edgardo Paras quoted the late Alexander Sycip, a corporate lawyer, to describe the growth and development of corporate law:

> Even today, there are still uninformed laymen whose concept of a lawyer is one who principally tries cases before the courts. The members of the bench and bar and the informed laymen, such as businessmen, know that in most developed societies today, substantially more legal work is transacted in law offices than in courtrooms. General practitioners of law who do both litigation and non-litigation work also know that in most cases, they find themselves spending more time doing what [is] loosely describe[d] as business counseling than in trying cases. The business lawyer has been described as the planner, the diagnostician, and the trial lawyer, the surgeon. I[t] need not [be] stress[ed] that in law, as in medicine, surgery should be avoided where internal medicine can be effective.[8]

More and more Philippine lawyers are engaging in what is known as corporate law. In a nutshell, a corporate lawyer handles the legal affairs of a corporation. He or she does corporate housekeeping or otherwise acts as counsel to a corporation. His or her areas of practice may include, among others, corporate legal research and tax laws research. In addition, he or she may represent the corporation as a corporate secretary in board meetings. The corporate lawyer may likewise appear in courts and other adjudicatory agencies, such as the Securities and Exchange Commission. All of these tasks, while non-litigious in nature, require an ability to deal with the law.[9]

A corporate lawyer may be engaged in transactional practice involving, among others, negotiating and structuring business transactions. He or she drafts the underlying agreements between parties to a transaction, usually various corporations, which range from simple loans to complex company mergers. In the field of securities, the corporate lawyer also provides legal advice in public offerings, private placements, and the listing of securities, among others.[10]

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[7] Muring, Jr. v. Gatcho , A.M. No. CA-05-19-P, Aug. 31, 2006

[8] Cayetano v. Monsod, G.R. No. 100113, 201 SCRA 210, 217, Sep. 3, 1991.

[9] *Id.* at 219.

[10] Rafael Morales, *A Teaching Manual on Ethical Issues In Corporation and Securities Law*, in TEACHING MANUAL ON LEGAL ETHICS, PREFACE, (2007).

The corporate lawyer creates strategies to minimize the risks of legal trouble and maximize legal rights for the corporation in the course of its transactions and deals.[11] He or she also acts as a manager to oversee the legal consequences which may attach to the corporation's activities.

At any rate, a corporate lawyer may assume responsibilities other than just the legal affairs of the corporation. These include matters such as determining policy and becoming involved in management.[12] As such, the corporate lawyer assists in the structuring of the corporation's global operations, the managing of its exposure to liabilities, and its interactions with public decision-makers, among others.[13] He or she may also become more intricately involved with the corporation as a stakeholder and may participate in executive boards and other decision-making roles, thereby becoming a close participant in the organization and operations of corporate governance.[14]

II. THE CHANGING CLIENT IN CORPORATE LAW

A corporation is an artificial being created by operation of law, having the right of succession and the powers, attributes and properties expressly authorized by law or incident to its existence.[15] A corporation, as an artificial being, is a juridical person to whom the law grants a juridical personality, separate and distinct from that of each shareholder, partner or member.[16] As a juridical person, a corporation may acquire and possess property of all kinds, as well as incur obligations and bring civil or criminal actions.[17] A corporation cannot, however, exercise certain rights that presuppose physical existence, such as family rights, the making of wills, among others.[18] It is a well settled doctrine both in law and in equity, that as a legal entity, a corporation has a personality distinct and separate from its individual stockholders or members, and is not affected by the personal rights, obligation and transaction of the latter.[19]

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[11] Cayetano v. Monsod, *supra* note 8, at 218.
[12] Cayetano v. Monsod, *supra* note 8, at 219.
[13] *Id.*
[14] *Id.*
[15] CORP. CODE, § 2.
[16] CIVIL CODE, art. 44 (3).
[17] CIVIL CODE, art. 46.
[18] I ARTURO TOLENTINO, CIVIL CODE OF THE PHILIPPINES 184 (1990).
[19] Sulo ng Bayan, Inc. v. Araneta, Inc. et al, L-31061, 72 SCRA 347, Aug. 17, 1976 as cited in I JOSE CAMPOS, THE CORPORATION CODE, 137 (1990).

Since a corporation is an inanimate juridical entity, it cannot act on its own. The corporation is a fictional entity that, while having independent status under the law, can only act through its agents.[20] These are the human agents who perform what the corporation could have done had it been able to do so were it not for its inanimate state.

The first group of agents includes the directors or trustees of a corporation. Under the Corporation Code,[21] corporate powers of all corporations formed under said code shall be exercised, all business conducted and all property of such corporation controlled and held by the board of directors or trustees.[22]

The corporate officers comprise the second group of human agents. Immediately after their election, the directors of a corporation must formally organize by electing a president, who shall be a director, a treasurer who may or may not be a director, a secretary who shall be a resident and citizen of the Philippines, and such other officers as may be provided for in the by-laws.[23]

The third group of human agents includes the stockholders. The Corporation Code provides some instances where it expressly requires the stockholders to consent to certain matters before the Board of Directors can take any action.[24] These matters cover mostly fundamental changes in the corporation which would affect its contractual relations with the stockholders, without whose consent such changes would have no effect.[25]

The last major group of human agents consists of all the other employees of the corporation.

III. THE CORPORATE LAWYER AS A LAWYER FOR AN ENTITY

As a juridical entity, the corporation depends upon these human agents for the smooth running of its affairs. Thus, a corporation, through its

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[20] Samaritan Foundation v. Goodfarb, 176 Ariz. 497, 862 P.2d 870 (1993).
[21] CORP. CODE
[22] CORP. CODE, § 23.
[23] CORP. CODE, § 25.
[24] CORP. CODE, § 23.
[25] I JOSE CAMPOS, THE CORPORATION CODE, 413 (1990).

Board of Directors and officers, may hire lawyers to handle its legal affairs either on a general, retainer basis[26] or for specific work[27] only.

A corporate lawyer deals with unique constraints in his or her practice of law that the traditional litigator does not face. These constraints are primarily imposed by the nature of the client itself and by the way in which the lawyer is organized into a social unit to perform that work.[28]

Firstly, the representation of a corporation is not always as clear-cut compared to a natural person as a client. While the corporation is the lawyer's client, he or she must act with and represent the corporation *through* its human agents who are not the lawyer's clients. Their presence is indispensable as the corporation is a fictional entity which, while having independent status under the law, can only act through such agents.[29] Necessarily, the in-house counsel has to deal with the directors, officers and shareholders as the human agents who exert influence and control in running the corporation.

This results in a more complicated manner of representing clients in that it forms a triangular arrangement involving the corporation, the corporate lawyer, and the human agents. The corporation, while an independent juridical entity, can act only through its human agents in order to deal with the corporate lawyer. Ideally, the human agents serve as the link between the corporation and the corporate lawyer. They are supposed to work for and in behalf of the best interests of the corporation, as its physical and human representatives. Everything that the corporation can and must do as an independent legal entity can only be physically accomplished through its human agents. The corporate lawyer, therefore, does not theoretically directly deal with just the corporation as the client. He or she manages the corporation's legal affairs by interacting with the human agents who run it.

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[26] Traders Royal Bank Employers Union v. NLRC, G.R. No. 120592, 269 SCRA 733, 746, Mar. 14, 1997. A general retainer, or a retaining fee, is the fee paid to a lawyer to secure his future services as general counsel for any ordinary legal problem that may arise in the routinary business of the client and referred to him for legal action. The future services of the lawyer are secured and committed to the retaining client. For this, the client pays the lawyer a fixed retainer fee which could be monthly or otherwise, depending upon their arrangement. The fees are paid whether or not there are cases referred to the lawyer. The reason for the remuneration is that the lawyer is deprived of the opportunity of rendering services for a fee to the opposing party or other parties. In *fine*, it is a compensation for lost opportunities.

[27] *Id.* at 746. A special retainer is a fee for a specific case handled or special service rendered by the lawyer for the client. A client may have several cases demanding special or individual attention. If for every case there is a separate and independent contract for attorney's fees, each fee is considered a special retainer..

[28] Cayetano v. Monsod, *supra* note 8,,at 218.

[29] Samaritan Foundation v. Goodfarb, *supra* note 20.

The overall effect of this triangular arrangement is an "Alice in Wonderland" quality where interests among corporate constituencies diverge:

> The client to which [the lawyer] owes undivided loyalty, fealty and allegiance cannot speak to him except through voices that may have interests adverse to his client. He is hired and may be fired by people who may or may not have interests diametrically opposed to those of his client. And finally, his client is itself an illusion, a fictional "person" that exists or expires at the whim of its shareholders, whom the lawyer does not represent.[30]

Most economists accept the views of Ronald Coase, Oliver Hart and Oliver Williamson that a corporation is simply a "nexus of contracts." At any given point, the organization represents an equilibrium of agreements between capital, labor, management, creditors, and so on. Under this perspective, there is no entity apart from its constituencies. To treat the corporation as an entity is a harmless form of abstraction provided that this equilibrium holds. It is when major conflicts, such as competing interests, arise to disturb this equilibrium that it becomes problematic to consider the corporation as an entity type of client.[31] The corporate lawyer never deals with the client as such, but only with client people.[32]

It is precisely because of this triangular arrangement that unique ethical problems arise for corporate lawyers. The typical problems of loyalty, conflict of interest, confidentiality, and the duty not to aid a client's crimes and frauds manifest themselves in new forms. When a client is represented "through" others, and is itself a legal fiction, these problems become exponentially more complex.[33] The multiple interests in organizational representation makes client identity issues inevitable.[34] It is these client identity issues that further compound these various problems earlier mentioned.

For instance, a corporate officer instructs the corporate lawyer to conduct internal investigations within the corporation for alleged bribes being conducted to encourage the sales of its products. The corporate lawyer then proceeds to meet with and arrange the investigation for a particular division of the corporation. The Division Head tells the corporate

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[30] Ralph Jonas, *Who Is The Client?* The Corporate Lawyer's Dilemma, 39 HASTINGS L.J. 617, 619 (1988).

[31] DEBORAH. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD, 544 (2nd ed., 1998).

[32] Geoffrey Hazard, *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J., 1011, 1013 (1997).

[33] GILLERS, *supra* note 4, at 541.

[34] *Id.* at 553.

lawyer to keep the results of the investigation confidential. Does the corporate lawyer have the duty of confidentiality to this Division Head? Is this "division," as a section or group of the corporation, considered as being "part" of the client, and therefore entitled to the duty of confidentiality?[35] To what extent is there a "duty" of confidentiality extended to this division, particularly if it may be found guilty of the allegations?

It becomes difficult to determine who the client is, given the triangular arrangement of corporation-constituents-lawyer. Therefore, the identity and representation of a corporation as an entity client is not always as clear-cut compared to a client who is a natural person.

Secondly, the way in which the corporate lawyer is organized into a social unit to perform his or her work also affects the corporate lawyer's practice of law.[36] The extent to which a corporate lawyer participates in the corporation influences the kinds of ethical situations that he or she may encounter. The more embedded a corporate lawyer becomes in a corporation, the more tangled the web of ethical situations that may arise within the triangular arrangement.

It bears noting that there are some advantages in having lawyers serve as directors. Some corporate lawyers, while on general retainer basis, may more closely participate in the management of the corporation as directors. By engaging them as directors, corporations receive legal advice at no extra charge beyond the normal fees paid to a member of the board. Moreover, lawyers generally make good directors. They may recognize problems that others miss, and the knowledge of the business that they obtain from board discussions can inform their legal advice.[37] However, this makes the lawyer-director more deeply embedded within the triangular arrangement. The lawyer-director, for example, will find himself or herself in a precarious position when the Board of Directors decides to pursue a profitable business venture that the lawyer-director knows is against the law. Should the lawyer-director wear the "lawyer hat" and fulfill his or her ethical duty to speak up and vote against this proposition? Or should the lawyer-director keep his or her "director hat" on and be a "good" director like everyone else in the Board to help make money for the corporation?

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[35] Situation loosely based on Upjohn Co. v. United States, 449 U.S. 383 (1981).

[36] Cayetano v. Monsod, *supra* note 8, at 219.

[37] RHODE, *supra* note 32, at 548.

IV. THE IN-HOUSE COUNSEL: A NEW BREED OF CORPORATE LAWYER

In some instances, a corporate lawyer is instead hired directly by the corporation as its own employee. This is what is known as an in-house counsel. An in-house counsel is a lawyer who acts as an attorney for a given business although carried as an employee of that business and not as an independent lawyer. Generally, such lawyer advises business on day-to-day matters.[38] It is usually the large corporations for profit[39], however, that have a need to employ in-house counsels to handle their legal affairs. Larger businesses have legal departments with attorneys assigned to specialized areas of law affecting particular businesses, such as labor law, taxes, personal injury litigation, and corporate law.[40]

The corporate in-house counsel engages in the typical corporate practice of preventive lawyering and managing similar to a corporate lawyer on a retainer basis. However, the in-house counsel is placed in a unique position. He or she not only manages the legal affairs of the corporation, but is also directly employed by the corporation itself. The in-house counsel thus wears two hats at the same time: that of a lawyer and that of an employee. The in-house counsel is answerable not only as the lawyer of but also as an employee of the corporation.

As a lawyer, the in-house counsel is first and foremost an officer of the court like any other lawyer. His duties to the court are more significant than those which he owes to his client. His first duty is not to his client but to the administration of justice; to that in the end, his client's success is wholly subordinate; and his conduct ought to and must always be scrupulously observant of the law and the ethics of the profession.[41]

As an employee, the in-house counsel is expected to advocate for the best interests of the corporation. Unless it is non-stock,[42] a corporation implicitly[43] aims to produce as much profit as it can for its stockholders.[44] Therefore, the in-house counsel is, at least ideally, expected to maximize and

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[38] BLACK'S LAW DICTIONARY, 740 (6th ed) 1990.

[39] CORP. CODE, § 3.

[40] BLACK'S LAW DICTIONARY, 740 (6th ed.) 1990.

[41] Cobb-Perez v. Lantin, G.R. No. 22320, 24 SCRA 291, 298, Jul. 29, 1968.

[42] CORP. CODE, §§ 3, 87.

[43] Section 3 of the Corporation Code provides that "corporations which have capital stock divided into shares and are authorized to distribute to the holders of such shares dividends or allotments of the *surplus profits* on the basis of shares held are stock corporations." [emphasis supplied]

[44] CAMPOS, *supra* note 25, at 44.

exhaust all the possible legal avenues that will help the corporation increase its profits.

Philippine jurisprudence recognizes that lawyers may be employed as in-house counsels for corporations. It likewise recognizes that corporations exercise control over the in-house counsel due to their employment in the corporation.

In *Hydro Resources Contractors Corporation. v. Pagalilauan,*[45] private respondent Rogelio Aban is a lawyer for Hydro Resources Contractors Corporation, a private corporation. Aban was hired as the firm's "Legal Assistant." The corporation terminated him for his alleged failure to perform his duties well, which prompted Aban however, to file a complaint against the corporation for illegal dismissal. The labor arbiter ruled that Aban was illegally dismissed which the National Labor Relations Commission (NLRC) later affirmed on appeal.

The corporation contested the jurisdiction of the labor arbiter and the NLRC, raising as an issue, the absence of an employer-employee relationship between Aban and the corporation. It contended that "a lawyer as long as he is acting as such, as long as he is performing acts constituting practice of law, can never be considered an employee. His relationship with those to whom he renders services, as such lawyer, can never be governed by the labor laws. For a lawyer to so argue is not only demeaning to himself (sic), but also to his profession and to his brothers in the profession."[46]

The Supreme Court held that an employer-employee relationship existed between Aban and the corporation as he performed his dual role as lawyer and employee of the corporation.

> A lawyer, like any other professional, may very well be an employee of a private corporation or even of the government. It is not unusual for a big corporation to hire a staff of lawyers as its in-house counsel, pay them regular salaries, rank them in its table of organization, and otherwise treat them like its other officers and employees. At the same time, it may also contract with a law firm to act as outside counsel on a retainer basis. The two classes of lawyers often work closely together but one group is made up of employees while the

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[45] G.R. No. 62909, 172 SCRA 399, 402, Apr. 18, 1989
[46] *Id.*

> other is not. A similar arrangement may exist as to doctors, nurses, dentists, public relations practitioners, and other professionals."[47]

The Supreme Court further added,

> This Court has consistently ruled that the determination of whether or not there is an employer-employee relation depends upon four standards: 1) the manner of selection and engagement of the putative employee; 2) the mode of payment and wages; 3) the presence or absence of a power of dismissal; and 4) the presence or absence of a power to control the putative employee's conduct. Of the four, the right-of-control has been held to be the decisive factor.[48]

In this case, the Supreme Court recognized that a lawyer employed by a corporation wears the twin hats of a lawyer and of an employee. It explained that Aban worked solely for the petitioner [corporation] and dealt only with legal matters involving the said corporation and its employees. He also assisted the Personnel Officer in processing appointment papers of employees. This latter duty is not an act of a lawyer in the exercise of his profession but rather a duty for the benefit of the corporation."[49]

In the abovementioned case, the Supreme Court recognized that such a breed of lawyers as in-house counsels existed. It thus applied the usual employer-employee tests meant for employees, which distinguished an employed in-house counsel from the corporate lawyer hired on a retainer basis. The Supreme Court further explained that it was "...not without a guide in deciding whether or not an employer-employee relation exists between the contending parties or whether or not the private respondent was hired on a retainer basis."[50]

The in-house counsel is thus trying to balance two competing interests as an advocate for the legal profession and as an advocate for the corporation. His or her professional duty to uphold the Constitution, obey the laws of the land and promote respect for law and legal processes[51] may inevitably clash with the business interests of the corporation.

His or her employment into the corporation introduces a third interest that the in-house counsel must consider in every action he or she

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[47] *Id.* at 402-403.
[48] Citing Tabas v. California Manufacturing Co., G.R. 80680, January 26, 1989.
[49] Hydro Resources Contractors Corp. v. Pagalilauan, *supra* note 46, at 403..
[50] *Id.* at 402-403
[51] CODE OF PROF. RESP., Canon 1.

plans to pursue.[52] The human agents that run the inanimate corporation significantly influence the way the in-house counsel conducts his or her legal affairs.

> If the single client is a corporation, its officers will have significant control over the lawyer's professional life – [his or] her title, income, assignments, office space, and support staff. Put [him or] her in a small city with two children headed for college and a hefty mortgage, and the plot does begin to thicken. While such facts are supposed to be irrelevant to the lawyer's professional conduct, realistically it may strongly influence how she reacts when faced with a duty to [his or] her client or others that the CEO [Chief Operating Officer] suggests [he or] she ignore. ('Don't be such a Goody Two-Shoes. Learn how to play ball.')[53]

Professor Stephen Gillers describes some hypothetical situations that may arise in an in-house counsel's "donning of two hats." If a high-ranking officer of the corporation intends to implement a business decision that the in-house counsel believes is unwise but defensible, should the in-house counsel approve a legal but unprofitable venture? Should the in-house counsel allow a profitable venture that he or she knows may later on subject the corporation to civil antitrust liability? How will the in-house counsel manage an action that will personally benefit an officer but that which will violate the officer's fiduciary obligation to the corporation? [54]

The main difference between the in-house counsel and the retained corporate lawyer lies in the element of employment. The in-house counsel takes his or her employment into consideration when faced with corporate ethical issues. His or her very livelihood is always placed on the line whenever he or she has to decide on a course of action regarding an ethical issue. The most that can happen to a retained corporate lawyer is that his or her retainer may be terminated. On the other hand, the in-house counsel serves a single client, the corporation.

The Board of Directors and the corporate officers exercise a significant amount of control over the in-house counsel's livelihood and career as an employee of the corporation. This, in turn, will determine the extent to which an in-house counsel will stay true to his fiduciary oath when

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[52] J. TRIPLETT MACKINTOSH & KRISTEN ANGUS, *How E.U. Laws Leave In-House Counsel Outside The Privilege*, THE INTERNATIONAL LAWYER, 39 (2004)

[53] GILLERS, *supra* note 4, at 542.

[54] *Id.*

faced with ethical issues. If the in-house counsel does not have enough guidance in ethical rules, he or she will be more likely to be forced to act in favor of keeping his livelihood. In some instances, this will mean a transgression of his or her ethical duties as a lawyer. The legal profession as a whole will then suffer. It thus becomes all the more crucial to have special ethical rules to guide this special breed of corporate lawyer.

V. AMERICAN AND PHILIPPINE ETHICAL RULES COMPARED

A. THE AMERICAN BAR ASSOCIATION'S MODEL RULES OF PROFESSIONAL CONDUCT ("MODEL RULES")

The American Bar Association's Model Rules of Professional Conduct traces its roots all the way back from 1836. In 1836, when the legal profession was relatively free from any regulation, David Hoffman, a professor of law at the University of Maryland, published fifty *Resolutions In Regard To Professional Development* for his students.[55] This paved the way for Professor George Sharwood's *A Compendium of Lectures on the Aims and Duties of the Profession of Law.*[56] The *Lectures* greatly influenced the Alabama Bar Association to publish its "Code of Ethics" in 1887. This is considered as the first code of ethics enacted by a state bar association in the United States.

The American Bar Association ("ABA") started with a small, select membership in 1878. It was not until August 27, 1908 that the ABA would approve 32 Canons of Professional Ethics. This was the first national standard or model code for legal ethics in the United States. It was based largely on the Alabama model.[57]

At first, the ABA treated the Canons of Professional Ethics as private law to govern its members. Its remedies for violations of its rules were very limited. The ABA could expel a member from its association for noncompliance with these Canons. However, a lawyer did not have to be admitted into the ABA in order to practice law.[58]

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[55] RUSSELL PEACRE, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO L.J. OF LEGAL ETHICS 241 (1992).

[56] MAXWELL BLOOMFIELD, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD.L.REV. 673, 687 (1979).

[57] RONALD ROTUNDA, PROFESSIONAL RESPONSIBILITY, 2 (2001).

[58] *Id.*

Over the years other states started to adopt the ABA Canons as positive law. If a lawyer violated the ethics rules adopted by the state Supreme Court, the lawyer could now be suspended from practice or be disbarred. The ABA also established an Ethics Committee that issued opinions interpreting its Canons. Various courts across the country likewise soon began to cite the ABA Canons as legal authority, and enforced its legal requirements.[59]

In 1969, the ABA adopted a completely revised set of rules, known as the *Code of Professional Responsibility*. This *Code* was investigated upon by the Department of Justice when it noted serious antitrust problems. It was argued that lawyers will agree with each other to abide by certain purportedly "ethical" restrictions that would restrict competition. The ABA thus changed its title to what is now known as the *Model* Code of Professional Responsibility, "that such codes might serve only as exemplars for the proper conduct of legal practitioners but that the power of disciplinary enforcement rests with the judiciary."[60]

The ABA successfully persuaded state and federal courts to adopt its Model Code as law, as an enacted rule of court. State courts have also cited the ABA Model Code as evidence of the law even in states where it had not been officially adopted. Courts have likewise also often cited and relied on the ABA Formal and Informal Opinions that interpret the Model Code, even though they are not per se law.[61]

Between 1977 and 1983, the ABA established the Kutak Commission, headed by the late Robert J. Kutak, to draft a new code of conduct for lawyers. The new Model Rules totally revised the format, organization and language of the previous Model Code. The Model Rules were, in part, a response to criticisms about the Model Code's focus on litigation and its three-tiered structure of canons, ethical considerations, and disciplinary rules.[62] This Kutak Commission drafted what is now known as the ABA Model Rules of Professional Conduct, which the ABA House of Delegates approved on August 2, 1983. There is no "effective" date because the proposed law does not bind ABA members. Instead, it binds lawyers practicing in a jurisdiction where the court has adopted the ABA Rules as

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[59] ROTUNDA, *supra* note 58, at 5.

[60] ABA Informal Opinion 1420 (June 5, 1978) as cited in ROTUNDA, *supra* note 58, at 6.

[61] ROTUNDA, *supra* note 58, at 5.

[62] GEOFFREY HAZARD, *Rules of Ethics: The Drafting Task*, 36 THE RECORD OF ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 77 (1981), as cited in ROTUNDA, *supra* note 58, at 7.

substantive law.[63] By the end of 1999, over 80% of the states, including the District of Columbia, had adopted the Model Rules, subject to various non-uniform amendments. The Model Rules are also frequently cited as evidence of the law in various court decisions even if the jurisdiction does not formally adopt a version of it.

> The Model Rules of Professional Conduct are intended to serve as a national framework for implementation of standards of professional conduct...no set of national standards that speaks to such a diverse constituency as the legal profession can resolve each issue to the complete satisfaction of every affected party...And the Model Rules, like all model legislation, will be subject to modification at the level of local implementation. Viewed as a whole however, the Model Rules represent a responsible approach to the ethical practice of law and are consistent with professional obligations imposed by other laws, such as constitutional, corporate, tort, fiduciary and agency law.[64]

The Model Rules of Professional Conduct distinguish between what must be done, what should be done, and what may be done. When the black letter Rules use imperative language such as "shall"[65] or "shall not,"[66] then these violations are disciplinable.[67] Others that are generally cast with the term "may"[68] are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.[69] The Rules also presuppose a larger legal context that includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general.[70] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.[71]

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[63] ROTUNDA, *supra* note 58 at 7.

[64] ROBERT MESERVE, *Introduction* in MODEL RULES OF PROFESSIONAL CONDUCT, xiii (2004 ed.).

[65] For instance, Model Rule 1.3 on Diligence provides that "A lawyer **shall** act with reasonable diligence and promptness in representing a client." (emphasis supplied).

[66] Under Model Rule 4.2 on Communication With Person Represented by Counsel, "In representing a client, a lawyer **shall not** communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." (emphasis supplied).

[67] ROTUNDA, *supra* note 58, at 10.

[68] Model Rule 1.15 on Safekeeping [of Client] Property provides, "A lawyer **may** deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose." (emphasis supplied).

[69] Scope of ABA Model Rules [14], in MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 65, at 3.

[70] Scope of ABA Model Rules [14] & [15], in MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 65, at 3.

[71] Scope of ABA Model Rules [19], in MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 65, at 4.

The violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such cases that a legal duty has been breached. In addition, the violation of a Rule does not necessarily warrant any other non-disciplinary remedy, such as the disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.[72]

The Model Rules follow the format in various Restatements published by the American Law Institute. The Model Rules place the Rule in text, often referred to as black letter text and then include, in official "Comments," additional material that elaborates on the Rule.[73] These Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.[74] The Comments are likewise used to alert lawyers to their responsibilities under other pertinent laws.[75] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. They are intended as guides to interpretation, but the text of each Rule is authoritative.[76]

B. THE PHILIPPINE CODE OF PROFESSIONAL RESPONSIBILITY ("CPR")

The American Bar Association (ABA) framed the Canons of Professional Ethics for lawyers in 1908. As a colony of the United States, these Canons were adopted by the Philippine Bar Association in 1917. The Philippine Bar Association (PBA) later went on to further adopt its revised version[77] in Article IX, paragraph 6 of its Revised Constitution, which provides that "The Association adopts and makes its own Code of Ethics of the American Bar Association." However, it is unknown whether the PBA meant to adopt only the first 32 Canons or all 46 in 1946.[78] While the Canons have not been reduced to statutory rules, they have received judicial

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[72] Scope of ABA Model Rules [20], in MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 65, at 4-5.

[73] Rotunda, *supra* note 58, at 7.

[74] Scope of ABA Model Rules [14], in MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 65, at 3

[75] Scope of ABA Model Rules [15], in MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 65, at 3.

[76] Scope of ABA Model Rules [21], in MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 65, at 5.

[77] In Re: Tagorda, 53 Phil. 37 (1929).

[78] GLADWELL MALCOLM, *Legal Ethics*, as cited in CODE OF PROFESSIONAL RESPONSIBILITY, viii. (ANNOTATED).

recognition by being cited and applied by the Supreme Court in its decisions and resolutions and have been considered as sources of legal ethics.[79]

The Integrated Bar of the Philippines Committee on Responsibility, Discipline and Disbarment drafted a proposed Code of Professional Responsibility in 1980.[80] In receiving the canons of legal ethics, the Supreme Court approved and promulgated the Code of Professional Responsibility on June 21, 1988. The Code of Professional Responsibility is based on the 1970 ABA Model Code of Professional Responsibility, the 1974 Canadian Bar Association's Code of Professional Conduct, the District of Columbia's Code of Professional Responsibility, the California State Bar's Rules of Professional Conduct, and the Philippine Bar Association's Canons of Professional Ethics of 1917 and 1946. It is likewise based on other statutes such as the Civil Code[81], An Act Providing for a Local Government Code of 1991[82], and the Code of Conduct and Ethical Standards for Public Official and Employees[83]. Some of its provisions are also drawn from the Rules of Court, such as Section 20 of Rule 138 on the duties of attorneys. It also refers to various decisions and circulars of the Supreme Court.

Before the approval of the Code, the Supreme Court had promulgated Rule 139-B on Disbarment and Discipline of Attorneys of the Revised Rules of Court. This granted the Integrated Bar of the Philippines the concurrent power to investigate its members, preserving, however, the final authority to suspend and disbar attorneys to the Supreme Court, pursuant to Section 5(5), Article VIII[84] of the 1987 Constitution.[85]

The CPR consists of 22 Canons and 77 Rules. It is divided into four chapters, namely, The Lawyer and Society; The Lawyer and the Legal Profession; The Lawyer and the Courts; and the Lawyer and the Client.

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[79] Director of Lands v. Ababa , G.R. No. 26906, 88 SCRA 523, Feb. 27, 1979.

[80] This Committee was composed of Dean Irene Cortes as Chairman and Justice Carolina Grino-Aquino, Attys. Gonzalo W. Gonzales, Marcelo B. Fernan, Camilo Quiason, Jose F. Espinosa and Carmelo V. Sison as members, with former Chief Justice Roberto Concepcion and former Justice Jose B.L. Reyes as consultants, and Prof. Myrna S. Feliciano and Atty. Concepcion Lim-Jardeleza as resource persons.

[81] Rep. Act No. 386, as amended.

[82] Rep. Act No. 7160.

[83] Rep. Act No. 6713.

[84] "The Supreme Court shall have the following powers:

...

Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged...

[85] CODE OF PROF. RESP. *supra* note 81, at viii.

An advocate, in the discharge of his duty, knows but one person in the entire world, and that person is his client.[86] A lawyer needs to know who his or her client is so that he or she will be able to competently perform the fundamental responsibilities required of him as an attorney. These include, but are not limited to, the duties of confidentiality, competence, diligence, among others. The responsibilities to clients, and the limits to these responsibilities as well, are the primary focus of ethical and legal rules that govern lawyers.[87]

The triangular arrangement of the corporation, its human constituents, and the in-house counsel creates a novel problem concerning client identity. The client is no longer simply the person who walks into a law office.[88] As such, corporations, trade associations, estates and governments can all be clients.

Lawyers however, must still be people of course. Whether they practice in a partnership, in a professional corporation, or with a prepaid legal services plan, one rule that has not changed is that flesh-and-blood professionals will be responsible for their failures.[89] In the case of the in-house counsel, the stakes are higher because of the constant risk of losing one's livelihood. Therefore, the in-house counsel needs to be able to refer to ethical rules that will clear up to whom he or she owes his or her ethical duties. Only then will the in-house counsel be able to effectively fulfill these ethical duties themselves.

The American Model Rules have a particular provision that specifically instructs lawyers on how to deal with clients that are juridical entities. In contrast, the Philippine Code of Professional Responsibility does not contain a similar provision. The "client" under the CPR remains largely confined to the image of that person who walks into a law office.[90] A corporation does not quite fit that traditional conception of a human client in litigation. Therefore, there is a need to have a primary rule that specifically deals with entity clients before delving into the more general ethical rules.

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[86] 2 Trial of Queen Caroline 8 (J. Nightingale ed., 1821) as quoted in GILLERS, *supra* note 4, at 21.
[87] GILLERS, *supra* note 4, at 21.
[88] Westinghouse Electric Corp. v. Kerr McGee Corp., 580 F.2D 1311 (7TH CIR. 1978).
[89] GILLERS, *supra* note 4, at 25.
[90] Westinghouse Electric Corp. v. Kerr McGee Corp., 580 F.2D 1311 (7TH CIR. 1978).

VI. ABA MODEL RULE 1.13: THE ORGANIZATION AS CLIENT[91]

A. WHO IS THE CLIENT?

The ABA Model Rules have a distinct provision for lawyers whose clients are juridical entities. This is one of the new provisions created under the Kutak Commission. The Kutak Commission, as earlier discussed, was commissioned to revise the earlier Model Code that focused too much on litigation.[92]

The creation of a Model Rule 1.13[93] explicitly recognizes the need to have specific rules regarding juridical entities as clients. In the earlier Model Code, there was no counterpart to this new Rule under Disciplinary Rules.[94] The precursors to this Rule offered merely a bare bones[95] approach which did not quite appreciate the need for considering the organization as an entity.[96]

Model Rule 1.13(a) provides that "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." This Model Rule does not directly define who or what a juridical entity client is. Instead, it explains client identity by way of explaining lawyer representation. Paragraph (a) indicates that there is an organization that exists as a separate legal entity. The lawyer represents this entity that acts through its duly authorized constituents. Therefore, the lawyer does not represent these duly authorized constituents. These constituents merely serve as human vehicles through whom the organization

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[91] From this section onwards, please refer to the pertinent Model Rules as cited in full in the Annexes section of this paper.

[92] ROTUNDA, *supra* note 58, at 7.

[93] See Annex "A".

[94] The former ABA Model Code divided its Rules into two: Ethical Considerations ("EC"), which were merely aspirational duties, and the Disciplinary Rules ("DR"), which were mandatory in character. ROTUNDA, *supra* 58, at 9.

[95] RONALD ROTUNDA AND ROBERT HACKER, *Representing the Corporate Client and the Proposed Rules of Professional Conduct*, 6 CORP. L. REV. 269, as cited in ROTUNDA, *supra* note 58, at 339.

[96] For instance, EC 5-18 stated that "a lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24, on the other hand, states that although a lawyer "may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5-107(B) provided that a lawyer "shall not permit a person who...employs...him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." ROTUNDA, *supra* note 58, at 336.

acts because it is inanimate. However, inanimate as it is, the organization really is the client. And however animated or alive all the agents are, they are not the proper clients of the lawyer. It is highly important to distinguish this as there is a tendency among in-house counsels to confuse such human agents as clients. This is because the lawyer traditionally deals with these human agents in order to deal with the organization.

This Model Rule crystallized what is now known as the entity theory of ethics.[97] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.[98] The officers, directors, employees and shareholders are the constituents of the corporate organizational client. To illustrate, a competitor sues a corporate client for an alleged antitrust violation. The corporate lawyer does not represent a shareholder of the defendant corporate client who is likewise a shareholder of the competitor. The lawyer instead represents the corporation as an entity.[99]

Applying Paragraph (a) to the triangular arrangement of the corporation-constituent-in-house counsel, the Model Rule makes it clear that it is the corporation that the in-house counsel truly represents. Again, it is important to make this distinction in order to remove any doubts as to issues regarding representation and client identity. The in-house counsel mainly deals with the Board of the Directors, officers, shareholders and employees. As earlier discussed, the corporate lawyer never deals with the client as such, but only with client people.[100] These "client people," however much they act in representation of the corporation, are not the proper clients of the in-house counsel.

B. ETHICAL "MIRANDA WARNINGS"

It is usually clear that whenever a human constituent of the corporation consults with the in-house counsel, that human constituent is consulting on behalf of the corporation. For example, if a department manager seeks advice from the legal counsel on departmental issues, the

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[97] The entity theory, as embodied in Rule 1.13, states that the lawyer for an organization, such as a corporation, does not represent the constituent members of the organization, such as its shareholders. Rather, the lawyer represents the organization as an entity. ROTUNDA, *supra* note 58, at 350.

[98] Model Rule 1.13 Comment [1]

[99] ROTUNDA, *supra* note 58, at 337.

[100] HAZARD, *supra* note 33, at 1011, 1013

context usually makes it clear that the manager is seeking advice on behalf of the corporation.[101]

However, when a human constituent wants to pursue an interest that is adverse to that of the corporation, a conflict of interest may arise. Remember that the corporation can only act through its human constituents. These human constituents, therefore, are presumed to act for the corporation, and not against it. Model Rule 1.13(f)[102] is the "Miranda warning"[103] provision that exhorts an in-house counsel to give some sort of "Miranda warning" to an adversely placed human constituent. "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[104]

There are times when the organization's interests may be adverse to those of its constituents. In such circumstances the lawyer should advise any constituent, whose interest is adverse to that of the organization, of the potential conflict of interest which may arise from it; that under such circumstances, the lawyer cannot represent such constituents; and that he or she may wish to obtain independent representation. Care must be taken to ensure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.[105] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.[106]

Paragraph (f) obliges the in-house counsel to clarify his or her role as lawyer for the corporation in a Miranda warning fashion whenever he or she is dealing with any human constituent that he or she knows represents interests adverse to the corporation. Whether the in-house counsel "knows or reasonably knows," he or she should remind the human constituent involved that he or she represents the corporation. Paragraph (f) addresses the need of an in-house counsel to be able to categorically state that in case

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[101] Cole v. Ruidoso Mun. Sch., 43 F. 3d 1373 (10th Cir. 1994).

[102] See Annex "A".

[103] T. DACEY, Goulston & Storrs, http://library.findlaw.com/2003/Oct/31/133126.html, accessed on 1/15/08.

[104] Model Rule 1.13 (f), see also Annex "A".

[105] Model Rule 1.13 Comment [10].

[106] Model Rule 1.13 Comment [11].

of competing interests, he or she serves the interests of and is loyal to the corporation as the client. It removes any confusion as to client loyalty. It will likewise diminish the tendency of all these competing interests to influence the in-house counsel, since he or she will be clear as to the identity of the corporation as the client.

C. DUAL REPRESENTATION

Model Rule 1.13(g)[107] provides that a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7[108]. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.[109] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Such an action may be brought nominally by the organization, but usually there is, in fact, a legal controversy over management of the organization.[110]

The question can arise whether counsel for the organization may defend such action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7[111] governs who should represent the directors and the organization.[112]

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[107] See Annex "A".
[108] See Annex "B".
[109] Model Rule 1.13 Comment [12].
[110] Model Rule 1.13 Comment [13].
[111] See Annex "B".
[112] Model Rule 1.13 Comment [14].

A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless: 1) the circumstances are such that the affiliate should also be considered a client of the lawyer; 2) there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates; or 3) the lawyer's obligations to either the organizational client or the new client are likely to materially limit the lawyer's representation of the other client.[113]

Paragraph (g) is another provision that clears up representation issues involving a constituent who holds interests adverse to the corporation. For example, a stockholder or group of stockholders may, for the benefit of the corporation, file a derivative suit in order to protect or vindicate corporate rights, whenever officials of the corporation refuse to sue or are the ones to be sued or hold the control of the corporation.[114] Paragraph (g) instructs the in-house counsel that, in case Model Rule 1.7 requires it, to procure the consent of the client through an appropriate official of the organization other than the individual to be represented.

D. THE UP THE LADDER APPROACH

In some cases, a constituent's interest may become so adverse that the constituent plans to do something that is violative of a legal obligation to the corporation. In other cases, this contemplated action may be a violation of a law itself. The corporation stands to be substantially injured in both cases. Model Rule 1.13 (b)[115] instructs the in-house counsel to employ an up the ladder, exhaustion of remedies approach in dealing with these adverse constituent interests.

Paragraph (b) affords the in-house counsel two different levels of actions depending on the severity of the contemplated action. First, Paragraph (b) exhorts the in-house counsel to act in favor of what will be reasonably necessary in the best interest of the organization. When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones

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[113] Model Rule 1.7 Comment [34].
[114] Pascual v. Orozco, 19 Phil 83 (1911).
[115] See Annex "A".

entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes it clear, however, that when the lawyer knows that the organization is likely to be substantially injured by the action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization.[116]

Paragraph (b) also makes it clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or any similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.[117]

The second level thus instructs the in-house counsel to employ an "exhaustion of internal remedies"[118] course of action. In some instances, there is a need to refer to higher authority due to the seriousness of the adverse interests involved. Some cases merit more action than just efforts at upholding the best interests of the corporation. Paragraph (b) directs the in-house counsel to climb up the corporate ladder in order to determine what the corporation really "wants." This is, of course, in consideration of Model Rule 1.13(a):[119] that the [corporation] acts *through* its duly authorized constituents.[120] One constituent's adverse interest against the corporation may not necessarily be shared by another constituent. Paragraph (b) makes it the in-house counsel's ethical duty to go up the ladder and convince constituents with higher authority to veto or reverse an adverse course of action being contemplated by a lower constituent group.

In determining how to proceed under Paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences; the responsibility in the organization and the apparent motivation of the person involved; the policies of the organization concerning such matters; and any other relevant considerations.

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[116] Model Rule 1.13 Comment [3].
[117] Model Rule 1.13 Comment [5].
[118] ROTUNDA, *supra* note 58, at 339.
[119] See Annex "A".
[120] ROTUNDA, *supra* note 58, at 341.

Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter. For example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in his or her conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization.

If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Even in circumstances where a lawyer is not obligated by [Model] Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.[121]

Paragraph (b)'s best interest approach justifies the in-house counsel who is faced with an adverse constituent to work for the best interests of the corporation. As an employee of the corporation, the in-house counsel is supposed to work for the interests of the corporation. Paragraph (b) limits these interests and directs the in-house counsel to work for the best interests of the corporation that will not result in a violation of a legal obligation to the organization, a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization.

In essence, Paragraph (b) exhorts the in-house counsel to uphold his lawyer's hat over and above his employee hat when the interests defy legal rules and processes. It likewise justifies the in-house counsel in prioritizing the corporation to such an extent that such constituents are unable to use this as leverage against the in-house counsel's employment in the corporation.

The up the ladder, exhaustion of remedies approach will prevent any one constituent from exerting pressure over the in-house counsel to give in to this constituent's demands. This approach allows the in-house counsel to rely on the power of higher authority to veto, overturn or reverse any action

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[121] Model Rule 1.13 Comment [4].

of a lower-ranked constituent. It further allows for an internal review process by a higher ranked constituent over the actions of the lower ranked one. Such a process eventually lessens the pressure on the in-house counsel to please any one constituent group, because the final decisions on matters shall come from higher constituent authority.[122]

VII. THE PHILIPPINE CODE OF PROFESSIONAL RESPONSIBILITY

A. THE CLIENT WHO STILL WALKS INTO THE OFFICE

The CPR does not contain a Rule that treats of entity clients similar to Model Rule 1.13.[123] In fact, the word "client" is not defined anywhere in the CPR. The CPR does not provide a direct definition of the word. Under our code, there exists no provision similar to Model Rule 1.13 (a) which adequately defines the term "client" by further explaining representation. Unfortunately, the definition of a client is only implicitly defined in our jurisprudence.

The nature of the lawyer-client relationship is premised on the Roman Law concepts of *locatio conductio operarum* (contract of lease of services) where one person offers his services and another hires him without reference to the purpose for which his services are to be performed. Such services may be compensated by *honorarium* or for hire, and *mandato* (the contract of agency). In this case, a friend on whom reliance could be placed makes a contract in his name, but gives up all of his gain by contract to the person who requested him.[124] The "client" in the Philippine legal profession is thus defined by way of describing the attorney-client relationship. Given the definition above, it is evident that there is an emphasis on the client as a natural person. As will be seen later on, the CPR still adheres to the traditional notion that the client is a natural person who engages the services of a lawyer for legal advice or for the purposes of prosecuting or defending a suit in his behalf and usually for a fee.[125]

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[122] In some extreme cases, the Board of Directors may choose to sever the in-house counsel's employment due to disagreement. This is what is known as retaliatory discharge, or the retaliation by the employer for the lawyer's either insisting on adhering to mandatory ethical norms of the profession or for refusing to violate them. General Dynamics Corp. v. Superior Court 7 CAL. 4TH 1164, 876 P.2D 487, 32 CAL RPTR. 2D 1 (1994). This topic, which will have to involve a discussion on laws on termination of employment, is beyond the scope of this paper.

[123] See Annex "A".

[124] Regala v. Sandiganbayan, G.R. 108113, 262 SCRA 123, 137-138, *Sep.* 20, 1996

[125] ERNESTO PINEDA, LEGAL AND JUDICIAL ETHICS, 5 (1999 ed.).

The closest provision in the CPR which pertains to a juridical entity can be found in an earlier proposed one. This was, however, not included in the final approved version of the CPR. This proposed CPR Rule was supposed to have read:

> Rule 9.03[126] A lawyer working with non-lawyers, or with a corporation, association, or partnership not organized for the practice of law, may render legal services only to these persons or entities, but not to their clients.[127]

However, a cursory reading of the pertinent Comments on the Proposed Code of Professional Responsibility[128] shows that this Rule 9.03 was intended to prevent the unauthorized practice of law by non-lawyers or by associations.[129] One of the Comments further discusses that a corporate agency cannot practice law by hiring a lawyer to practice for it for profit because of the nature of privilege and trust relation between the attorney and client.[130]

A Comment, however, was made that "It may, however, hire an attorney to conduct its legal affairs."[131] It was likewise mentioned that,

> Moreover, the relation of trust and confidence growing out of the employment and entering into the performance of every duty which an attorney owes to his client cannot arise where the attorney is employed by a corporation to practice for it, his immediate allegiance being to the corporation as his employer, and he owing, at best, a secondary and divided loyalty to the clientele of his corporate employer. The intervention of the corporation is destructive of that confidential and trust relation, and is obnoxious to the law.[132]

On some level, the IBP Committee on Professional Responsibility, Discipline and Disbarment did slightly recognize, albeit in a different form, the conflict created by the triangular arrangement common in corporations with in-house counsels. The lawyer contemplated in this situation is employed to practice for, but not to represent, the corporation. The situation is similar to that of our triangular arrangement caused by a juridical

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[126] There is no CPR Rule 9.03 in the final approved version promulgated by the Supreme Court.

[127] CODE OF PROF. RESP.

[128] INTEGRATED BAR OF THE PHILIPPINES, PROPOSED CODE OF PROFESSIONAL RESPONSIBILITY (1979).

[129] *Id.* at 38.

[130] Re Cooperative Law Co., 198 NY 479, 92 NE 15 (1910), as cited in INTEGRATED BAR OF THE PHILIPPINES,

[131] *Id.* at 38.

[132] Re Cooperative Law Co., 198 NY 479, 92 NE 15 (1910), as cited in INTEGRATED BAR OF THE PHILIPPINES, *Id.* at 39.

entity that acts through human constituents. However, the positions of the lawyer and the officers, directors, stockholders, etc. are interchanged. The lawyer becomes the human constituent who acts for the corporation but who also represents the clients of the corporation as well. This proposed Rule was not included in the final approved version promulgated by the Supreme Court. This would have been the only CPR Rule that actually discusses juridical entities as clients.

B. ETHICAL MIRANDA WARNINGS: SHOUTING OUT INTO THE VOID

The closest to an ethical "Miranda warning" of sorts comparable to Model Rule 1.13 (f)[133] in the CPR is CPR Rule 15.08. It provides that "a lawyer who is engaged in another profession or occupation concurrently with the practice of law shall make clear to his client whether he is acting as a lawyer or in another capacity."

However, CPR Rule 15.08 is sorely insufficient to meet the needs of the in-house counsel. A cursory reading of this CPR Rule will show that it contemplates a lawyer who holds two separate professions at the same time. It does not quite capture the situation of the in-house counsel who simultaneously dons the twin hats of a lawyer and of an employee.[134] The in-house counsel cannot divorce these dual roles because he or she is precisely a lawyer who is employed as such for the corporation. He or she cannot clarify that he or she is acting *only* as a lawyer at any given point in time, or *only* as an employee at another. The in-house counsel is an *employed lawyer*. He or she is tasked to uphold the Constitution, obey the laws of the land and promote respect for law and legal processes[135] *and* business interests for more profits. He or she does not have the luxury of telling the corporation that profits will have to take a back seat in order to comply with the laws. Upholding the lawyer hat creates constant risks to the in-house counsel's livelihood.

A "Miranda warning" similar to Model Rule 1.13 (f) is supposed to allow the in-house counsel to clarify his or her role as the lawyer for the corporation as the client. He or she should be able to categorically state that in case of competing interests between constituencies, he or she stands by the corporation as the client. However, it becomes difficult for the in-house

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[133] See Annex "A".

[134] Hydro Resources Contractors Corp. v. Pagalilauan, G.R. 62909, 172 SCRA 399, 403, Aprl. 18, 1989

[135] CODE OF PROF. RES., Canon 1.

counsel to justify this role when he or she does not know who the client is in the first place. Even if CPR Rule 15.08 could be stretched in its meaning, the in-house counsel cannot "make clear to his client whether he is acting as a lawyer or in another capacity" because he or she is not clear as to who is the client. To whom is the in-house counsel trying to make his or her role clear?

This goes back to the triangular arrangement caused by the nature of the corporation as a juridical entity. The corporate lawyer never deals with the client as such, but only with client people.[136] If the in-house counsel does not know who the client is, and the corporation acts through its constituents, who among the client people is he or she supposed to explain that he is acting as lawyer? How does the in-house counsel know which of the client people are the ones who truly represent the corporation, to whom he or she owes the clarification?[137]

The Comments on the Proposed Code of Professional Responsibility explain that CPR Rule 15.08 pertains to lawyers who practice dual or multiple professions.

> ...It is not uncommon for lawyers to combine law practice with some other occupation. The fact of being a lawyer does not preclude him from engaging in business, and such practice is not necessarily improper. Impropriety arises when the business is of such a nature or is in such a manner as to be inconsistent with the lawyer's duties as a member of the Bar.
>
> Ethical inconsistency arises when the business is one that will readily lend himself as a means of procuring professional employment for him or is such that it can be used as a cloak for an indirect solicitation on his behalf, or is of a nature that would be regarded as the practice of law.
>
> Hence, it is recommended that the lawyer should keep any business in which he is engaged entirely separate and apart from his practice of law. He must, in any event, conduct it with due observance of the standards required of him as a lawyer.
>
> ...
>
> The lawyer should keep any business in which he is engaged separate from his practice of law, and make clear to the public in what capacity he is acting."[138]

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[136] HAZARD, *supra* note 33, at 1011, 1013.

[137] Model Rule 1.13(a), see Annex "A".

[138] INTEGRATED BAR OF THE PHILIPPINES, *supra* note 129, at 65-66.

C. DUAL REPRESENTATION: WHO SIGNS THE CONSENT SLIP?

CPR Rule 15.03 is the Philippine rule on conflicts of interest. It is the closest counterpart to the Model Rule 1.13(g)[139] on dual representation in cases of conflict of interest. CPR Rule 15.03 provides that "a lawyer shall not represent conflicting interests except by **written consent of all concerned given after a full disclosure of the facts.**" (Emphasis supplied)

CPR Rule 15.03 absurdly stretches the scope of our Code of Professional Responsibility to apply to triangular arrangements without the necessary guidelines found in Model Rule 1.13. First, the corporation as the client is a juridical entity that can only act through its agents. As such, it requires human agents to provide written consent on its behalf. On a figurative and literal level, the corporation, as an inanimate entity, is incapable of doing so.

Model Rule 1.13(a)[140] and the entity theory of ethics[141] envision the corporation as a separate entity to whom the in-house counsel owes its ethical duty as a client. Assuming but not conceding, that this fiduciary duty to the corporation could be sufficiently inferred from the phrase "all concerned" in CPR Rule 15.03, it remains unclear to whom such phrase refers to. Paragraph (a) provides that as the organization acts through its duly authorized constituents, it is these constituents who are the human agents concerned in this matter. In addition, Paragraph (g), as earlier discussed, states that subject to Model Rule 1.7 on Conflict of Interest: Current Clients, in cases of dual representation *within* the constituent groups, "the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."

CPR Rule 15.03 fails to anticipate the possibility that a conflict of interest may arise from *within* a triangular arrangement. This is a novel conflict of interest situation where the conflict arises between different constituents who are presumed to act for the interests of the corporation as the singular client. The difficulty stems from the fact that the CPR does not categorically define the corporation (or organization, as per Model Rule 1.13) as a client.

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[139] See Annex "A".

[140] See Annex "A".

[141] The entity theory, as embodied in Model Rule 1.13, states that the lawyer for an organization, such as a corporation, does not represent the constituent members of the organization, such as its shareholders. Rather, the lawyer represents the organization as an entity. ROTUNDA *supra* note 58, at 350.

In determining the scope of the phrase "all concerned," it is crucial to determine 1) who the client is and 2) that there exist duly authorized constituents who are supposed to act in the interest of such a client. Otherwise, consent to dual representation will not be an informed one which may result in the in-house counsel representing other constituents having an interest adverse to the corporation. An inadvertent consent given to allow dual representation by the in-house counsel will only serve to muddle the in-house counsel's fundamental problem of determining to whom ethical duties are owed.

In fact, the proposed wording of CPR Rule 15.03 was originally intended to be read as follows: "A lawyer shall not represent conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose. However, in matters which are neither litigious nor contentious, he may represent clients with conflicting interests after full disclosure to them and with their prior consent."[142]

An examination of the Comments on the Proposed Code of Professional Responsibility will reveal that CPR Rule 15.03 was primarily intended to prevent conflicts of interest under litigious circumstances. The Comment provides:

> "This rule departs from the Canons of Professional Ethics which permits a lawyer to represent conflicting interests *even in a litigation* or where the issues between the parties are contentious; provided that the parties expressly agree.
>
> Under this rule, the lawyer cannot represent both parties **in a case,** even with their consent. *It is hard to visualize litigation where a lawyer can be justified in representing both the conflicting interests.*
>
> Where a lawyer is asked to draft a contract between the parties or to intervene in a matter which requires minor legal advice, (sic) the lawyer should secure the written consent of the parties.
>
> But even in these cases, the lawyer should not continue to act for both of the parties if a contentious issue develops between them. This rule applies to *multiple clients, like co-plaintiffs or co-defendants,* with potentially conflicting interests. The lawyer should immediately

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[142] INTEGRATED BAR OF THE PHILIPPINES, *supra* note 129, at 59.

> withdraw from serving multiple clients the moment any contentious issue becomes imminent.[143] (Emphasis supplied)

Again, the conflict of interest rule in the Philippine Code of Professional Responsibility focuses heavily on the conflict that occurs within the traditional litigation setting. A reading of the Comments on the Proposed Code of Professional Responsibility reflects that the framers of the CPR had in mind opposing natural parties as the "all concerned." The conflict of interest within the triangular arrangement, however, is quite a novel one that involves conflicts of interest between groups of constituents in their representation of a juridical entity. Therefore, it is imperative that those through whom the corporation acts are defined as a first step to determine who will be concerned in giving consent to dual representation.

D. THERE IS NO LADDER TO CLIMB, NOT EVEN A FOOT STOOL IN SIGHT

The CPR does not have a "best interests, up the ladder" Rule similar to Model Rule 1.13 (b).[144] The CPR Rule comparable to Model Rule 1.13 (b) is CPR Rule 19.02. This Rule provides that "a lawyer who has received information that his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon the client to rectify the same, and failing which he shall terminate the relationship with such client in accordance with the Rules of Court."[145]

CPR Rule 19.02 thus exhorts the in-house counsel to tell the client to correct the fraud done. If the client does not correct or rectify the fraud done, then the in-house counsel shall terminate the attorney-client relationship.

The provision above takes the in-house counsel's novel situation rather simplistically. The fraud caused may have been perpetuated by a constituent who acting under the guise of due authority from the corporation, really intends to pursue an adverse interest. CPR Rule 19.02 does not anticipate the potential fraud which may be performed by an adversely interested constituent *through whom* the corporation is supposed to act. In essence, the fraudulent acts may not be imputed to the corporation if

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[143] INTEGRATED BAR OF THE PHILIPPINES, *supra* note 129, at 62.
[144] See Annex "A".
[145] CPR RULE 19.02.

the act was done by an adversely interested constituent who is not duly authorized to act[146] for the corporation.

The in-house counsel cannot filter through the various competing interests to find out which constituent truly represents the corporation without a similar Model Rule 1.13 (a) and (b)[147] in place. The in-house counsel needs to know who the client is in order to know what is in its best interests. Only then will the in-house counsel be able to recognize if a fraud has been perpetrated or is being perpetrated as well. The "fraud" in CPR Rule 19.02 is analogous to the officer, employee or other person associated with the corporation [who], intends to act or refuses to act on a matter related to his or her representation which may result in a violation of a legal obligation to the corporation, or a violation of the law that might be imputed to the corporation, and is likely to result in substantial injury to the corporation under Model Rule 1.13(b).[148]

If the in-house counsel does not know who the client is how is he supposed to know what is in the corporation's best interest? Corollary to this, if the identity and interests of the client are unclear, how is the in-house counsel supposed to know if a constituent's interest is an adverse one? How is the in-house counsel then supposed to know that something fraudulent was done or is being done?

CPR Rule 19.02 proceeds to instruct the in-house counsel to terminate the attorney-client relationship. This seems absurd precisely because the attorney-client relationship referred to here is intrinsically connected to the lawyer's employment within the corporation. CPR Rule 19.02 fails to recognize an in-house counsel's unique predicament which exposes his or her livelihood to greater risk. It pertains more to other corporate lawyers, particularly retained ones, who are not directly employed by the corporation.

The Comments on the Proposed Code of Professional Responsibility show that CPR Rule 19.02 was drafted with the traditional litigator in mind.

> "It is the duty of the lawyer to represent his client with zeal. This duty is owed not only to the client but also to the legal system. The bounds of the law including the Canons of Professional Ethics are

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[146] Model Rule 1.13(a), see Annex "A".
[147] See Annex "A".
[148] Applying Model Rule 1.13(a), see Annex "A".

> essential restrictions on the zeal which a lawyer must use in representing his client.
>
> ...
>
> The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of society is entitled to have his conduct judged and regulated in accordance with the law, to seek any lawful objectives through legally permissible means, and to present for adjudication any lawful claim, issues or defense.
>
> It is a truism that the zeal of counsel in his task of advocacy is commendable. His persistence in the discharge of his responsibility is understandable. However, it shall not amount to obstinacy. His zeal loses merit if the pleadings submitted by him do not reveal an adequate grasp of the law and the judicial decisions...[149]

It is submitted that the reason why there is no CPR Rule similar to Model Rule 1.13 is that the CPR focuses mainly on the traditional practice of law as litigation. The CPR focuses on the conventional notion of the practice of law as 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.[150]

The Comments of the Proposed Code of Professional Responsibility prove that the framers of the CPR had litigation in mind when they defined the term client. For instance, under CPR Rule 15.03[151] a Comment was made that "this rule applies to multiple clients, like **co-plaintiffs or co-defendants** with potentially conflicting interests."[152] (Emphasis supplied)

CPR Rule 15.04 provides that a lawyer may, with the written consent of all concerned, act as a mediator, conciliator or arbitrator in settling disputes. The Comment for this Rule stated that

> ...one of the very first ***questions a client usually asks his lawyer*** refers to the probable result of his contemplated or pending ***litigation***...A lawyer who guarantees the successful outcome of a

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[149] INTEGRATED BAR OF THE PHILIPPINES, *supra* note 129, at 79.

[150] In re Matthews, 62 P2D 578, 111 ALR 13 (1936).

[151] CPR Rule 15.03 provides that "A lawyer shall not represent conflicting interests except by written consent of all concerned given after a full disclosure of the facts."

[152] INTEGRATED BAR OF THE PHILIPPINES, *supra* note 129, at 62.

> **litigation** is either under a heavy pressure to employ any means to **win the case** at all costs or a cloud of suspicion of having betrayed the client when the **case is lost.**[153] (Emphasis supplied)

CPR Canon 8[154] is a general statement that compels lawyers to be courteous and fair towards fellow lawyers. However, the reason behind this Canon is to admonish lawyers that "agreements among lawyers, for the purpose of **settling a case** or **facilitating its trial** where not otherwise unconscionable, are perfectly in order.[155] (Emphasis supplied) Again, the rationale for this particular Canon is primarily litigation-oriented.

Similarly, CPR Rule 1.04 is couched in general terms that a lawyer in any field of practice shall encourage his clients to avoid, end or settle a controversy if it will admit of a fair settlement. The Comment, however, contemplates a settlement again in a litigious sense. It further elaborates that the rule...

> ...enjoins lawyers to avoid legal controversies and to settle amicably all causes which can thus be justly terminated. A good attorney is not one who is continually *bursting into court* but is one who advises his clients how to avoid legal entanglements, and who goes so far as possible compatible with the interests of his clients to effect a compromise. Parties to an amicable settlement may enjoy benefits greater than those which can legally be secured by the most elaborate and exacting *judicial procedure. Litigation* involves time, expense and ill feelings which may be avoided by the *settlement of the action.*[156] (emphases supplied)

The CPR is couched in general terms and appears to address more of the litigation or adversarial side of the legal profession, where generally one party wins at the expense of the other rather than the non-adversarial practice of a business lawyer, where give-and-take is possible and all transacting parties may come out as winners. Perhaps not surprisingly, Philippine jurisprudence too on legal ethics more often that not revolves around the adversarial nature of the practice, rather than its non-adversarial, aspects.[157]

The CPR does not afford the Filipino in-house counsel with any guidance as to the identity of the real client in a triangular arrangement. As

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[153] INTEGRATED BAR OF THE PHILIPPINES, *supra* note 129, at 63.

[154] CPR Canon 8 provides that "A lawyer shall conduct himself with courtesy, fairness and candor towards his professional colleagues, and shall avoid harassing tactics against opposing counsel."

[155] INTEGRATED BAR OF THE PHILIPPINES, *supra* note 129, at 32.

[156] INTEGRATED BAR OF THE PHILIPPINES, , *supra* note 129, at 5.

[157] MORALES, *supra* note 10, at Preface.

earlier adverted to, it is crucial to determine who the client really is in order to determine to whom the in-house counsel owes his or her ethical duties and responsibilities. If the in-house counsel does not deal with the corporation but only with the human constituents as client people[158], he or she runs the risk of confusing ethical duties.

The stakes become higher precisely because the human constituents control and exert pressure on the in-house counsel as an employee. The lack of a clear-cut CPR Rule categorically saying that the corporation is the real client creates a veritable moral hazard for the in-house counsel. It creates a loophole which creates a tendency among in-house counsels to succumb to the pressures of possibly losing their employment.

It becomes easier to justify subverting ethical rules in favor of one's livelihood because of the lack of ethical rules on client identity. There can be no ethical duty owed when there is no client to whom the duty is owed. The interests of upholding the high ethical standards of the legal profession become second fiddle to the interest of keeping one's employment. On a wider scale, therefore, the legal profession will stand to suffer.

It is thus submitted that a similar Model Rule 1.13(a)[159] should be included in our CPR in order to facilitate solving client identity and representation issues. A similar provision will help introduce the entity theory of ethics into our own CPR and within our jurisdiction. The entity theory of ethics will assist in helping lawyers for juridical entities or organizations obtain a clear grasp of their ethical responsibilities and duties and to whom they are owed. A categorical CPR Rule will remove the moral hazard perpetuated over the livelihood of in-house counsels.

Model Rule 1.13[160] is only the first of a two-tiered approach under the American Bar Association's Model Rules of Professional Responsibility in solving such ethical problems. On the first level, Model Rule 1.13 provides the guidelines on how to solve problems of client identity and representation. The first level of inquiry therefore involves determining to whom the lawyer owes his ethical duties. This preliminary consideration is crucial because of the unique triangular arrangement caused by the nature of the client as a juridical entity. A lawyer cannot be expected to exercise his or her ethical duties without knowing to whom he or she owes them. Model

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[158] HAZARD, *supra* note 33, at 1011, 1013.
[159] See Annex "A".
[160] See Annex "A".

Rule 1.13 answers some dilemmas that may arise in the course of the lawyer's dealings with the human agents through whom the juridical entity client acts.

The Comment to Model Rule 1.13 provides that the authority and responsibility provided in Model Rule 1.13 are concurrent with the authority and responsibility provided in other Model Rules. In particular, this Model Rule does not limit or expand the lawyer's responsibility under Rules 1.6[161], 1.8[162], 1.16[163], 3.3[164] or 4.1[165].[166] These Model Rules which pertain to more specific ethical duties constitute the second tier in solving ethical issues. The clear purpose behind Model Rule 1.13 is to enhance the corporate lawyer's ability to represent the best interests of the corporation without automatically having the additional and potentially conflicting burden of representing the corporation's constituents.[167]

After resolving client identity and representation issues, the in-house counsel will be better equipped to deal with more specific ethical issues such as confidentiality and conflicts of interest. In essence, Model Rule 1.13 instructs the lawyer to bear in mind that in the concurrent application of more particular Rules, there are special Rules involving juridical entity clients.

One of the more precarious ethical situations that in-house counsels face involves the duty of confidentiality. The attorney-client privilege regarding confidentiality has been described as not only a principle of privacy, but also a device for cover ups.[168] It is not uncommon that some of the human constituents who run the corporation may choose to engage in illegal business practices. The in-house corporate practice of law is particularly vulnerable to the use of privilege as a tool for covering up illegal corporate practices. These human constituents may use the fact of the in-house counsel's employment in the corporation as leverage. These corporate agents may force the in-house counsel, under pain of dismissal, to hide these illegal business practices under the cloak of the in-house counsel's duty to keep client communications confidential.

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[161] Model Rule 1.6 on Confidentiality of Information.

[162] Model Rule 1.8 on Conflict of Interest: Current Clients: Specific Rules.

[163] Model Rule 1.16 on Declining or Terminating Representation.

[164] Model Rule 3.3 on Candor Towards The Tribunal.

[165] Model Rule 4.1 on [Transactions With Persons Other Than Clients]: Truthfulness In Statements To Others.

[166] Model Rule 1.13 Comment [6].

[167] *Jesse v. Danforth*, 485 N.W.2d 63 (Wis. 1992).

[168] GEOFFREY HAZARD, An Historical Perpective on the Attorney-Client Privilege, 66 CAL. L. REVIEW 1061 (1978) as quoted in J. MACKINTOSH AND K. ANGUS, *supra* note 53, at 38.

There is thus a real and compelling need to have Rules that categorically spell out to the in-house counsel his ethical duty of confidentiality to the corporation as his actual client. The in-house counsel needs specific Rules that identify to whom the ethical duty of confidentiality is owed within a triangular arrangement of corporation-constituent-in-house counsel. These concrete Rules will counteract the influence and pressure which human agents may exert. Actual ethical Rules in place will justify the in-house counsel's actions, thereby minimizing the compulsions against his or her livelihood.

The advantages of having a two-tiered approach will be demonstrated in the following discussion concerning confidentiality. It is submitted that a similar two-tiered approach where Model Rule 1.13 is concurrently applied with Model Rule 1.6 on Confidentiality of Information will sufficiently address these particular in-house counsel issues of confidentiality.

Having a more specific Rule that initially resolves issues in client identity and representation will later on help the in-house counsel deal with confidentiality problems. This is precisely because of the peculiar nature of the corporation as a juridical entity client. The difficulties that arise due to the lack of such a two-tiered approach will be demonstrated in a comparison of the concurrent application of Model Rule 1.13 to Model Rule 1.6 on Confidentiality of Information with its counterpart provisions in the CPR.

VIII. THE ETHICAL DUTY OF CONFIDENTIALITY FOR IN-HOUSE COUNSEL: AN APPLICATION OF MODEL RULE 1.13

A. CONFIDENTIALITY: THE FOUNDATION OF THE ATTORNEY-CLIENT RELATIONSHIP

Confidentiality is the state or quality of being confidential; treated as private and not for publication.[169] Confidential communications are communications made under circumstances showing that [the] speaker intended [the] statement only for [the] ears of [the] person addressed.[170] Privileged communications include those between spouses, physician-

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[169] BLACK'S LAW DICTIONARY, *supra* note 39, at 298.
[170] *Id.* at 1198.

patient, attorney-client, [and] confessor-penitent.[171] The oldest of the privileges for confidential communications is that of the attorney-client."[172]

The privilege of keeping communications between the attorney and the client as confidential is protected in order to promote open and uninhibited consultations between them. The fundamental principle in the attorney-client relationship is that in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.[173] This contributes to the fiduciary trust that is the hallmark of the attorney-client relationship.

To facilitate the smooth functioning of a society governed by law, its citizenry must have an acceptable degree of competence on the law. The ability to consult with an attorney makes this possible. To ensure that such consultation will happen, it is widely accepted that citizens need, at a minimum, an assurance that the consultation with a lawyer will not result in greater liability.[174]

The current client[175], and even the prospective client[176], is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer. This encompasses even embarrassing or legally damaging subject matter. The lawyer needs full and truthful information in order to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. It is the duty of an attorney to maintain inviolate the confidence, and at every peril to himself, to preserve the secret of his client.[177] An attorney, without the consent of his client, can neither 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, nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of the client and his employers, concerning any such fact the knowledge of which has been acquired in such capacity.[178] The lawyer's duty

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[171] *Id.*

[172] J. WIGMORE, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, 2290 (1940) as quoted in J. MACKINTOSH AND K. ANGUS, *supra* note 53, at 40.

[173] Model Rule 1.6 Comment [2].

[174] J. MACKINTOSH & K. ANGUS, *supra* note 53, at 38.

[175] See Annex "F".

[176] CPR Rule 15.02 provides that "A lawyer shall be bound by the rule on privilege communication in respect of matters disclosed to him by a prospective client."

[177] Hilado v David, 84 Phil 569 (1949).

[178] RULES OF COURT, sec. 24(c) Rule 130. Federal Rule of Evidence 501 is the foundation for attorney-client privilege in the United States. This rule provides that unless otherwise required by the United States Constitution or by an Act of Congress, the "privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law." It further provides that "in civil actions and proceedings, with respect to an elements of a claim or defense as to which State law supplies the

outlasts his professional employment[179] and continues even after the client's death.

The privileged communications between attorney and client exists only for lawful and honest purposes. It can neither be used as a shield against wrongdoing nor can it be employed as an excuse to deny a lawyer the right to protect himself against abuse by the client or false charges by third persons.[180] If an attorney is accused by his client of misconduct in the discharge of his duty, he may disclose the truth with respect to the accusation, including the client's instructions or the nature of the duty which the client expects him to perform.[181]

The privilege itself, however, is susceptible to abuse and can be used to suppress information necessary for the fair administration of justice. As a result, the attorney-client privilege has been described as not only a principle of privacy, but also a device for cover ups.[182] In promoting legal consultation under a veil of confidentiality, the privilege can directly conflict with the truth-seeking function of the judicial system.[183] Hence, there exists a long-standing debate regarding attorney-client privilege covering its appropriate and acceptable boundaries.[184]

B. CONFIDENTIALITY IN IN-HOUSE CORPORATE PRACTICE: THE CASE OF UPJOHN

Some jurisdictions consider the impact of having in-house counsels as significant enough to preclude this particular class of lawyers from serving as legal counsels.[185] Particularly, when a lawyer is dependent on the client for his livelihood, he will be less likely to exercise objective counseling because

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rule of decision, the privilege...shall be determined in accordance with State law." Under this Rule, all states have recognized attorney-client privilege and have codified in their common law requirements to claim the privilege.

[179] CPR Canon 21 provides that "A lawyer shall preserve the confidences and secrets of his client even after the attorney-client relation is terminated."

[180] RUBEN AGPALO, COMMENTS ON THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE CODE OF JUDICIAL CONDUCT, 347 (2001 ed.).

[181] Baird v. Koerner, 279 F2D 623, 95 ALR 2D 303 (1960) as cited in AGPALO, *Id.* at 47.

[182] HAZARD, *supra* note 172, at 38.

[183] *Id.*

[184] *Id.*

[185] PETER BURKARD, Attorney-Client Privilege in the EEC: The Perspective of Multinational Corporate Counsel, 20 INTERNATIONAL LAW 677, 685-686 (1986), discussing the European Commission's position that in-house counsel do not enjoy privileged communications with their corporate clients because the lawyer must remain independent in order to "collaborat[e] in the administration of justice" as cited in J. MACKINTOSH AND K. ANGUS, *supra* note 53, at 40.

he has too great an interest in the outcome of his advice.[186] This concern over the effect of employment has led some countries to prohibit in-house lawyers from being members of the bar and/or to limit the privilege extended to communications between corporations and their employee-attorneys.[187]

Other jurisdictions give little credence to the argument that employment removes the ability of an attorney to provide objective legal advice to the employer-client.[188] The social benefit of a corporation fully informed of the laws governing its behavior is accorded greater weight.[189] These jurisdictions believe that an attorney who works as an in-house counsel is in the best position to provide a corporation with advice on governing laws and the requisites of their compliance.[190] Thus, these jurisdictions recognize in-house attorneys as members of the bar, and extend attorney-client privilege to communications made between in-house counsels and their corporate clients.[191]

The United States as settled in the landmark case of *Upjohn Co. v. United States*[192] recognizes in-house counsels as full-fledged attorneys and members of the bar.[193] *Upjohn* extends the attorney-client privilege to communications between in-house counsels[194] and their corporate employer-clients.

In the abovementioned case, the corporation's management had reason to believe that some of the company's subsidiaries may have made payments to foreign government officials which were considered illegal under federal law. Attorneys for the corporation sent questionnaires to employees worldwide seeking information about these alleged payments and even conducted interviews. The Internal Revenue Service subpoenaed the

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[186] MARK VAN DEUSEN, The Attorney-Client Privilege for In-House Counsel When Negotiating Contracts: A Response to Georgia Pacific Corp. v. GAF Roofing Manufacturing Corp., 39 WM. & MARY L. REV. 1397, 1404-05 (1998) as cited in J. MACKINTOSH AND K. ANGUS, *supra* note 53, at 40.

[187] ALISON HILL, A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community, 27 CASE W. RES. J INT'L. LAW 145, 157 (1995), as cited in J. MACKINTOSH AND K. ANGUS, *supra* note 53, at 46.

[188] J. MACKINTOSH AND K. ANGUS, *supra* note 53, at 40.

[189] *Id.*

[190] *Id.*

[191] JOHN GERGACZ, Attorney-Corporate Client Privilege Section 1.04 (2d ed. 1990), where he argues that the attorney-client privilege "furthers the investigation of truth in our system of justice. It complements, rather than hinders, the factual disclosure ideal" as cited in J. MACKINTOSH AND K. ANGUS, *supra* note 53, at 33.

[192] 449 U.S. 383 (1981).

[193] There is no similar jurisprudence in the Philippines.

[194] Rossi v. Blue Cross & Blue Shield, 540 N.E.2D 703 (N.Y. 1989) recognizes the attorney-client privilege to apply whether the counsel is an employee of an entity or a retained outside lawyer.

questionnaire answers and the interview transcripts. However, Upjohn resisted this subpoena by invoking the attorney-client privilege.

The Sixth Circuit Court applied a control group test and held that the privilege did not apply to "communications...by officers and agents not responsible for directing Upjohn's actions in response to legal advice...for the simple reason that the communications were not of the 'client's."[195] The Court of Appeals considered the application of the privilege in the corporate context to present a "different problem" since the client was an inanimate entity and "only the senior management, guiding and integrating the several operations...can be said to possess an identity analogous to the corporation as a whole."

The Supreme Court, however, reversed the Court of Appeals. It was of the opinion that "in the corporate context, however, it will frequently be employees beyond the control group as defined by the Court below -- 'officers and agents...responsible for directing [the company's] actions in response to legal advice' -- who will possess the information needed by the corporation's lawyers."

The crux of the problem was determining which persons within an entity client fall within the scope of privileged communication. In this case, the Court of Appeals employed the control test, which determined whether or not a person was within the "control group" of the entity so as to avail of the privilege.

The Supreme Court expanded this to include a second test called a subject matter test. In the subject matter test, the issue was whether or not the information was imparted to the lawyer to enable him or her to give the entity legal advice. The Supreme Court explained that middle level and lower level employees can involve the corporation in serious legal matters as well. This is in contrast to the control test, which severely restricts the privilege to only the upper bosses who perform "substantial roles" in deciding how the corporation should legally respond. The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice.

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[195] Upjohn Co. v. United States, 449 U.S. 383 (1981).

Under United States law, when the client is a corporation and an attorney is employed as an in-house counsel, the attorney-client privilege applies provided the following elements are present: 1) the communication is made for the purpose of securing legal advice; 2) the employee making the communication does so at the direction of his or her corporate superior; 3) the superior requests the communication to secure legal advice; 4) the subject matter of the communication is within the scope of the employee's corporate duties; and 5) the communication is not disseminated beyond those who need to know its contents.[196]

If there is one thing that *Upjohn* demonstrates, it is that there is a fundamental need to sort through client identity and representation issues *prior* to solving the actual ethical issue of confidentiality. The Supreme Court expanded the old test to include those constituents that it thought should also be considered as duly authorized to act for the corporation.

IX. CONFIDENTIALITY FOR THE IN-HOUSE COUNSEL IN THE UNITED STATES: A TWO-TIERED APPLICATION OF THE MODEL RULES[197]

As discussed earlier, the authority and responsibility provided in Model Rule 1.13[198] are concurrent with the authority and responsibility provided in other Rules. Model Rule 1.13 does not limit or expand the lawyer's responsibility under other Model Rules.[199] Therefore, in order to solve more particular ethical issues, the in-house counsel should undergo a two-tiered process. He or she should first refer to Model Rule 1.13 as the pertinent Rule that deals with juridical entity clients.

Model Rule 1.13 defines who the client is. It specifically instructs lawyers on how to deal with the unique features of a juridical entity especially in circumstances when in-house counsels deal with human agents that act on behalf of the corporation. The in-house counsel should then proceed to refer concurrently to the pertinent Model Rule in addressing the ethical issue at hand, keeping in mind the special rules that are applicable to entity clients.

Model Rule 1.6[200] on Confidentiality of Information is the specific Model Rule that tackles issues of confidentiality. The following is an

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[196] Upjohn Co. v. United States, 449 U.S. 383 (1981)
[197] J. MACKINTOSH AND K. ANGUS, *supra* note 53, at 41.
[198] See Annex "A".
[199] Model Rule 1.16 Comment [6]
[200] See Annex "C".

illustration of how the in-house counsel can benefit from such a two-tiered approach.

Suppose that Corporation A, located in G Country, is a local manufacturer of fruit juices. Its marketing team made a study and concluded that there is a market for lower cost orange juice made from concentrate. Corporation A's chemists copied the formulation of Brand X, an orange juice concentrate sold in F Country. Corporation A thus created its own Brand Y. Brand X and Brand Y have the same formulation. They are made from concentrate, with a very strong synthetic orange flavor and high levels of preservatives. Corporation A foresees that Brand Y will become a very profitable venture.

However, Corporation A's in-house counsel thinks that while its Brand Y will definitely bring in profits, the production and sale of Brand Y will violate local health rules in G Country regarding preservatives. G Country has stricter food laws than F Country when it comes to preservative levels in food and beverages. The in-house counsel advises against concealment because G Country's food laws provide for the shutdown of business operations for violations of the law.

Corporation A's marketing team argues against the in-house counsel, saying that there is no need to disclose the real level of preservatives in its Brand Y. The team suggested that they should be able to just copy Brand X's label. They argue that since Brand X is not sold in G Country, no one will know the difference anyway. The officer who heads the marketing team admonishes the in-house counsel that if Corporation A will pass up this opportunity, Corporation A will lag in sales behind other local juice manufacturers. The officer chides the in-house counsel for not being a "team player" in helping Corporation A grow. "Stop being a Goody Two-Shoes and learn how to play ball."[201]

The in-house counsel's dilemma is whether or not to disclose the real level of preservatives to make Corporation A comply with G Country's food laws. In disclosing such information, the in-house counsel also risks revealing what has now become confidential communication.[202] Does the in-

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[201] GILLERS, *supra* note 4, at 42.

[202] Applying *Upjohn*, the attorney-client privilege exists when the communication is made for the purpose of securing legal advice; the employee making the communication does so at the direction of his or her corporate superior; the superior requests the communication to secure legal advice; the subject matter of the communication is within the scope of the employee's corporate duties; and the communication is not disseminated beyond those who need to know its contents.

house counsel have an ethical duty to keep this matter confidential[203]? To what extent is this matter confidential that it will not provide a safe haven for the marketing team that intends to violate the food and drug laws?

If the in-house counsel insists on disclosure, then he or she is just fulfilling his duty to assist the client in abiding by the law.[204] However, in doing so, he or she risks disfavor from constituents through whom the corporation acts. After all, Corporation A, like any business, surely wants to make a profit. Being a "Goody Two-Shoes" will not earn any profits for the corporation.

Corporation A may take stringent measures and use the fact of the in-house counsel's employment as leverage to conceal. The in-house counsel therefore, will not want to annoy the "boss" and risk losing his or her job, just like any other regular employee. However, does the marketing arm really represent the wishes of Corporation A as the "boss?" Or is it possible that the "boss" actually does not agree with the marketing team? Who can articulate what the "boss" really "wants"?

It becomes apparent in our hypothetical example that an entity constituent is contemplating a violation of the law. This constitutes an exception to the rule on confidentiality, because the privileged relation of attorney and client exists only for lawful and honest purposes.[205] It cannot be used as a shield against wrongdoing nor can it be employed as an excuse to deny a lawyer the right to protect himself against abuse by the client or false charges by third persons.[206] However, the unique nature of the corporation presents additional issues. To whom is the ethical duty of confidentiality owed? Is it owed to the corporation, or to the human agents through whom it acts? What happens when a human agent decides to pursue an action that is in violation of the law? How will the in-house counsel go about to prove that this human agent is not representing what the corporation truly "wants" in order to justify the revelation without risking the ire of the constituents involved?

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[203] When one of the human constituents of a corporation communicates with the in-house counsel, the communication is protected by Model Rule 1.6. See Annex "C". This does not mean, however, that the constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents any information that relates to the representation except for disclosures that the corporation explicitly or impliedly authorized in order to carry out the representation or as otherwise permitted by Rule 1.6. Model Rule 1.13, see Annex "A".

[204] CPR Canon 1 provides that "A lawyer shall uphold the Constitution, obey the laws of the land and promote respect for the law and legal processes."

[205] See Annex "C" for Model Rule 1.6(b)(b). CPR Canon 19 also provides that "a lawyer shall represent his client with zeal within the bounds of the law." See also Annex "F" for CPR Rule 21.01(c).

[206] *AGPALO supra* note 184, at 347.

The in-house counsel's ethical dilemma is whether or not to disclose his client's potential violation of the law. The greatest danger of upholding the attorney-client privilege is that it is "not only a principle of privacy, but also a device for cover ups.[207]" The risk to the in-house counsel's very livelihood creates a great temptation for the in-house counsel to cover up. This is why he or she needs the guidance of concrete ethical rules that will justify the course of his or her actions in upholding the law. The use of Model Rule 1.13 on the Organization as Client concurrently with Model 1.6 on Confidentiality of Information will help him or her achieve this.

First, the in-house counsel needs to be clear to whom the ethical duty of confidentiality is owed. Model Rule 1.13(a)[208] explains that the corporation is the in-house counsel's client. The in-house counsel represents the corporation that acts through its duly authorized constituents. Therefore, the lawyer does not represent these duly authorized constituents. These constituents merely serve as the vehicles for the corporation to act because it is inanimate. The in-house counsel deals with client people who are presumed to act in the interest of the corporation.

In the hypothetical situation earlier discussed, the marketing team intends to pursue a course of action that may become a violation of law which will eventually pinned on the corporation, and is likely to result in substantial injury to the corporation.[209] It becomes obvious that the corporation's interests are adverse to those of the marketing team with whom the in-house counsel deals. The marketing team intends to pursue a plan of action that the in-house counsel knows or reasonably knows[210] is something that Corporation A will definitely not do in the regular course of its business. In the regular course of its business, Corporation A does not engage in such operations that carry the extreme risk of corporate shutdown. In the course of its dealings with the marketing team the in-house counsel shall thus make it clear that he or she is working for Corporation A as client.[211] The in-house counsel must then "Miranda warn"[212] the marketing team that he or she is working for what is in the best interest of Corporation A. This will remove any confusion as to the in-house counsel's loyalties.

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[207] G. HAZARD, in J. MACKINTOSH AND K. ANGUS, *supra* note 53, at 38.
[208] See Annex "A".
[209] Applying Model Rule 1.13 (b), see Annex "A".
[210] Applying Model Rule 1.13 (f), see Annex "A"
[211] Applying Model Rule 1.13 (f), see Annex "A".
[212] Applying Model Rule 1.13 (f), see Annex "A".

Model Rule 1.13(b)[213] encourages the in-house counsel to further discuss with the marketing team to see if they could possibly reconsider their decision. The in-house counsel is exhorted to proceed as is reasonably necessary in the best interest of Corporation A.[214] He must consider the seriousness of the violation and its consequences; the responsibility of the corporation; the apparent motivation of the marketing arm concerned; the policies of Corporation A concerning such matters; and any other relevant considerations.[215] The best interests of Corporation A, regarding this Brand Y matter, is to prevent its possible shutdown. In order to achieve this, the in-house counsel must aim to convince the marketing team not to proceed with Brand Y and warn them of exposing Corporation A's best interest to certain risk.

If the marketing team remains stubborn despite the in-house counsel's legal advice, then the in-house counsel should refer the matter to higher authority in Corporation A.[216] This higher authority may consist of higher corporate officers who have authority over the head marketing officer, if any. If these higher corporate officers agree with the head marketing officer, then the in-house counsel should proceed to further consult with some other higher authority. The in-house counsel should proceed until the consultation is exhausted with the Board of Directors.[217] In the course of its consultations with the marketing team and going up the ladder, any measures taken should, to the extent practicable, minimize the risk of revealing privileged information.[218]

If the Board of Directors, as the highest authority, decides to disapprove the manufacture and sale of Brand Y, then the in-house counsel will have fulfilled his or her ethical duties to his or her client, Corporation A. The in-house counsel will have seen to it that the best interests of the corporation are fulfilled.[219] The in-house counsel will have also sought what the corporation "really wants"[220] from the "real" duly authorized constituents through whom the corporation acts.[221]

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[213] See Annex "A".
[214] Applying Model Rule 1.13 (b), see Annex "A".
[215] Applying Model Rule 1.13 Comment [4].
[216] Applying Model Rule 1.13 (b), see Annex "A".
[217] Applying Model Rule 1.13 (b), see Annex "A".
[218] Model Rule 1.13 Comment [4].
[219] Applying Model Rule 1.13 (b), see Annex "A".
[220] ROTUNDA, *supra* note 58, at 341.
[221] Model Rule 1.13(a), see Annex "A".

Since the in-house counsel had already exhausted all the levels of higher authority until the Board of Directors, he or she would have then fulfilled its duty of keeping client communications confidential. Had the in-house counsel failed to go up the ladder, he or she would not have known that the Board of Directors would veto the marketing team's proposal anyway. Therefore this prevented an inadvertent disclosure of client confidences regarding Brand Y. It kept the matter internal within the corporation.

Suppose that the Board of Directors decide instead to uphold the marketing team's plan of action. The in-house counsel had already exhausted all efforts going up the ladder to the highest authority, but was still rebuffed. He or she, however, still believes that the nondisclosure will cause substantial injury to Corporation A through shutdown. In this case, all efforts having been exhausted internally, the in-house counsel may now reveal information whether or not the Rule on Confidentiality of Information[222] permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to Corporation A.[223] The in-house counsel will be justified in revealing information relating to the representation of Corporation A to the extent he or she believes necessary in order to comply with a law.[224]

Why is there a need to go through an entire process of figuring out who the client is and going up the ladder when Model Rule 1.6 provides, in a very clear and straightforward manner, that "a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to comply with other law or a court order?[225] This is because the practical reality of the in-house counsel does not allow him or her to comply with the law, shotgun style. In the absence of ethical rules that will justify his or her actions, the in-house counsel, unlike the retained corporate lawyer, does not have the luxury of ethics. It is but human nature to shield and protect one's source of livelihood, in the absence of any substantial protective rules.

The existence of a Model Rule 1.13[226] in concurrent application with Model Rule 1.6 justifies disclosures as a last resort. These revelations are

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[222] Model Rule 1.6, see Annex "C".
[223] Applying Model Rule 1.13 (c) in concurrence with Model Rule 1.6.
[224] Applying Model Rule 1.6(b)(6), see Annex "C".
[225] Model Rule 1.6 (b)(6), see Annex "C".
[226] See Annex "A".

made only after the in-house counsel will have exhausted all levels of authority up until the Board of Directors. Model Rule 1.13 guides the in-house counsel every step of the way. Paragraphs (a) and (b) justify his loyalty to the best interests of Corporation A, even at the cost of earning the ire of the marketing team. Paragraph (f) discourages him or her from concealing information which he or she knows is contrary to law. Paragraph (b) justifies why he or she has to report on the marketing team to higher authorities. Paragraph (c) justifies why he or she has to finally make the necessary disclosure.

If, as discussed earlier, the Board of Directors should decide to uphold the marketing team, then Model Rule 1.6(b)(6) exhorts the lawyer to make the necessary disclosure to comply with the law. Whether that corporate lawyer is a retained one or an in-house counsel, he or she will ultimately make the disclosure anyway. The difference lies in the two lawyers' *approaches* to this ethical problem. The retained corporate lawyer can afford to employ a shotgun, direct approach of disclosure. While he or she works with these human agents as well, they do not control him. The in-house counsel, on the other hand, needs to "feel through" all of the competing human interests all the way up to the top. The in-house counsel needs to gain the approval of duly authorized, representative constituents who share in protecting the best interests of the corporation, as representative of what the corporation truly "wants."

X. CONFIDENTIALITY FOR IN-HOUSE COUNSEL IN THE PHILIPPINES: THE SHOTGUN APPROACH

The CPR Rules, on the other hand, encourages the in-house counsel to employ this very "shotgun" approach that he or she wants to avoid. On a fundamental level, the issue of client identity where the client is a juridical entity is left unaddressed. This, in turn, will have serious implications on the exercise of the duty of confidentiality. How is an in-house counsel supposed to keep matters confidential when he or she does not even know *who* the real client is? *For whom* should the in-house counsel keep corporate communications privileged? *Against whom* should the in-house counsel keep these communications privileged?

If only to protect his or her livelihood, the in-house counsel will more likely than not act to serve the interests of these client people. These interests promote the use of the attorney-client privilege as a device for

cover ups.[227] As the loophole on client identity creates a muddling of ethical duties, the in-house counsel becomes confused and may end up fulfilling ethical duties to constituents to whom these duties are not owed.

Assuming *arguendo* that the term "client" in the CPR encompasses juridical entities as clients, it still does not afford a remedy to this "shotgun approach." As the CPR fails to address the peculiar nature of corporations as separate entities acting through human agents, it is thus not enough that a definition similar to Model Rule 1.13(a)[228] be read into or included into our CPR. A similar CPR Rule should include specific guidelines on how to deal with these human agents.

As discussed earlier, the closest to the Model Rule 1.13(f)[229] concept of the Miranda warning in our CPR is CPR Rule 15.08[230] Applying this to our hypothetical Brand Y problem, CPR Rule 15.08 instructs the in-house counsel to make it clear to the "client" that he or she is working for the client in his or her capacity as a lawyer. Again, if the in-house counsel does not know who the client is, his or her clarification will do nothing to reinforce his fiduciary duty to the corporation. Familiar questions once again emerge: which of the client people is he or she supposed to explain that he or she is acting as a lawyer [for the corporation]? Against whom is he or she supposed to explain that he or she cannot represent such constituent? How can the in-house counsel "Miranda warn" a constituent of his or her loyalties when he or she is unclear as to who the client is?

Assume, for the sake of argumentation, that a Model Rule 1.13(a) definition is read into the term "client" in CPR Rule 15.08. This still fails to address the in-house counsel's problem of risk to his or her employment. The CPR Rule states that "[the lawyer] shall make clear **whether he is acting as a lawyer or in another capacity.**" (Emphasis supplied) This goes back to the dual function which the in-house counsel fulfills as an employed corporate lawyer. Under this predicament, the in-house counsel is compelled under CPR 15.08 to make it clear whether he is acting as a lawyer or as an employee. There is no other "capacity" for the in-house counsel to act other than being an employee of the corporation. In this sense, CPR Rule 15.08 instructs the in-house counsel to tell the marketing team whether he or she is acting as a lawyer or as an employee at any given point in time,

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[227] G. HAZARD, in J. MACKINTOSH AND K. ANGUS, *supra* note 53, at 38.
[228] See Annex "A".
[229] See Annex "A".
[230] See Annex "D".

ignoring the instances during which the in-house counsel fulfills both roles simultaneously. There are times when the in-house counsel cannot simply prioritize one hat over the other. Ultimately, the marketing team will admonish the in-house counsel for not being a "good employee" because the disclosure will block profits for the corporation. This will not bode well for the in-house counsel's employment in the corporation.

As discussed earlier, CPR Rule 15.08 does not quite fit the puzzle because it contemplates the holding of two separate professions. In addition, it does not address how to deal with internal competing interests *within* a client. This, of course, goes back to the root of the problem: that the client is a juridical entity.

CPR Rule 19.02[231] was discussed earlier as the nearest counterpart to the "exhaustion of remedies" approach of Model Rule 1.13(b).[232] Applying this to our Brand Y hypothetical situation, again the basic problem of client identity resurfaces. It is not Corporation A *per se* that intends to conceal the preservative levels. It is the marketing team, supposedly a duly authorized constituent of the corporation, which intends to do so in violation of the law. As there is no similar top-up approach in CPR Rule 19.02, the in-house counsel cannot undergo a filtering or a sifting through of competing constituent interests from within the entity.

CPR Rule 19.02 creates the unusual situation in which the in-house counsel directly calls on the corporation to rectify the adverse actions of its agents, through whom the corporation is constrained to act. The in-house counsel thus will end up accusing Corporation A for the concealment. If there was a similar Model Rule 1.13(f) and (b) in place, the in-house counsel would have been able to confer first with the various levels of authority within the entity. This is in order to find out whether or not Corporation A really sanctioned the marketing team to conceal.

In essence, a Model Rule 1.13(b) with an up the ladder approach would have forestalled a direct, shotgun accusation against Corporation A. The in-house counsel would have then been able to contain the problem first to the marketing team and go up the ladder to higher authority instead of making a blanket accusation up front.

Since Corporation A is run by all these constituents, a shotgun accusation will antagonize the entire corporation altogether. It will not

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[231] See Annex "E".
[232] See Annex "A".

reflect well on the in-house counsel's employment to accuse his or her own employer of fraud. The gravity of the consequences becomes all the more salient as only a small faction within the entity intended to commit the concealment. The in-house counsel thus risks his or her livelihood.

CPR Rule 19.02 mandates that in case Corporation A fails to correct the fraud caused, then the in-house counsel should terminate the attorney-client relationship. However, the attorney-client relationship is inextricably linked to the in-house counsel's *employment* in the corporation. Again, this is a rather simplistic, shotgun suggestion of how to fulfill one's legal ethical duty, without regard whatsoever to the implications on the in-house counsel's livelihood.

This is in contrast with Model Rule 1.16(b)(2)[233], which provides that a lawyer *may* withdraw from representing a client if the client persists in a course of action involving the lawyer's services that he or she reasonably believes is criminal or fraudulent. Model Rule 1.16(b)(4) also provides that a lawyer *may* withdraw if the client insists upon taking an action that the lawyer considers repugnant or which the lawyer fundamentally disagrees with. (italics supplied)

Finally, CPR Rule 21.01,[234] the pertinent Rule on confidentiality, provides that:

> ...a lawyer shall not disclose the confidences of the client except:
>
> When authorized by the client after acquainting him of the consequences of the disclosure
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> ...
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> When required by law...

Client identity is yet again a recurring problem. It isn't clear under this provision to which party the in-house counsel owes his fiduciary duty. Who authorizes the in-house counsel to disclose these confidences after such acquaintance? Is there identity between the client whose confidence the lawyer intends to expose and the client whom the lawyer is obliged to warn of the consequences?

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[233] Model Rule 1.16 on Declining Or Terminating Representation.

[234] See Annex "F".

with the law. This goes back to the practical realities that prevent the in-house counsel from employing a shotgun approach. An in-house counsel cannot just report the concealment according to CPR Rule 21.01(b). It makes the in-house counsel's predicament a rather simplistic one without regard to the consequences on the in-house counsel's employment.

It can be argued that the interpretation of certain CPR Rules should just be stretched to somehow address these gaps. However, these Rules still fail to address the risks to the in-house counsel's employment. The CPR is deficient on essentially two aspects. First, it does not provide separate guidelines on how to tackle the fundamental problem of client identity. As discussed earlier, client identity issues are the most basic hurdles faced by any lawyer working for or retained by a juridical entity. This can be attributed to the peculiar nature of juridical entities which possess a separate personality from the agents through which it acts. This complicates what would otherwise be textbook ethical issues.

The in-house counsel likewise needs to contend with pressures on his or her employment as well. For instance, with respect to Canon 17,[236] it is difficult for the in-house counsel to "owe fidelity" and "be mindful of the trust" when he or she does not know to whom they are owed. CPR Rules 1.01[237] and 1.02, for instance, would have been useful for our in-house counsel in the hypothetical Brand Y problem. These are basic, fundamental maxims that all lawyers, in-house counsels or not, should abide by. However, these CPR Rules are meaningless for purposes of in-house counsels, where there are no guidelines to determine who the client is.

Second, even if we were to assume that the term "client" in the CPR encompasses a similar triangular arrangement, the CPR Rules lean towards a shotgun approach. Reading a definition of juridical entity into the term "client" in order to make the CPR Rules fit is a rather simplistic attempt at addressing the issue. It is the interplay among the various agents within the juridical entity which underlies these ethical issues. Therefore, there is a need to have specific guidelines on how to manage all these various constituent interests *within* the client entity.

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[235] See Annex "C".

[236] CPR Canon 17 provides that "A lawyer owes fidelity to the cause of the client and he shall be mindful of the trust and confidence reposed in him."

[237] CPR, Rule 1.01 provides that "A lawyer shall not engage in unlawful, dishonest, immoral or deceitful conduct." CPR Rule 1.02 provides that "A lawyer shall not counsel or abet activities aimed at defiance of the law or at lessening confidence in the legal system."

It is the legal profession that stands to suffer as a whole when the in-house counsel does not have the guidance of particular Rules similar to a Model Rule 1.13[238]. Without any specific Rules, the in-house counsel will act rather blindly in the performance of his or her ethical duties. This will have serious consequences on his or her very employment in the corporation. First, he or she does not even know who the client is. He or she then proceeds to employ a shotgun approach to deal with an ethical issue. As a lawyer, the legal profession lauds that he or she fulfilled his ethical duties to uphold the Constitution, obey the laws of the land and promote respect for law and legal processes.[239] However for some, covering up may be a better alternative than to lose one's employment over a mere disclosure of 2 grams of preservatives in juice.

XI. OVERHAULING THE PHILIPPINE CODE OF PROFESSIONAL RESPONSIBILITY: SOME RECOMMENDATIONS

It is respectfully submitted that the CPR focuses too narrowly on ethical rules for lawyers who practice in litigation. In this respect, the CPR has remained stagnant since its enactment in 1988. With the rapid burgeoning of other fields of practice and following *Cayetano v. Monsod*, the CPR is now sorely insufficient to address novel ethical issues in non-litigation fields.

The Integrated Bar of the Philippines should seriously consider forming a commission similar to the Kutak Commission of the ABA to revise the format, organization and language of our own current Code of Professional Responsibility. The original Model Code which the Kutak Commission revised was highly criticized for its undue focus on litigation. Model Rule 1.13, enacted in 1983, is one of the new provisions included by this Commission.

A proposed IBP Commission should consider completely overhauling the entire Code in order to liberate our rules from the litigation-centric perspective of its original codifiers. An overhaul of the Code would wipe the slate clean so to speak. This is in order to make our ethical rules more dynamic in the context of an ever expanding legal profession.

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[238] See Annex "A".

[239] CODE OF PROF. RESP.,,Canon 1.

wipe the slate clean so to speak. This is in order to make our ethical rules more dynamic in the context of an ever expanding legal profession.

The envisioned commission should refer to the ABA's Model Rules of Professional Conduct just as it did when it first borrowed from the 1970 version of the Model Rules in drafting the CPR. The current ABA Model Rules of Professional Conduct have a separate section for ethical Rules governing lawyers involved in litigation.

The other sections of the Model Rules deal with other ethical issues that may still be read with possible concurrent application to litigation-related issues, but should not, in anyway, be read restrictively.

For example, the ABA Model Code's Rules on Advocate are its Rules for litigation. This includes Rules such as Expediting Litigation[240], Candor Toward the Tribunal[241], and Special Responsibilities of a Prosecutor[242], among others. The ABA Model Code, however, also has separate sections for non-litigation Rules, such as Public Service[243] and Transactions with Persons Other Than Clients.[244] These sections are general ethical Rules that are *not* restricted to public service *in litigation*, or transactions with persons other than clients *in litigation*. These Rules may be concurrently applied with the Rules on litigation, but they are not limited to apply to the practice of litigation itself. This is the difference between the Model Rules and the CPR. The entire CPR Rules are restrictively read mainly to refer to situations in litigation practice.

It is likewise submitted that a similar Model Rule 1.13[245] be included into the CPR. As was demonstrated in this paper, there is a need for a separate Rule that effectively guides lawyers in dealing with the various constituencies acting behind juridical entity clients. A Model Rule 1.13 may solve the fundamental problem of client identity which afflicts in-house counsels in the performance of his or her ethical duties.

A similar Model Rule 1.13 in the CPR will only be efficacious, however, when all the other CPR Rules have become less litigation-oriented. This is especially important in the case of juridical entity clients which require representation not only in litigation-related cases, but also in other

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[240] Model Rule 3.2, whose suggested equivalent is Canon 12 of the CODE OF PROF. RESP.
[241] Model Rule 3.3, whose suggested equivalent is Canon 10 of the CODE OF PROF. RESP.
[242] Model Rule 3.8, whose suggested equivalent is Rule 6.01 of the CODE OF PROF. RESP.
[243] Model Rules 6.1 to 6.5.
[244] Model Rules 4.1 to 4.4.
[245] See Annex "A".

As described in the earlier part of this paper, corporate practice itself involves non-litigious legal work, from transactional practice, contract drafting, tax research, listing of securities, to management of corporate liabilities, to name a few. With the development of our country in an increasingly interconnected global world, there is a myriad of corporate legal work that goes on in corporate offices throughout the Philippines. These corporate lawyers, particularly those who serve as in-house counsels, require particular Rules that are unique to their practice of law. The CPR, however, has become inadequate to solve the problems of traditional clients who walk into the litigator's office.

It is further submitted that Canon 4 of the CPR encourages members of the IBP to seriously consider completely overhauling the Code of Professional Responsibility. Canon 4 provides that "a lawyer shall participate in the development of the legal system by initiating or supporting efforts in law reform and in the improvement of the administration of justice."[246] A former Chief Justice of the Supreme Court of New Jersey succinctly admonishes every lawyer to work for the constant improvement of his or her profession:

> (Another) task of the great lawyer is to do his part individually and as a member of the organized bar to improve his profession, the courts, and the law. As President Theodore Roosevelt aptly put it, *'Every man owes some of his time to the upbuilding of the profession to which he belongs.'* Indeed, this obligation is one of the great things which distinguishes a profession from a business...The advances in natural science and technology are so startling and the velocity of change in business and in social life is so great that the law along with other social sciences, and even human life itself, is in grave danger of being extinguished by new gods of its own invention if it does not awake from its lethargy.'[247] (Emphasis supplied)

The Comment to Canon 4 states that "the improvement of the legal system...cannot be done by dreaming in a vacuum. The lawyer must recognize that law is part of a vast social network and whether he wishes it or not, interacts, for better or worse with the rest of the society. Hence, there is a need on the part of the lawyer to transcend the narrow limits of

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[246] CODE OF PROF. RESP., Canon 4

[247] T. VANDERBILT, The Five Functions of the Lawyer: Service to Clients and the Public, 40 A.B.A.J. 31 (1954), as quoted in INTEGRATED BAR OF THE PHILIPPINES, *supra* note 129, at 18.

technical law. He must broaden out, so to speak, in order to be able to make the law socially responsive."[248]

Cayetano v. Monsod demonstrates that lawyers have indeed transcended the narrow limits of technical law by branching out into various practice areas. The same, however, cannot be said of the Code of Professional Responsibility. It has sorely lagged in being responsive to the needs of these lawyers who have moved beyond the traditional practice of litigation. The ethical Rules that govern the legal profession must also keep up with the emerging trends in legal practice if lawyers are to be expected to accomplish these continuing tasks of making the law socially responsive, "as a living organism that cannot be encased within the provisions of a statute but thrives in the dynamics of human life."[249]

The IBP must update itself on new and emerging trends in practice areas and periodically update the CPR to reflect these changes. In fact, under the ABA Model Rules of Professional Responsibility, Model 1.13 has been revised to include new provisions as recently as 2004.[250] The IBP should take a cue from the ABA's methods of updating the Model Rules. These include an opinions service found in the ABA website[251], where queries to some ethical situations are posted and advisory opinions are made. These advisory opinions are also integrated in the future updating of the Comments to the Model Rules.

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[248] Comment to Canon 4, INTEGRATED BAR OF THE PHILIPPINES, *supra* note 129, at 17.

[249] Chief Justice Roberto Concepcion, as quoted in Comment to Canon 4, INTEGRATED BAR OF THE PHILIPPINES, *supra* note 129, at 17-18.

[250] Model Rule 1.13 (f) and (g) were added in 2004.

[251] http://www.abanet.org

ANNEX "A"

MODEL RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c)Except as provided in paragraph (d), if,

(1)despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that required or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organizations other than the individual who is to be represented, or by the shareholders.

ANNEX "B"

MODEL RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one of more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing

ANNEX "C"

MODEL RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has results from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or court order.

ANNEX "D"

CODE OF PROFESSIONAL RESPONSIBILITY RULE 15.08

A lawyer who is engaged in another profession or occupation concurrently with the practice of law shall make clear to his client whether he is acting as a lawyer or in another capacity.

ANNEX "E"

CODE OF PROFESSIONAL RESPONSIBILITY RULE 19.02

A lawyer who has received information that his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon the client to rectify the same, and failing which he shall terminate the relationship with such client in accordance with the Rules of Court.

ANNEX "F"

CODE OF PROFESSIONAL RESPONSIBILITY RULE 21.01

A lawyer shall not reveal the confidences or secrets of his client except:

(a) When authorized by the client after acquainting him of the consequences of the disclosure;

(b) When required by law;

(c) When necessary to collect his fees or to defend himself, his employees, or associates or by judicial action.