

**BENEDICTO HORNILLA AND ATTY. FEDERICO D. RICAFORT,
COMPLAINANTS, VS. ATTY. ERNESTO S. SALUNAT, RESPONDENT.***A.C. No. 5804. July 01, 2003*

Ponente: YNARES-SANTIAGO, J.

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On November 21, 1997, Benedicto Hornilla and Federico D. Ricafort filed an administrative complaint^[1] with the Integrated Bar of the Philippines (IBP) Commission on Bar Discipline, against respondent Atty. Ernesto S. Salunat for illegal and unethical practice and conflict of interest. They alleged that respondent is a member of the ASSA Law and Associates, which was the retained counsel of the Philippine Public School Teachers Association (PPSTA). Respondent's brother, Aurelio S. Salunat, was a member of the PPSTA Board which approved respondent's engagement as retained counsel of PPSTA.

Complainants, who are members of the PPSTA, filed an intra-corporate case against its members of the Board of Directors for the terms 1992-1995 and 1995-1997 before the Securities and Exchange Commission, which was docketed as SEC Case No. 05-97-5657, and a complaint before the Office of the Ombudsman, docketed as OMB Case No. 0-97-0695, for unlawful spending and the undervalued sale of real property of the PPSTA. Respondent entered his appearance as counsel for the PPSTA Board members in the said cases. Complainants contend that respondent was guilty of conflict of interest because he was engaged by the PPSTA, of which complainants were members, and was being paid out of its corporate funds where complainants have contributed. Despite being told by PPSTA members of the said conflict of interest, respondent refused to withdraw his appearance in the said cases.

Moreover, complainants aver that respondent violated Rule 15.06^[2] of the Code of Professional Responsibility when he appeared at the meeting of the PPSTA Board and assured its members that he will win the PPSTA cases.

In his Answer,^[3] respondent stressed that he entered his appearance as counsel for the PPSTA Board Members for and in behalf of the ASSA Law and Associates. As a partner in the said law firm, he only filed a "Manifestation of Extreme Urgency" in OMB Case No. 0-97-0695.^[4] On the other hand, SEC Case No. 05-97-5657 was handled by another partner of the firm, Atty. Agustin V. Agustin. Respondent claims that it was complainant Atty. Ricafort who instigated, orchestrated and indiscriminately filed the said cases against members of the PPSTA and its Board.

Respondent pointed out that his relationship to Aurelio S. Salunat was immaterial; and that when he entered into the retainer contract with the PPSTA Board, he did so, not in his individual capacity, but in representation of the ASSA Law Firm. He denied that he ensured the victory of the PPSTA Board in the case he was handling. He merely assured the Board that the truth will come out and that the case before the Ombudsman will be dismissed for lack of jurisdiction, considering that respondents therein are not public officials, but private employees. Anent the SEC case, respondent alleged that the same was being handled by the law firm of Atty. Eduardo de Mesa, and not ASSA.

By way of Special and Affirmative Defenses, respondent averred that complainant Atty. Ricafort was himself guilty of gross violation of his oath of office amounting to gross misconduct, malpractice and unethical conduct for filing trumped-up charges against him and Atty. De Mesa. Thus, he prayed that the complaint against him be dismissed and, instead, complainant Ricafort be disciplined or disbarred.

The complainant was docketed as CBD Case No. 97-531 and referred to the IBP Commission on Bar Discipline. After investigation, Commissioner Lydia A. Navarro recommended that respondent be suspended from the practice of law for six (6) months. The Board of Governors thereafter adopted Resolution No. XV-3003-230 dated June 29, 2002, approving the report and recommendation of the Investigating Commissioner.

Respondent filed with this Court a Motion for Reconsideration of the above Resolution of the IBP Board of Governors.

The pertinent rule of the Code of Professional Responsibility provides:

RULE 15.03. - A lawyer shall not represent conflicting interests except by written consent of all concerned given after a full disclosure of the facts.

There is conflict of interest when a lawyer represents inconsistent interests of two or more opposing parties. The test is "whether or not in behalf of one client, it is the lawyer's duty to fight for an issue or claim, but it is his duty to oppose it for the other client. In brief, if he argues for one client, this argument will be opposed by him when he argues for the other client." [5] This rule covers not only cases in which confidential communications have been confided, but also those in which no confidence has been bestowed or will be used. [6] Also, there is conflict of interests if the acceptance of the new retainer will require the attorney to perform an act which will injuriously affect his first client in any matter in which he represents him and also whether he will be called upon in his new relation to use against his first client any knowledge acquired through their connection. [7] Another test of the inconsistency of interests is whether the acceptance of a new relation will prevent an attorney from the full discharge of his duty of undivided fidelity and loyalty to his client or invite suspicion of unfaithfulness or double dealing in the performance thereof. [8]

In this jurisdiction, a corporation's board of directors is understood to be that body which (1) exercises all powers provided for under the Corporation Code; (2) conducts all business of the corporation; and (3) controls and holds all property of the corporation. [9] Its members have been characterized as trustees or directors clothed with a fiduciary character. [10] It is clearly separate and distinct from the corporate entity itself.

Where corporate directors have committed a breach of trust either by their frauds, ultra vires acts, or negligence, and the corporation is unable or unwilling to institute suit to remedy the wrong, a stockholder may sue on behalf of himself and other stockholders and for the benefit of the corporation, to bring about a redress of the wrong done directly to the corporation and indirectly to the stockholders. [11] This is what is known as a derivative suit, and settled is the doctrine that in a derivative suit, the corporation is the real party in interest while the stockholder filing suit for the corporation's behalf is only nominal party. The corporation should be included as a party in the suit. [12]

Having thus laid a suitable foundation of the basic legal principles pertaining to derivative suits, we come now to the threshold question: can a lawyer engaged by a corporation defend members of the board of the same corporation in a derivative suit? On this issue, the following disquisition is enlightening:

The possibility for conflict of interest here is universally recognized. Although early cases found joint representation permissible where no conflict of interest was obvious, the emerging rule is against dual representation in all derivative actions. Outside counsel must thus be retained to represent one of the

defendants. The cases and ethics opinions differ on whether there must be separate representation from the outset or merely from the time the corporation seeks to take an active role. Furthermore, this restriction on dual representation should not be waivable by consent in the usual way; the corporation should be presumptively incapable of giving valid consent.[13] (underscoring ours)

In other jurisdictions, the prevailing rule is that a situation wherein a lawyer represents both the corporation and its assailed directors unavoidably gives rise to a conflict of interest. The interest of the corporate client is paramount and should not be influenced by any interest of the individual corporate officials.[14] The rulings in these cases have persuasive effect upon us. After due deliberation on the wisdom of this doctrine, we are sufficiently convinced that a lawyer engaged as counsel for a corporation cannot represent members of the same corporation's board of directors in a derivative suit brought against them. To do so would be tantamount to representing conflicting interests, which is prohibited by the Code of Professional Responsibility.

In the case at bar, the records show that SEC Case No. 05-97-5657, entitled "Philippine Public School Teacher's Assn., Inc., et al. v. 1992-1995 Board of Directors of the Philippine Public School Teacher's Assn. (PPSTA), et al.," was filed by the PPSTA against its own Board of Directors. Respondent admits that the ASSA Law Firm, of which he is the Managing Partner, was the retained counsel of PPSTA. Yet, he appeared as counsel of record for the respondent Board of Directors in the said case. Clearly, respondent was guilty of conflict of interest when he represented the parties against whom his other client, the PPSTA, filed suit.

In his Answer, respondent argues that he only represented the Board of Directors in OMB Case No. 0-97-0695. In the said case, he filed a Manifestation of Extreme Urgency wherein he prayed for the dismissal of the complaint against his clients, the individual Board Members. By filing the said pleading, he necessarily entered his appearance therein.[15] Again, this constituted conflict of interests, considering that the complaint in the Ombudsman, albeit in the name of the individual members of the PPSTA, was brought in behalf of and to protect the interest of the corporation.

Therefore, respondent is guilty of representing conflicting interests. Considering however, that this is his first offense, we find the penalty of suspension, recommended in IBP Resolution No. XV-2002-230 dated June 29, 2002, to be too harsh. Instead, we resolve to admonish respondent to observe a higher degree of fidelity in the practice of his profession.

ACCORDINGLY, respondent Atty. Ernesto Salunat is found GUILTY of representing conflicting interests and is ADMONISHED to observe a higher degree of fidelity in the practice of his profession. He is further WARNED that a repetition of the same or similar acts will be dealt with more severely.

SO ORDERED.

Davide, Jr., C.J., Vitug, Carpio, and Azcuna, JJ., concur.

[1] Record, Vol. 1, p. 1.

[2] Rule 15.06 - A lawyer shall not state or imply that he is able to influence any public official, tribunal or legislative body.

[3] Rollo, p. 58.

[4] Id., p. 79.

[5] Pineda, Legal and Judicial Ethics, p. 199 [1999 ed.].

[6] *Id.*, citing *Hilado v. David*, 84 Phil. 569 [1949]; *Nombrado v. Hernandez*, 26 SCRA 13 [1968]; *Bautista v. Barrios*, 9 SCRA 695 [1963].

[7] *Pineda*, Legal and Judicial Ethics, *supra*, p. 199, citing *Pierce v. Palmer*, 31 R.I. 432.

[8] *Agpalo*, Legal Ethics, *supra*, p. 220, citing *In re De la Rosa*, 27 Phil. 258 [1914]; *Grievance Committee v. Rottner*, 152 Conn. 59, 203 A 2d 82 [1954] and *Titania v. Ocampo*, 200 SCRA 472 [1991].

[9] CORPORATION CODE, sec. 23.

[10] 3 FLETCHER, CYCLOPEDIA CORPORATIONS (Permanent Ed.) § 8044 (Importance of determining whether officer a trustee or agent).

[11] *Pascual v. Del Saz Orozco*, 19 Phil. 82 (1911), cited in *Gochan v. Young*, G.R. No. 131889, 12 March 2001.

[12] *Asset Privatization Trust v. CA*, 360 Phil. 768 (1998).

[13] *Harvard Law Review*, Developments in the Law: Conflict of Interest, 94 Harv. L. Rev. 1244, 1339-1342 (1981), cited in SOLOMON, SCHWARTZ, BAUMANWEISS, CORPORATIONS: LAW AND POLICY (3[rd] ed.) 1129 (1994).

[14] *Cannon v. United States Acoustics Corporation*, 398 F. Supp. 209 (N.D. Ill. 1975), affirmed in relevant part per curiam 532 F. 2d 1118 (7[th] Circ. 1978), citing *Murphy v. Washington American League Baseball Club, Inc.*, 116 U.S. App. D.C. 362, 324 F. 2d 394 (1963).

[15] *Ong Ching v. Ramolete*, 151-A Phil. 509, 514 [1973].

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