Chapter 20

Presidential Commission on Good Government v. Sandiganbayan:

Ethical Conduct of a Lawyer

In this case of first impression, the Court found itself in the problematic position of choosing between or balancing two policy considerations -- the efforts of the Supreme Court to upgrade the ethics of lawyers in government service on the one hand and, on the other, the right of the government to recruit competent counsel to defend its interests.

The case stemmed from a Motion to disqualify Atty. Estelito P. Mendoza, a former solicitor general, from representing Lucio Tan and several other respondents in cases involving the sequestration of certain properties by the Presidential Commission on Good Government (PCGG). The Court, by a majority vote of 11 members,[1] denied the PCGG's Petition for Certiorari charging the Sandiganbayan (SBN) Fifth Division with grave abuse of discretion for denying Atty. Mendoza's disqualification. Two members dissented,[2] while two others took no part in the deliberations and voting.[3]

The Facts

On March 25, 1977, the Central Bank declared the General Bank and Trust Company (GenBank) insolvent and ordered its liquidation. Atty. Mendoza, then solicitor general, filed a Petition with the then Court of First Instance (CFI) of Manila, praying for the court's

assistance and supervision in the liquidation of the bank as mandated by Section 29 of Republic Act (RA) No. 265.

Then came the EDSA Revolution of February 1986. Upon her ascension to power, President Corazon C. Aquino established the Presidential Commission on Good Government (PCGG) to recover the alleged ill-gotten wealth of former President Ferdinand Marcos, his family and his cronies. In line with its mandate, the PCGG filed a Complaint for the recovery of those assets belonging to suspected cronies. Among them was Lucio Tan's group, which had by then acquired GenBank (later renamed Allied Banking Corporation). Docketed as Civil Case No. 0005, the case was assigned to the SBN Second Division. The PCGG also issued several writs of sequestration on the properties of the Lucio Tan group, including shares of stock of Allied Bank.

Tan et al. filed three Petitions in the Supreme Court to nullify, among others, the writs of sequestration. In all these cases (Civil Case Nos. 0096-0099), which the Court referred to the SBN Second Division for proper disposition, they were represented by former Solicitor General Mendoza, who had by then resumed his private practice of law.

In Civil Case No. 005 and the sequestration cases, the PCGG moved to disqualify Atty. Mendoza as counsel for Tan et al. It was alleged that, as former solicitor general and counsel of the Central Bank, he had "actively intervened" in the liquidation and Tan et al.'s subsequent acquisition of GenBank. The Motion to disqualify him invoked Rule 6.03 of the Code of Professional Responsibility (CPR): "A lawyer shall not, after leaving government service, accept engagement or employment in connection with any matter in which he had intervened

while in said service."

On July 11, 2001, the Motion for the disqualification of Atty. Mendoza was denied by the SBN Fifth Division,[4] which had adopted an earlier Resolution by the Second Division in Civil Case No. 0005. In that case, a similar Motion for disqualification alleged that the PCGG had failed to prove any inconsistency between the former function of Atty. Mendoza as solicitor general and his current employment as counsel of the Lucio Tan group. On December 5, 2001, PCGG's Motion for Reconsideration was also denied.

Hence, the PCGG filed the Petition with the Supreme Court, ascribing grave abuse of discretion to the SBN Fifth Division for issuing the Resolutions of July 11, 2001 and December 5, 2000.

The Issue

In the main, the issue was whether the prohibition under Rule 6.03 of the Code of Professional Responsibility applied to Atty. Mendoza.

The Court's Ruling

Writing for the majority, Justice Reynato S. Puno undertook an exhaustive investigation of the historical antecedents and rationale of Rule 6.03 of the CPR. As early as 1924, concerns had been raised by the American Bar Association (ABA), from whose canons the

Philippine Code of Professional Responsibility has borrowed immensely. These concerns were over the "revolving door," in which "lawyers x x x temporarily enter government service from private life and then leave it for large fees in private practice, where they can exploit information, contacts, and influence garnered in government service." The areas of concern were classified as "adverse-interest conflicts" and "congruent-interest conflicts."

An "adverse-interest conflict" exists when the matter in which a former government lawyer represents a client in private practice is substantially related to a matter that the lawyer dealt with while employed by the government; and the current and the former interests are adverse. On the other hand, a "congruent-interest conflict" prohibits a former government lawyer from representing a private practice client, even if the interests of the former and the new clients are entirely parallel. The case of Atty. Mendoza involved the second type of representation conflict.

The Court sustained the SBN's denial of Atty. Mendoza's disqualification, saying that the key to unlocking Rule 6.03 of the CPR was understanding (1) the meaning of "matter," as well as (2) the metes and bounds of the "intervention" made by the former government lawyer on the "matter."

"Matter"

The "matter," in which Atty. Mendoza intervened, referred to "advising the Central Bank on how to proceed with [GenBank's] liquidation and even filing the petition for its liquidation with the CFI of Manila." This matter, the Court said, was not the one

contemplated by Rule 6.03 of the CPR. As interpreted in ABA's Formal Opinion No. 342 (precursor of the Rule), "drafting, enforcing or interpreting government or agency procedures, regulations or laws, or briefing abstract principles of law" are acts that do not fall within the scope of the term "matter'; hence, they cannot be used to disqualify. Besides, the matter" involved in the special proceeding for GenBank's liquidation was entirely different from the "matter" involved in the sequestration cases.

Intervention

Meanwhile, two possible interpretations of the word "intervene" were noted. The first interpretation included participation in a proceeding, even if the intervention was irrelevant or had no effect or little influence. Under the second interpretation, "intervene" included only the act of a person who had the power to influence the proceedings. The second meaning was more appropriately given to the word "intervention" in Rule 6.03 of the CPR. The intervention, therefore, must be substantial and significant.

In the instant case, the Petition in the special proceedings was noted to be an initiatory pleading; hence, it had to be signed by Atty. Mendoza as the solicitor general. Moreover, his actual participation in the liquidation -- a participation that was not clear -- was not that of the usual court litigator protecting the interest of the government. Thus, his "intervention" was held to be insignificant and insubstantial.

Balancing Competing Policy Considerations

In ruling the way it did, the Court stressed that Rule 6.03 of the CPR had not been interpreted to cause a chilling effect on government recruitment of able legal talent. It rejected the use of the litigation tactic of harassing the opposing counsel to deprive the client not only of a law firm of choice, but also of an individual lawyer in whom the latter had confidence.

The Court also considered the possible effect of a truncated Rule on the official independence of lawyers in the government service. Found to be no less significant was the fact that former government lawyers were being deprived of the freedom to exercise their profession.

Impropriety

On the other hand, the possible appearance of impropriety and loss of public confidence in government -- the mischief sought to be remedied by Rule 6.03 of the CPR -- had already been rejected in the 1983 ABA Model Rules of Professional Conduct. Accordingly, per se disqualification in cases involving an actual conflict of interest has been abandoned by some courts. Demanded, instead, is an evaluation of the interests of the defendant, the government, the witnesses, and the public.

Switching Sides

Meanwhile, found to be inapplicable was the argument for strictness that was meant to

discourage lawyers from "switching sides" and thereby compromising confidential official information. There were no inconsistent sides, because Atty. Mendoza's act of informing the Central Bank (CB) of the procedure for liquidating GenBank was a subject matter that differed from that of the sequestration cases involving Allied Bank. Consequently, there was no danger that confidential official information might be divulged.

Conflict of Loyalties

Fears over a possible conflict of loyalties, which a government employee might experience while still in government service, were likewise brushed aside as a non-factor. The Court pointed out that Atty. Mendoza had not been charged with advising the CB on how to liquidate GenBank with an eye on defending Tan et al. of Allied Bank at a later time. Quite the contrary, he continued defending both the interests of the CB and of Tan et al. in the cases mentioned.

Excessive Influence or
Clout of Former Officials

The Court likewise paid no heed to the need to curtail the alleged excessive influence or clout of former officials. It considered such concern to be overextended and demeaning to those sitting in government.

In view of the foregoing points, the Petition assailing the Sandiganbayan Resolutions in the sequestration cases was denied.

The Separate Opinions

My Separate Opinion

I wrote a Separate Opinion arguing that the Petition should be dismissed only on the grounds of *res judicata* -- specifically, conclusiveness of judgment -- and prescription.

In his *ponencia*, Justice Puno contended that the procedural advice given by Atty. Mendoza was not the "matter" contemplated by Rule 6.03 of the CPR; and, in his Dissent, Justice Romeo J. Callejo Sr. took the position that Atty. Mendoza had violated Rule 6.03. With due respect, I submitted in my Separate Opinion that there was no need to inquire if the Rule had been transgressed, because a Resolution of the Sandiganbayan on the disqualification issue in a case involving the same parties and the same subject matter (Civil Case No. 005) had already become final and immutable and could no longer be altered. Rather, the material issue was whether Atty. Mendoza could still be barred from representing Tan et al. despite (1) the said final Order; and (2) the passage of sufficient time from the date he ceased to be solicitor general to the date when his supposed disqualification (for violation of the Code) was raised.

The Petition was barred by the principle of conclusiveness of judgment, which precluded the re-litigation of conclusively settled facts or issues between the same parties. While there was as yet no final adjudication on the merits of the main issues of "reversion,

reconveyance and restitution," the question with respect to the disqualification of Atty. Mendoza had nonetheless been *conclusively* settled.[5] The April 22, 1991 Resolution of the SBN Second Division had resolved on the merits the very same ground for his disqualification. And since no appeal was taken, the Resolution became final and executory. I stressed that, for the principle of conclusiveness of judgment to operate as an estoppel, the only identity required was that between *parties* and *issues*.

Finally, I submitted that the restriction on government lawyers, specifically with respect to their subsequent engagement under "congruent-interest representation," should be allowed to expire after a reasonable period when no further prejudice to the public could be contemplated. The prohibition should expire five years from retirement or separation from government service -- five years being the prescriptive period for suits for which no period was prescribed by law. Some lawyers had chosen in some distant past to dedicate their service to the government for some years, during which they had taken part in certain cases pursuant to their official functions. To ban them perpetually and absolutely from now taking part in any of those cases would then be unduly harsh, unreasonable and unfair.

The Gutierrez
Concurring Opinion

Madame Justice Angelina Sandoval-Gutierrez wrote a Concurring Opinion, in which she declared that motions to disqualify counsels from representing their clients must be considered with caution, because those motions might have been filed merely to harass a particular counsel, to delay litigation, to intimidate the adversary, or to gain a tactical

advantage. Motions like those were not motivated by a fine sense of ethics or a sincere desire to remove an unethical practitioner from litigation. In this case, she found that the "scattershot manner in which the PCGG filed the various motions to disqualify Atty. Mendoza shows its intent to harass him and Tan et al."

On the other issues, Justice Gutierrez opined as follows:

1. An order denying a motion to disqualify a counsel was final and not merely interlocutory. The issue was separable from, independent of, and collateral to, the merits of the sequestration cases. Therefore, the proper remedy was not a petition for certiorari, but an appeal.

2. *Res judicata* would apply. The Decision of the SBN in Civil Case Nos. 0095[6] and 0100,[7] in which a similar Motion to disqualify Atty. Mendoza had been denied, became final with the Court's Decision in GR Nos. 112708-09.[8] Because the PCGG had failed to assign as an error the denial of its Motion to disqualify him, the SBN Resolution denying his disqualification likewise became final. Hence, the PCGG could not re-litigate the issue.

3. Special Proceedings No. 107812, which involved the liquidation of GenBank before the CFI of Manila, was filed by Atty. Mendoza on behalf of the CB, Arnulfo B. Aurellano and several insurance companies. The issue in that case was whether the CB had acted in good faith in ordering GenBank's liquidation. On the other hand, Civil Case No. 0096 was for the annulment of various sequestration Orders issued by the PCGG over Tan et al.'s properties,

among them Allied Bank. The issues here were whether the sequestration Order over the shares of stock in the bank had been issued without notice, hearing and evidence. Thus, the two cases were different in all aspects, such as the parties, issues, facts and reliefs sought. The liquidation proceeding could not, therefore, be considered as a "matter" in connection with which Atty. Mendoza had accepted his engagement as counsel in the sequestration case.

4. The word "intervention" in Rule 6.03 of the CPR must be read in the context of an action affecting the interest of others.

The Morales Dissenting Opinion

While she joined Mr. Justice Callejo in his Dissent, Madame Justice Conchita Carpio Morales nonetheless wrote a Separate Opinion, in which she emphasized that the principle of conclusiveness of judgment was not applicable to the case. She cited *Kilosbayan v. Morato*, [9] in which the Court held that "the rule on conclusiveness of judgment x x x does not apply to issues of law, at least when substantially unrelated claims are involved."

The disqualification of Atty. Mendoza was "undoubtedly a legal question"; and "Civil Case No. 005 and Civil Case No. 0096 involve two different substantially unrelated claims," she said. Moreover, the denial of PCGG's Motion to disqualify him was not a final order, because it did not finally dispose of the case.

Justice Morales likewise disagreed with putting a five-year cap on Rule 6.03 of the

CPR. For that matter, she argued that the rule on privileged communication did not allow a lawyer to represent an interest in conflict with that of a former client, even after five years from the termination of the attorney-client relationship. That the professional right was a property right within constitutional guarantees was not unqualified, she added. No right was absolute and, in any case, property rights could be regulated.[10]

As regards the participation of Atty. Mendoza in the liquidation of GenBank, she opined that what was material was not his lack of participation in the decision of the CB to liquidate the bank, but his role in facilitating the liquidation through his legal expertise. In advising the CB, he did not just mechanically point to Section 20 of RA 265; he also synthesized the law and the facts that he was privy to because of his position.

The argument for a liberal interpretation of Rule 6.03 because of its "chilling effect on government recruitment of able legal talent" should be rejected, because it was likely to compromise ethical standards. While conceding that financial considerations were important, Justice Morales submitted that they were not the sole factor affecting the recruitment of lawyers to the government sector, particularly because serving in the government was its own reward.

The Callejo Dissenting Opinion

In his Dissenting Opinion, Justice Callejo urged a strict application of Rule 6.03 of the CPR "to provide an ethical compass to lawyers who, in the pursuit of the profession, often

find themselves in the unchartered sea of conflicting ideas and interests." To follow the "straight and narrow" path demanded by the ethics of the legal profession was to avoid the appearance of impropriety.

According to him, the restriction embodied in Rule 6.03 of the CPR applied to the case of Atty. Mendoza, because 1) it pertained to a lawyer who had once served in the government; and 2) related to his accepting "engagement or employment in connection with any matter in which he had intervened while in said service."

He pointed out that Atty. Mendoza's acts of giving counsel to the Central Bank on how to go about GenBank's liquidation and of filing a Petition in Special Proceedings No. 107812 did not merely involve drafting, enforcing or interpreting government or agency procedures, regulations or laws; or briefing abstract principles of law. These acts were discrete, isolatable, as well as identifiable transactions or conduct involving a particular situation and a specific party. Consequently, they could be properly considered as "matter" within the contemplation of Rule 6.03. Moreover, the sequestration of the shares of stock in Allied Bank, which was the subject of Civil Case No. 0096, necessarily involved or was related to Tan et al.'s acquisition of GenBank upon its liquidation, in which Atty. Mendoza had intervened as the solicitor general.

Also constituting "intervention" were the same acts of advising the Central Bank on how to proceed with GenBank's liquidation and of filing a Petition in the special proceeding. Atty. Mendoza played a significant and substantial role in those proceedings, as shown by the Central Bank Memorandum dated March 29, 1977.

Justice Callejo likewise argued that Rule 6.03 would apply, even if Atty. Mendoza did not "switch sides" or take an inconsistent position, because no congruent-interest or adverse-interests conflict was required for the interdiction to apply. Rule 16.03, which was a restatement of Canon 36 of the ABA's Canons of Professional Ethics -- now superseded by the ABA's Code of Professional Responsibility -- rested on the policy consideration that an attorney must seek to avoid even the appearance of evil. As *General Motors Corporation v. City of New York*[11] held, the appearance of impropriety must be avoided through disqualification when the overlap of issues is so plain, and the lawyer's involvement while in government employ so direct, as in this case.

He contended that the absence of an explicit temporal limitation in Rule 6.03 was deliberate. While the passage of time was a factor to consider in determining the applicability of the Rule, each case must be considered in the light of the peculiar circumstances. In this case, he said that the time that had passed since the liquidation of GenBank in 1977 was not sufficient to consider it to be far removed from the present engagement of Atty. Mendoza as counsel for Respondents Tan et al. in the sequestration case. The validity of the liquidation was still in question; and with it, the validity of the sequestration of the shares in Allied Bank hung in the balance.

On the procedural issues, Justice Callejo opined thus:

1. PCGG's Petition for Certiorari under Rule 65 of the Rules of Court was proper,

because the special civil action of certiorari could be availed of if there was no appeal; or no plain, speedy and adequate remedy in the ordinary course of law. Here, the remedy of appeal was not available to the PCGG, because the denial of its Motion to disqualify Atty. Mendoza as counsel for Respondents Tan et al. was an interlocutory order and, hence, not appealable.

2. The doctrine of *res judicata*, whether as a bar by prior judgment or in the concept of conclusiveness of judgment, did not apply. The Resolution dated April 22, 1991 -- issued by the SBN (Second Division) in Civil Case No. 0005, denying the PCGG's similar Motion to disqualify Atty. Mendoza as counsel for Respondents Tan et al.-- was an interlocutory Order, as it did not terminate or finally dispose of the case. Hence, the Resolution could not operate to bar the filing of another motion to disqualify Atty. Mendoza in the other cases.

The Tinga Separate Opinion

Justice Dante O. Tinga voted also to deny the Petition. He maintained that Rule 6.03 of the CPR, which had not yet been promulgated at the time Atty. Mendoza entered government service, could not yet be made to apply to the latter. To apply it would therefore be a violation of the attorney's right to due process.

It was also a dangerous precedent to apply the CPR retroactively, because it was a source of penal liabilities, said Justice Tinga. To impute culpability to Atty. Mendoza, it would be necessary to ascertain whether his representation of Tan et al. violated any binding law or regulation at the time of his engagement as counsel. At most, his actions would have

violated Canon 36 of the Canons of Professional Ethics, which had been adopted by the Philippine Bar Association (PBA). But then, those Canons were per se binding only on the members of the PBA -- a private, civic, nonprofit association of limited membership within the Philippine bar. The Rules had not been formally adopted by the Supreme Court then; hence, they could not have been a source of obligations or the basis of penalties. The absence of a definitive rule that would have guided Atty. Mendoza when he undertook the questioned acts sufficiently justified the SBN's denial of the Motion, Justice Tinga concluded.

---

[1] Chief Justice Hilario G. Davide Jr.; and Justices Reynato S. Puno (*ponente*), Artemio V. Panganiban, Leonardo A. Quisumbing, Consuelo Ynares-Santiago, Angelina Sandoval-Gutierrez, Antonio T. Carpio, Ma. Alicia Austria-Martinez, Renato C. Corona, Dante O. Tinga and Cancio C. Garcia.

[2] Justices Conchita Carpio Morales and Romeo J. Callejo Sr.

[3] Justices Adolfo S. Azcuna and Minita Chico-Nazario.

[4] Civil Case Nos. 0096-0099 were transferred from the SBN Second Division to the Fifth Division.

[5] In this, I disagreed with Justices Conchita Carpio Morales and Callejo, who had both opined that the April 22, 1991 Resolution of the SBN Second Division in Civil Case No. 0005 was merely interlocutory.

[6] *Sipalay Trading Corp. v. PCGG*.

[7] *Allied Banking Corp. v. PCGG.*

[8] *Republic of the Philippines v. Sandiganbayan*, 255 SCRA 438, March 29, 1996.

[9] 316 Phil. 652, July 17, 1995.

[10] Justice Morales cited *JMM Promotion and Management, Inc. v. Court of Appeals* (329 Phil. 87, August 5, 1996) as authority on this matter.

[11] 501 F.2d 639 (1974).