

**PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT (PCGG),
PETITIONER, VS. SANDIGANBAYAN (FIFTH DIVISION), LUCIO C. TAN,
CARMEN KHAO TAN, FLORENCIO T. SANTOS, NATIVIDAD P. SANTOS,
DOMIN...**

G.R. NOS. 151809-12. April 12, 2005

Ponente: PUNO, J.

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PUNO, J.:

This case is *prima impressiones* and it is weighted with significance for it concerns on one hand, the efforts of the Bar to upgrade the ethics of lawyers in government service and on the other, its effect on the right of government to recruit competent counsel to defend its interests.

In 1976, General Bank and Trust Company (GENBANK) encountered financial difficulties. GENBANK had extended considerable financial support to Filcapital Development Corporation causing it to incur daily overdrawings on its current account with the Central Bank.[1] It was later found by the Central Bank that GENBANK had approved various loans to directors, officers, stockholders and related interests totaling P172.3 million, of which 59% was classified as doubtful and P0.505 million as uncollectible.[2] As a bailout, the Central Bank extended emergency loans to GENBANK which reached a total of P310 million.[3] Despite the mega loans, GENBANK failed to recover from its financial woes. On March 25, 1977, the Central Bank issued a resolution declaring GENBANK insolvent and unable to resume business with safety to its depositors, creditors and the general public, and ordering its liquidation.[4] A public bidding of GENBANK's assets was held from March 26 to 28, 1977, wherein the Lucio Tan group submitted the winning bid.[5] Subsequently, former Solicitor General Estelito P. Mendoza filed a petition with the then Court of First Instance praying for the assistance and supervision of the court in GENBANK's liquidation as mandated by Section 29 of Republic Act No. 265.

In February 1986, the EDSA I revolution toppled the Marcos government. One of the first acts of President Corazon C. Aquino was to establish the Presidential Commission on Good Government (PCGG) to recover the alleged ill-gotten wealth of former President Ferdinand Marcos, his family and his cronies. Pursuant to this mandate, the PCGG, on July 17, 1987, filed with the Sandiganbayan a complaint for "reversion, reconveyance, restitution, accounting and damages" against respondents Lucio Tan, Carmen Khao Tan, Florencio T. Santos, Natividad P. Santos, Domingo Chua, Tan Hui Nee, Mariano Tan Eng Lian, Estate of Benito Tan Kee Hiong, Florencio N. Santos, Jr., Harry C. Tan, Tan Eng Chan, Chung Poe Kee, Mariano Khoo, Manuel Khoo, Miguel Khoo, Jaime Khoo, Elizabeth Khoo, Celso Ranola, William T. Wong, Ernesto B. Lim, Benjamin T. Albacita, Willy Co, Allied Banking Corporation (Allied Bank), Allied Leasing and Finance Corporation, Asia Brewery, Inc., Basic Holdings Corp., Foremost Farms, Inc., Fortune Tobacco Corporation, Grandspan Development Corp., Himmel Industries, Iris Holdings and Development Corp., Jewel Holdings, Inc., Manufacturing Services and Trade Corp., Maranaw Hotels and Resort Corp., Northern Tobacco Redrying Plant, Progressive Farms, Inc., Shareholdings, Inc., Sipalay Trading Corp., Virgo Holdings & Development Corp., (collectively referred to herein as respondents Tan, et al.), then President Ferdinand E. Marcos, Imelda R. Marcos, Panfilo O. Domingo, Cesar

Zalamea, Don Ferry and Gregorio Licaros. The case was docketed as Civil Case No. 0005 of the Second Division of the Sandiganbayan.[6] In connection therewith, the PCGG issued several writs of sequestration on properties allegedly acquired by the above-named persons by taking advantage of their close relationship and influence with former President Marcos.

Respondents Tan, et al. repaired to this Court and filed petitions for certiorari, prohibition and injunction to nullify, among others, the writs of sequestration issued by the PCGG.[7] After the filing of the parties' comments, this Court referred the cases to the Sandiganbayan for proper disposition. These cases were docketed as Civil Case Nos. 0096-0099. In all these cases, respondents Tan, et al. were represented by their counsel, former Solicitor General Estelito P. Mendoza, who has then resumed his private practice of law.

On February 5, 1991, the PCGG filed motions to disqualify respondent Mendoza as counsel for respondents Tan, et al. with the Second Division of the Sandiganbayan in Civil Case Nos. 0005[8] and 0096-0099.[9] The motions alleged that respondent Mendoza, as then Solicitor General[10] and counsel to Central Bank, "actively intervened" in the liquidation of GENBANK, which was subsequently acquired by respondents Tan, et al. and became Allied Banking Corporation. Respondent Mendoza allegedly "intervened" in the acquisition of GENBANK by respondents Tan, et al. when, in his capacity as then Solicitor General, he advised the Central Bank's officials on the procedure to bring about GENBANK's liquidation and appeared as counsel for the Central Bank in connection with its petition for assistance in the liquidation of GENBANK which he filed with the Court of First Instance (now Regional Trial Court) of Manila and was docketed as Special Proceeding No. 107812. The motions to disqualify invoked Rule 6.03 of the Code of Professional Responsibility. Rule 6.03 prohibits former government lawyers from accepting "engagement or employment in connection with any matter in which he had intervened while in said service."

On April 22, 1991 the Second Division of the Sandiganbayan issued a resolution denying PCGG's motion to disqualify respondent Mendoza in Civil Case No. 0005.[11] It found that the PCGG failed to prove the existence of an inconsistency between respondent Mendoza's former function as Solicitor General and his present employment as counsel of the Lucio Tan group. It noted that respondent Mendoza did not take a position adverse to that taken on behalf of the Central Bank during his term as Solicitor General.[12] It further ruled that respondent Mendoza's appearance as counsel for respondents Tan, et al. was beyond the one-year prohibited period under Section 7(b) of Republic Act No. 6713 since he ceased to be Solicitor General in the year 1986. The said section prohibits a former public official or employee from practicing his profession in connection with any matter before the office he used to be with within one year from his resignation, retirement or separation from public office.[13] The PCGG did not seek any reconsideration of the ruling.[14]

It appears that Civil Case Nos. 0096-0099 were transferred from the Sandiganbayan's Second Division to the Fifth Division.[15] In its resolution dated July 11, 2001, the Fifth Division of the Sandiganbayan denied the other PCGG's motion to disqualify respondent Mendoza.[16] It adopted the resolution of its Second Division dated April 22, 1991, and observed that the arguments were the same in substance as the motion to disqualify filed in Civil Case No. 0005. The PCGG sought reconsideration of the ruling but its motion was denied in its resolution dated December 5, 2001.[17]

Hence, the recourse to this Court by the PCGG assailing the resolutions dated July 11, 2001 and December 5, 2001 of the Fifth Division of the Sandiganbayan via a petition for certiorari and prohibition under Rule 65 of the 1997 Rules of Civil Procedure.[18] The PCGG alleged that the Fifth Division acted with grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the assailed resolutions contending that: 1) Rule 6.03 of the Code of Professional Responsibility prohibits a former government lawyer from accepting employment in connection with any matter in which he intervened; 2) the prohibition in the Rule is not time-bound; 3) that

Central Bank could not waive the objection to respondent Mendoza's appearance on behalf of the PCGG; and 4) the resolution in Civil Case No. 0005 was interlocutory, thus res judicata does not apply.[19]

The petition at bar raises procedural and substantive issues of law. In view, however, of the import and impact of Rule 6.03 of the Code of Professional Responsibility to the legal profession and the government, we shall cut our way and forthwith resolve the substantive issue.

I

Substantive Issue

The key issue is whether Rule 6.03 of the Code of Professional Responsibility applies to respondent Mendoza. Again, the prohibition states: "A lawyer shall not, after leaving government service, accept engagement or employment in connection with any matter in which he had intervened while in the said service."

I.A. The history of Rule 6.03

A proper resolution of this case necessitates that we trace the historical lineage of Rule 6.03 of the Code of Professional Responsibility.

In the seventeenth and eighteenth centuries, ethical standards for lawyers were pervasive in England and other parts of Europe. The early statements of standards did not resemble modern codes of conduct. They were not detailed or collected in one source but surprisingly were comprehensive for their time. The principal thrust of the standards was directed towards the litigation conduct of lawyers. It underscored the central duty of truth and fairness in litigation as superior to any obligation to the client. The formulations of the litigation duties were at times intricate, including specific pleading standards, an obligation to inform the court of falsehoods and a duty to explore settlement alternatives. Most of the lawyer's other basic duties -- competency, diligence, loyalty, confidentiality, reasonable fees and service to the poor -- originated in the litigation context, but ultimately had broader application to all aspects of a lawyer's practice.

The forms of lawyer regulation in colonial and early post-revolutionary America did not differ markedly from those in England. The colonies and early states used oaths, statutes, judicial oversight, and procedural rules to govern attorney behavior. The difference from England was in the pervasiveness and continuity of such regulation. The standards set in England varied over time, but the variation in early America was far greater. The American regulation fluctuated within a single colony and differed from colony to colony. Many regulations had the effect of setting some standards of conduct, but the regulation was sporadic, leaving gaps in the substantive standards. Only three of the traditional core duties can be fairly characterized as pervasive in the formal, positive law of the colonial and post-revolutionary period: the duties of litigation fairness, competency and reasonable fees.[20]

The nineteenth century has been termed the "dark ages" of legal ethics in the United States. By mid-century, American legal reformers were filling the void in two ways. First, David Dudley Field, the drafter of the highly influential New York "Field Code," introduced a new set of uniform standards of conduct for lawyers. This concise statement of eight statutory duties became law in several states in the second half of the nineteenth century. At the same time, legal educators, such as David Hoffman and George Sharswood, and many other lawyers were working to flesh out the broad outline of a lawyer's duties. These reformers wrote about legal ethics in unprecedented detail and thus brought a new level of understanding to a lawyer's duties. A number of mid-nineteenth century laws and statutes, other than the Field Code, governed lawyer behavior. A few forms of colonial regulations - e.g., the "do no falsehood" oath and the deceit prohibitions -- persisted in some states. Procedural law continued to directly, or indirectly, limit an attorney's litigation behavior. The developing law of

agency recognized basic duties of competence, loyalty and safeguarding of client property. Evidence law started to recognize with less equivocation the attorney-client privilege and its underlying theory of confidentiality. Thus, all of the core duties, with the likely exception of service to the poor, had some basis in formal law. Yet, as in the colonial and early post-revolutionary periods, these standards were isolated and did not provide a comprehensive statement of a lawyer's duties. The reformers, by contrast, were more comprehensive in their discussion of a lawyer's duties, and they actually ushered a new era in American legal ethics.[21]

Toward the end of the nineteenth century, a new form of ethical standards began to guide lawyers in their practice - the bar association code of legal ethics. The bar codes were detailed ethical standards formulated by lawyers for lawyers. They combined the two primary sources of ethical guidance from the nineteenth century. Like the academic discourses, the bar association codes gave detail to the statutory statements of duty and the oaths of office. Unlike the academic lectures, however, the bar association codes retained some of the official imprimatur of the statutes and oaths. Over time, the bar association codes became extremely popular that states adopted them as binding rules of law. Critical to the development of the new codes was the re-emergence of bar associations themselves. Local bar associations formed sporadically during the colonial period, but they disbanded by the early nineteenth century. In the late nineteenth century, bar associations began to form again, picking up where their colonial predecessors had left off. Many of the new bar associations, most notably the Alabama State Bar Association and the American Bar Association, assumed on the task of drafting substantive standards of conduct for their members.[22]

In 1887, Alabama became the first state with a comprehensive bar association code of ethics. The 1887 Alabama Code of Ethics was the model for several states' codes, and it was the foundation for the American Bar Association's (ABA) 1908 Canons of Ethics.[23]

In 1917, the Philippine Bar found that the oath and duties of a lawyer were insufficient to attain the full measure of public respect to which the legal profession was entitled. In that year, the Philippine Bar Association adopted as its own, Canons 1 to 32 of the ABA Canons of Professional Ethics.[24]

As early as 1924, some ABA members have questioned the form and function of the canons. Among their concerns was the "revolving door" or "the process by which lawyers and others 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." [25] These concerns were classified as 'adverse-interest conflicts' and 'congruent-interest conflicts.' "Adverse-interest conflicts" exist where the matter in which the 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 interests of the current and former are adverse.[26] On the other hand, "congruent-interest representation conflicts" are unique to government lawyers and apply primarily to former government lawyers.[27] For several years, the ABA attempted to correct and update the canons through new canons, individual amendments and interpretative opinions. In 1928, the ABA amended one canon and added thirteen new canons.[28] To deal with problems peculiar to former government lawyers, Canon 36 was minted which disqualified them both for "adverse-interest conflicts" and "congruent-interest representation conflicts." [29] The rationale for disqualification is rooted in a concern that the government lawyer's largely discretionary actions would be influenced by the temptation to take action on behalf of the government client that later could be to the advantage of parties who might later become private practice clients.[30] Canon 36 provides, viz.:

36. RETIREMENT FROM JUDICIAL POSITION OR PUBLIC EMPLOYMENT

A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

A lawyer, having once held public office or having been in the public employ should not, after his retirement, accept employment in connection with any matter he has investigated or passed upon while in such office or employ.

Over the next thirty years, the ABA continued to amend many of the canons and added Canons 46 and 47 in 1933 and 1937, respectively.[31]

In 1946, the Philippine Bar Association again adopted as its own Canons 33 to 47 of the ABA Canons of Professional Ethics.[32]

By the middle of the twentieth century, there was growing consensus that the ABA Canons needed more meaningful revision. In 1964, the ABA President-elect Lewis Powell asked for the creation of a committee to study the "adequacy and effectiveness" of the ABA Canons. The committee recommended that the canons needed substantial revision, in part because the ABA Canons failed to distinguish between "the inspirational and the proscriptive" and were thus unsuccessful in enforcement. The legal profession in the United States likewise observed that Canon 36 of the ABA Canons of Professional Ethics resulted in unnecessary disqualification of lawyers for negligible participation in matters during their employment with the government.

The unfairness of Canon 36 compelled ABA to replace it in the 1969 ABA Model Code of Professional Responsibility.[33] The basic ethical principles in the Code of Professional Responsibility were supplemented by Disciplinary Rules that defined minimum rules of conduct to which the lawyer must adhere.[34] In the case of Canon 9, DR 9-101(b)[35] became the applicable supplementary norm. The drafting committee reformulated the canons into the Model Code of Professional Responsibility, and, in August of 1969, the ABA House of Delegates approved the Model Code.[36]

Despite these amendments, legal practitioners remained unsatisfied with the results and indefinite standards set forth by DR 9-101(b) and the Model Code of Professional Responsibility as a whole. Thus, in August 1983, the ABA adopted new Model Rules of Professional Responsibility. The Model Rules used the "restatement format," where the conduct standards were set-out in rules, with comments following each rule. The new format was intended to give better guidance and clarity for enforcement "because the only enforceable standards were the black letter Rules." The Model Rules eliminated the broad canons altogether and reduced the emphasis on narrative discussion, by placing comments after the rules and limiting comment discussion to the content of the black letter rules. The Model Rules made a number of substantive improvements particularly with regard to conflicts of interests.[37] In particular, the ABA did away with Canon 9, citing the hopeless dependence of the concept of impropriety on the subjective views of anxious clients as well as the norm's indefinite nature.[38]

In cadence with these changes, the Integrated Bar of the Philippines (IBP) adopted a proposed Code of Professional Responsibility in 1980 which it submitted to this Court for approval. The Code was drafted to reflect the local customs, traditions, and practices of the bar and to conform with new realities. On June 21, 1988, this Court promulgated the Code of Professional Responsibility.[39] Rule 6.03 of the Code of Professional Responsibility deals particularly with former government lawyers, and provides, viz.:

Rule 6.03 - 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.

Rule 6.03 of the Code of Professional Responsibility retained the general structure of paragraph 2, Canon 36 of the Canons of Professional Ethics but replaced the expansive phrase "investigated and passed upon" with the word "intervened." It is, therefore, properly applicable to both "adverse-interest conflicts" and "congruent-interest conflicts."

The case at bar does not involve the "adverse interest" aspect of Rule 6.03. Respondent Mendoza, it is conceded, has no adverse interest problem when he acted as Solicitor General in Sp. Proc. No. 107812 and later as counsel of respondents Tan, et al. in Civil Case No. 0005 and Civil Case Nos. 0096-0099 before the Sandiganbayan. Nonetheless, there remains the issue of whether there exists a "congruent-interest conflict" sufficient to disqualify respondent Mendoza from representing respondents Tan, et al.

I.B. The "congruent interest" aspect of Rule 6.03

The key to unlock Rule 6.03 lies in comprehending first, the meaning of "matter" referred to in the rule and, second, the metes and bounds of the "intervention" made by the former government lawyer on the "matter." The American Bar Association in its Formal Opinion 342, defined "matter" as any discrete, isolatable act as well as identifiable transaction or conduct involving a particular situation and specific party, and not merely an act of drafting, enforcing or interpreting government or agency procedures, regulations or laws, or briefing abstract principles of law.

Firstly, it is critical that we pinpoint the "matter" which was the subject of intervention by respondent Mendoza while he was the Solicitor General. The PCGG relates the following acts of respondent Mendoza as constituting the "matter" where he intervened as a Solicitor General, viz:[40]

The PCGG's Case for Atty. Mendoza's Disqualification

The PCGG imputes grave abuse of discretion on the part of the Sandiganbayan (Fifth Division) in issuing the assailed Resolutions dated July 11, 2001 and December 5, 2001 denying the motion to disqualify Atty. Mendoza as counsel for respondents Tan, et al. The PCGG insists that Atty. Mendoza, as then Solicitor General, actively intervened in the closure of GENBANK by advising the Central Bank on how to proceed with the said bank's liquidation and even filing the petition for its liquidation with the CFI of Manila.

As proof thereof, the PCGG cites the Memorandum dated March 29, 1977 prepared by certain key officials of the Central Bank, namely, then Senior Deputy Governor Amado R. Brinas, then Deputy Governor Jaime C. Laya, then Deputy Governor and General Counsel Gabriel C. Singson, then Special Assistant to the Governor Carlota P. Valenzuela, then Assistant to the Governor Arnulfo B. Aurellano and then Director of Department of Commercial and Savings Bank Antonio T. Castro, Jr., where they averred that on March 28, 1977, they had a conference with the Solicitor General (Atty. Mendoza), who advised them on how to proceed with the liquidation of GENBANK. The pertinent portion of the said memorandum states:

Immediately after said meeting, we had a conference with the Solicitor General and he advised that the following procedure should be taken:

1)

Management should submit a memorandum to the Monetary Board reporting that studies and evaluation had been made since the last examination of the bank as of August 31, 1976 and it is believed that the bank can not be reorganized or placed in a condition so that it may be permitted to resume business with safety to its depositors and creditors and the general public.

2)

If the said report is confirmed by the Monetary Board, it shall order the liquidation of the bank and indicate the manner of its liquidation and approve a liquidation plan.

3)

The Central Bank shall inform the principal stockholders of Genbank of the foregoing decision to liquidate the bank and the liquidation plan approved by the Monetary Board.

4)

The Solicitor General shall then file a petition in the Court of First Instance reciting the proceedings which had been taken and praying the assistance of the Court in the liquidation of Genbank.

The PCGG further cites the Minutes No. 13 dated March 29, 1977 of the Monetary Board where it was shown that Atty. Mendoza was furnished copies of pertinent documents relating to GENBANK in order to aid him in filing with the court the petition for assistance in the bank's liquidation. The pertinent portion of the said minutes reads:

The Board decided as follows:

...

E. To authorize Management to furnish the Solicitor General with a copy of the subject memorandum of the Director, Department of Commercial and Savings Bank dated March 29, 1977, together with copies of:

- Memorandum of the Deputy Governor, Supervision and Examination Sector, to the Monetary Board, dated March 25, 1977, containing a report on the current situation of Genbank;

- Aide Memoire on the Antecedent Facts Re: General Bank and Trust Co., dated March 23, 1977;

- Memorandum of the Director, Department of Commercial and Savings Bank, to the Monetary Board, dated March 24, 1977, submitting, pursuant to Section 29 of R.A. No. 265, as amended by P.D. No. 1007, a report on the state of insolvency of Genbank, together with its attachments; and

- Such other documents as may be necessary or needed by the Solicitor General for his use in then CFI-praying the assistance of the Court in the liquidation of Genbank.

Beyond doubt, therefore, the "matter" or the act of respondent Mendoza as Solicitor General involved in the case at bar is "advising the Central Bank, on how to proceed with the said bank's liquidation and even filing the petition for its liquidation with the CFI of Manila." In fine, the Court should resolve whether his act of advising the Central Bank on the legal procedure to liquidate GENBANK is included within the concept of "matter" under Rule 6.03. The procedure of liquidation is given in black and white in Republic Act No. 265, section 29, viz:

The provision reads in part:

SEC. 29. Proceedings upon insolvency. - Whenever, upon examination by the head of the appropriate supervising or examining department or his examiners or agents into the condition of any bank or non-bank financial intermediary performing quasi-banking functions, it shall be disclosed that the condition of the same is one of insolvency, or that its continuance in business would involve probable loss to its depositors or creditors, it shall be the duty of the department head concerned forthwith, in writing, to inform the Monetary Board of the facts, and the Board may, upon finding the statements of the department head to be true, forbid the institution to do business in the Philippines and shall designate an official of the Central Bank or a person of recognized competence in banking or finance, as receiver to immediately take charge of its assets and liabilities, as expeditiously as possible collect and gather all the assets and administer the same for the benefit of its creditors, exercising all the powers necessary for these purposes including, but not limited to, bringing suits and foreclosing mortgages in the name of the bank or non-bank financial intermediary performing quasi-banking functions.

...

If the Monetary Board shall determine and confirm within the said period that the bank or non-bank financial intermediary performing quasi-banking functions is insolvent or cannot resume business with safety to its depositors, creditors and the general public, it shall, if the public interest requires, order its liquidation, indicate the manner of its liquidation and approve a liquidation plan. The Central Bank shall, by the Solicitor General,

file a petition in the Court of First Instance reciting the proceedings which have been taken and praying the assistance of the court in the liquidation of such institution. The court shall have jurisdiction in the same proceedings to adjudicate disputed claims against the bank or non-bank financial intermediary performing quasi-banking functions and enforce individual liabilities of the stockholders and do all that is necessary to preserve the assets of such institution and to implement the liquidation plan approved by the Monetary Board. The Monetary Board shall designate an official of the Central Bank, or a person of recognized competence in banking or finance, as liquidator who shall take over the functions of the receiver previously appointed by the Monetary Board under this Section. The liquidator shall, with all convenient speed, convert the assets of the banking institution or non-bank financial intermediary performing quasi-banking functions to money or sell, assign or otherwise dispose of the same to creditors and other parties for the purpose of paying the debts of such institution and he may, in the name of the bank or non-bank financial intermediary performing quasi-banking functions, institute such actions as may be necessary in the appropriate court to collect and recover accounts and assets of such institution.

The provisions of any law to the contrary notwithstanding, the actions of the Monetary Board under this Section and the second paragraph of Section 34 of this Act shall be final and executory, and can be set aside by the court only if there is convincing proof that the action is plainly arbitrary and made in bad faith. No restraining order or injunction shall be issued by the court enjoining the Central Bank from implementing its actions under this Section and the second paragraph of Section 34 of this Act, unless there is convincing proof that the action of the Monetary Board is plainly arbitrary and made in bad faith and the petitioner or plaintiff files with the clerk or judge of the court in which the action is pending a bond executed in favor of the Central Bank, in an amount to be fixed by the court. The restraining order or injunction shall be refused or, if granted, shall be dissolved upon filing by the Central Bank of a bond, which shall be in the form of cash or Central Bank cashier(s) check, in an amount twice the amount of the bond of the petitioner or plaintiff conditioned that it will pay the damages which the petitioner or plaintiff may suffer by the refusal or the dissolution of the injunction. The provisions of Rule 58 of the New Rules of Court insofar as they are applicable and not inconsistent with the provisions of this Section shall govern the issuance and dissolution of the restraining order or injunction contemplated in this Section.

Insolvency, under this Act, shall be understood to mean the inability of a bank or non-bank financial intermediary performing quasi-banking functions to pay its liabilities as they fall due in the usual and ordinary course of business. Provided, however, That this shall not include the inability to pay of an otherwise non-insolvent bank or non-bank financial intermediary performing quasi-banking functions caused by extraordinary demands induced by financial panic commonly evidenced by a run on the bank or non-bank financial intermediary performing quasi-banking functions in the banking or financial community.

The appointment of a conservator under Section 28-A of this Act or the appointment of a receiver under this Section shall be vested exclusively with the Monetary Board, the provision of any law, general or special, to the contrary notwithstanding. (As amended by PD Nos. 72, 1007, 1771 & 1827, Jan. 16, 1981)

We hold that this advice given by respondent Mendoza on the procedure to liquidate GENBANK is not the "matter" contemplated by Rule 6.03 of the Code of Professional Responsibility. ABA Formal Opinion No. 342 is clear as daylight in stressing that the "drafting, enforcing or interpreting government or agency procedures, regulations or laws, or briefing abstract principles of law" are acts which do not fall within the scope of the term "matter" and cannot disqualify.

Secondly, it can even be conceded for the sake of argument that the above act of respondent Mendoza falls within the definition of matter per ABA Formal Opinion No. 342. Be that as it may, the said act of respondent Mendoza which is the "matter" involved in Sp. Proc. No. 107812 is entirely different from the "matter" involved in Civil Case No. 0096. Again, the plain facts speak for themselves. It is given that respondent Mendoza had nothing to do with the decision of the Central Bank to liquidate GENBANK. It is also given that he did not participate in the

sale of GENBANK to Allied Bank. The "matter" where he got himself involved was in informing Central Bank on the procedure provided by law to liquidate GENBANK thru the courts and in filing the necessary petition in Sp. Proc. No. 107812 in the then Court of First Instance. The subject "matter" of Sp. Proc. No. 107812, therefore, is not the same nor is related to but is different from the subject "matter" in Civil Case No. 0096. Civil Case No. 0096 involves the sequestration of the stocks owned by respondents Tan, et al., in Allied Bank on the alleged ground that they are ill-gotten. The case does not involve the liquidation of GENBANK. Nor does it involve the sale of GENBANK to Allied Bank. Whether the shares of stock of the reorganized Allied Bank are ill-gotten is far removed from the issue of the dissolution and liquidation of GENBANK. GENBANK was liquidated by the Central Bank due, among others, to the alleged banking malpractices of its owners and officers. In other words, the legality of the liquidation of GENBANK is not an issue in the sequestration cases. Indeed, the jurisdiction of the PCGG does not include the dissolution and liquidation of banks. It goes without saying that Code 6.03 of the Code of Professional Responsibility cannot apply to respondent Mendoza because his alleged intervention while a Solicitor General in Sp. Proc. No. 107812 is an intervention on a matter different from the matter involved in Civil Case No. 0096.

Thirdly, we now slide to the metes and bounds of the "intervention" contemplated by Rule 6.03. "Intervene" means, viz.:

1: to enter or appear as an irrelevant or extraneous feature or circumstance . . . 2: to occur, fall, or come in between points of time or events . . . 3: to come in or between by way of hindrance or modification: INTERPOSE . . . 4: to occur or lie between two things (Paris, where the same city lay on both sides of an intervening river . . .)[41]

On the other hand, "intervention" is defined as:

1: the act or fact of intervening; INTERPOSITION; 2: interference that may affect the interests of others.[42]

There are, therefore, two possible interpretations of the word "intervene." Under the first interpretation, "intervene" includes participation in a proceeding even if the intervention is irrelevant or has no effect or little influence.[43] Under the second interpretation, "intervene" only includes an act of a person who has the power to influence the subject proceedings.[44] We hold that this second meaning is more appropriate to give to the word "intervention" under Rule 6.03 of the Code of Professional Responsibility in light of its history. The evils sought to be remedied by the Rule do not exist where the government lawyer does an act which can be considered as innocuous such as "x x x drafting, enforcing or interpreting government or agency procedures, regulations or laws, or briefing abstract principles of law."

In fine, the intervention cannot be insubstantial and insignificant. Originally, Canon 36 provided that a former government lawyer "should not, after his retirement, accept employment in connection with any matter which he has investigated or passed upon while in such office or employ." As aforesaid, the broad sweep of the phrase "which he has investigated or passed upon" resulted in unjust disqualification of former government lawyers. The 1969 Code restricted its latitude, hence, in DR 9-101(b), the prohibition extended only to a matter in which the lawyer, while in the government service, had "substantial responsibility." The 1983 Model Rules further constricted the reach of the rule. MR 1.11(a) provides that "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee."

It is, however, alleged that the intervention of respondent Mendoza in Sp. Proc. No. 107812 is significant and substantial. We disagree. For one, the petition in the special proceedings is an initiatory pleading, hence, it has to be signed by respondent Mendoza as the then sitting Solicitor General. For another, the record is arid as to the

actual participation of respondent Mendoza in the subsequent proceedings. Indeed, the case was in slumberville for a long number of years. None of the parties pushed for its early termination. Moreover, we note that the petition filed merely seeks the assistance of the court in the liquidation of GENBANK. The principal role of the court in this type of proceedings is to assist the Central Bank in determining claims of creditors against the GENBANK. The role of the court is not strictly as a court of justice but as an agent to assist the Central Bank in determining the claims of creditors. In such a proceeding, the participation of the Office of the Solicitor General is not that of the usual court litigator protecting the interest of government.

II

Balancing Policy Considerations

To be sure, Rule 6.03 of our Code of Professional Responsibility represents a commendable effort on the part of the IBP to upgrade the ethics of lawyers in the government service. As aforesaid, it is a take-off from similar efforts especially by the ABA which have not been without difficulties. To date, the legal profession in the United States is still fine tuning its DR 9-101(b) rule.

In fathoming the depth and breadth of Rule 6.03 of our Code of Professional Responsibility, the Court took account of various policy considerations to assure that its interpretation and application to the case at bar will achieve its end without necessarily prejudicing other values of equal importance. Thus, the rule was not interpreted to cause a chilling effect on government recruitment of able legal talent. At present, it is already difficult for government to match compensation offered by the private sector and it is unlikely that government will be able to reverse that situation. The observation is not inaccurate that the only card that the government may play to recruit lawyers is have them defer present income in return for the experience and contacts that can later be exchanged for higher income in private practice.[45] Rightly, Judge Kaufman warned that the sacrifice of entering government service would be too great for most men to endure should ethical rules prevent them from engaging in the practice of a technical specialty which they devoted years in acquiring and cause the firm with which they become associated to be disqualified.[46] Indeed, "to make government service more difficult to exit can only make it less appealing to enter." [47]

In interpreting Rule 6.03, the Court also cast a harsh eye on its use as a litigation tactic to harass opposing counsel as well as deprive his client of competent legal representation. The danger that the rule will be misused to bludgeon an opposing counsel is not a mere guesswork. The Court of Appeals for the District of Columbia has noted "the tactical use of motions to disqualify counsel in order to delay proceedings, deprive the opposing party of counsel of its choice, and harass and embarrass the opponent," and observed that the tactic was "so prevalent in large civil cases in recent years as to prompt frequent judicial and academic commentary." [48] Even the United States Supreme Court found no quarrel with the Court of Appeals' description of disqualification motions as "a dangerous game." [49] In the case at bar, the new attempt to disqualify respondent Mendoza is difficult to divine. The disqualification of respondent Mendoza has long been a dead issue. It was resuscitated after the lapse of many years and only after PCGG has lost many legal incidents in the hands of respondent Mendoza. For a fact, the recycled motion for disqualification in the case at bar was filed more than four years after the filing of the petitions for certiorari, prohibition and injunction with the Supreme Court which were subsequently remanded to the Sandiganbayan and docketed as Civil Case Nos. 0096-0099. [50] At the very least, the circumstances under which the motion to disqualify in the case at bar were refiled put petitioner's motive as highly suspect.

Similarly, the Court in interpreting Rule 6.03 was not unconcerned with the prejudice to the client which will be caused by its misapplication. It cannot be doubted that granting a disqualification motion causes the client to lose not only the law firm of choice, but probably an individual lawyer in whom the client has confidence. [51] The

client with a disqualified lawyer must start again often without the benefit of the work done by the latter.[52] The effects of this prejudice to the right to choose an effective counsel cannot be overstated for it can result in denial of due process.

The Court has to consider also the possible adverse effect of a truncated reading of the rule on the official independence of lawyers in the government service. According to Prof. Morgan: "An individual who has the security of knowing he or she can find private employment upon leaving the government is free to work vigorously, challenge official positions when he or she believes them to be in error, and resist illegal demands by superiors. An employee who lacks this assurance of private employment does not enjoy such freedom." [53] He adds: "Any system that affects the right to take a new job affects the ability to quit the old job and any limit on the ability to quit inhibits official independence." [54] The case at bar involves the position of Solicitor General, the office once occupied by respondent Mendoza. It cannot be overly stressed that the position of Solicitor General should be endowed with a great degree of independence. It is this independence that allows the Solicitor General to recommend acquittal of the innocent; it is this independence that gives him the right to refuse to defend officials who violate the trust of their office. Any undue diminution of the independence of the Solicitor General will have a corrosive effect on the rule of law.

No less significant a consideration is the deprivation of the former government lawyer of the freedom to exercise his profession. Given the current state of our law, the disqualification of a former government lawyer may extend to all members of his law firm.[55] Former government lawyers stand in danger of becoming the lepers of the legal profession.

It is, however, proffered that the mischief sought to be remedied by Rule 6.03 of the Code of Professional Responsibility is the possible appearance of impropriety and loss of public confidence in government. But as well observed, the accuracy of gauging public perceptions is a highly speculative exercise at best [56] which can lead to untoward results.[57] No less than Judge Kaufman doubts that the lessening of restrictions as to former government attorneys will have any detrimental effect on that free flow of information between the government-client and its attorneys which the canons seek to protect.[58] Notably, the appearance of impropriety theory has been rejected in the 1983 ABA Model Rules of Professional Conduct [59] and some courts have abandoned per se disqualification based on Canons 4 and 9 when an actual conflict of interest exists, and demand an evaluation of the interests of the defendant, government, the witnesses in the case, and the public.[60]

It is also submitted that the Court should apply Rule 6.03 in all its strictness for it correctly disfavors lawyers who "switch sides." It is claimed that "switching sides" carries the danger that former government employee may compromise confidential official information in the process. But this concern does not cast a shadow in the case at bar. As afore-discussed, the act of respondent Mendoza in informing the Central Bank on the procedure how to liquidate GENBANK is a different matter from the subject matter of Civil Case No. 0005 which is about the sequestration of the shares of respondents Tan, et al., in Allied Bank. Consequently, the danger that confidential official information might be divulged is nil, if not inexistent. To be sure, there are no inconsistent "sides" to be bothered about in the case at bar. For there is no question that in lawyering for respondents Tan, et al., respondent Mendoza is not working against the interest of Central Bank. On the contrary, he is indirectly defending the validity of the action of Central Bank in liquidating GENBANK and selling it later to Allied Bank. Their interests coincide instead of colliding. It is for this reason that Central Bank offered no objection to the lawyering of respondent Mendoza in Civil Case No. 0005 in defense of respondents Tan, et al. There is no switching of sides for no two sides are involved.

It is also urged that the Court should consider that Rule 6.03 is intended to avoid conflict of loyalties, i.e., that a government employee might be subject to a conflict of loyalties while still in government service.[61] The

example given by the proponents of this argument is that a lawyer who plans to work for the company that he or she is currently charged with prosecuting might be tempted to prosecute less vigorously.[62] In the cautionary words of the Association of the Bar Committee in 1960: "The greatest public risks arising from post employment conduct may well occur during the period of employment through the dampening of aggressive administration of government policies." [63] Prof. Morgan, however, considers this concern as "probably excessive." [64] He opines "x x x it is hard to imagine that a private firm would feel secure hiding someone who had just been disloyal to his or her last client - the government. Interviews with lawyers consistently confirm that law firms want the "best" government lawyers - the ones who were hardest to beat - not the least qualified or least vigorous advocates." [65] But again, this particular concern is a non factor in the case at bar. There is no charge against respondent Mendoza that he advised Central Bank on how to liquidate GENBANK with an eye in later defending respondents Tan, et al. of Allied Bank. Indeed, he continues defending both the interests of Central Bank and respondents Tan, et al. in the above cases.

Likewise, the Court is nudged to consider the need to curtail what is perceived as the "excessive influence of former officials" or their "clout." [66] Prof. Morgan again warns against extending this concern too far. He explains the rationale for his warning, viz: "Much of what appears to be an employee's influence may actually be the power or authority of his or her position, power that evaporates quickly upon departure from government x x x." [67] More, he contends that the concern can be demeaning to those sitting in government. To quote him further: "x x x The idea that, present officials make significant decisions based on friendship rather than on the merit says more about the present officials than about their former co-worker friends. It implies a lack of will or talent, or both, in federal officials that does not seem justified or intended, and it ignores the possibility that the officials will tend to disfavor their friends in order to avoid even the appearance of favoritism." [68] III

The question of fairness

Mr. Justices Panganiban and Carpio are of the view, among others, that the congruent interest prong of Rule 6.03 of the Code of Professional Responsibility should be subject to a prescriptive period. Mr. Justice Tinga opines that the rule cannot apply retroactively to respondent Mendoza. Obviously, and rightly so, they are disquieted by the fact that (1) when respondent Mendoza was the Solicitor General, Rule 6.03 has not yet adopted by the IBP and approved by this Court, and (2) the bid to disqualify respondent Mendoza was made after the lapse of time whose length cannot, by any standard, qualify as reasonable. At bottom, the point they make relates to the unfairness of the rule if applied without any prescriptive period and retroactively, at that. Their concern is legitimate and deserves to be initially addressed by the IBP and our Committee on Revision of the Rules of Court.

IN VIEW WHEREOF, the petition assailing the resolutions dated July 11, 2001 and December 5, 2001 of the Fifth Division of the Sandiganbayan in Civil Case Nos. 0096-0099 is denied.

No cost.

SO ORDERED.

Davide, Jr., C.J., Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Carpio, Austria-Martinez, Corona, and Garcia, JJ., concur.

Panganiban and Tinga, JJ., Please see separate opinion.

Carpio Morales and Callejo, Sr., JJ., Please see dissenting opinion.

Azcuna, J., I was former PCGG Chair.

Chico-Nazario, J., No part.

- [1] Rollo, p. 240; Filcapital Development Corporation was a related interest of the Yujuico Family Group and the directors and officers of GENBANK.
- [2] Rollo, pp. 240, 242.
- [3] Rollo, p. 7.
- [4] Rollo, pp. 7, 108, 248.
- [5] Rollo, pp. 110-114, 248.
- [6] Rollo, pp. 217-218.
- [7] Rollo, p. 143.
- [8] Rollo, pp. 216-220.
- [9] Rollo, pp. 44, 221- 225.
- [10] Atty. Mendoza served as Solicitor General from 1972 to 1986.
- [11] Rollo, p. 63.
- [12] Rollo, p. 61.
- [13] Rollo, pp. 57-63.
- [14] Rollo, p. 178.
- [15] Rollo, pp. 42, 44; The "Motion to disqualify Atty. Estelito P. Mendoza as counsel for petitioners' in Civil Case Nos. 0096-0099 was filed with the Sandiganbayan's Second Division. However, the motion was ultimately resolved by the Sandiganbayan's Fifth Division in its proceedings held on July 11, 2001.
- [16] Rollo, p. 42.
- [17] Rollo, p. 43.
- [18] Rollo, pp. 2-40.
- [19] Rollo, pp. 12-14.
- [20] Andrews, Standards of Conduct for Lawyers: An 800-Year Revolution, 57 SMU L. Rev. 1385 (2004).
- [21] Ibid.
- [22] Ibid.
- [23] Ibid.
- [24] Agpalo, Legal and Judicial Ethics, pp. 24-25 (2002); In re Tagorda, 53 Phil. 37 (1927).
- [25] Wolfram, Modern Legal Ethics, p. 456 (1986).
- [26] Id. at 457.
- [27] Ibid.; The use of the word "conflict" is a misnomer; "congruent-interest representation conflicts" arguably do not involve conflicts at all, as it prohibits lawyers from representing a private practice client even if the interests of the former government client and the new client are entirely parallel.

[28] Supra, note 20.

[29] ABA Canons of Professional Ethics, Canon 36 (1908); ABA Model Code of Professional Responsibility (1963), DR 9-101(b); ABA Model Rules of Professional Responsibility, MR 1.11(a) and (b) (1983).

[30] Supra, note 25 at 458.

[31] Supra, note 20.

[32] Agpalo, Legal and Judicial Ethics, p. 25 (2002).

[33] Canon 9 was adopted to replace Canon 36 because Canon 36 "proved to be too broadly encompassing." ABA Opinion No. 342 (1975); Canon 9 states: "A lawyer should avoid even the appearance of professional impropriety."

[34] Model Code of Professional Responsibility, Preliminary Statement (1983); "The Disciplinary Rules ... are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."

[35] DR 9-101(b): A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

[36] Supra, note 20.

[37] Ibid.

[38] Model Rules of Professional Conduct, Rule 1.09 comment (1984): "The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term appearance of impropriety is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved . . . by the very general concept of appearance of impropriety."

[39] Supra, note 32.

[40] See Dissent of J. Callejo, Sr., pp.19-20.

[41] Webster's Third New International Dictionary of the English Language Unabridged, p. 1183 (1993).

[42] Id.

[43] Id.; This may be inferred from the second definition of "intervene" which is "to occur, fall, or come in between points of time or events."

[44] Id.; This may be inferred from the third definition of "intervene" which is "to come in or between by way of hindrance or modification," and the second definition of "intervention" which is "interference that may affect the interests of others."

[45] Wolfram, Modern Legal Ethics, p. 461 (1986).

[46] Kaufman, The Former Government Attorney and Canons of Professional Ethics, 70 Harv. L. Rev. 657 (1957).

[47] Remarks of Federal Trade Commission Chairman Calvin Collier before Council on Younger Lawyers, 1976 Annual Convention of the Federal Bar Association (September 16, 1976).

[48] *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1051 (D.C. Cir. 1984); *Board of Education of New York City v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Williamsburg Wax Museum v. Historic Figures, Inc.*, 501 F.Supp. 326, 331 (D.D.C. 1980).

[49] *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985).

[50] Rollo, p. 143; The petitions for certiorari, prohibition and injunction were filed sometime in August 1986. The motion for disqualification in Civil Case No. 0096-0099 was filed on February 5, 1991.

[51] *United States v. Brothers*, 856 F. Supp. 370, 375 (M.D. Tenn. 1992).

[52] *First Wis. Mortgage Trust v. First Wis. Corp.*, 584 F.2d 201 (7th Cir. 1978); *EZ Paints Corp. v. Padco, Inc.*, 746 F.2d 1459, 1463 (Fed. Cir. 1984); *Realco Serv. v. Holt*, 479 F. Supp. 867, 880 (E.D. Pa. 1979).

[53] Morgan, *Appropriate Limits on Participation by a former Agency Official in Matters Before an Agency*, *Duke L.J.*, Vol. 1980, February, No. 1, p. 54.

[54] *Ibid.*

[55] Agpalo, *Legal and Judicial Ethics*, pp. 292-293; *Hilado v. David*, 84 Phil. 569 (1949).

[56] Wolfram, *Modern Legal Ethics*, p. 320 (1986).

[57] *Id.* at p. 321.

[58] Kaufman, *The Former Government Attorney and Canons of Professional Ethics*, 70 *Harv. L. Rev.* 657 (1957).

[59] *Supra*, note 38.

[60] *United States v. O'Malley*, 786 F.2d 786, 789 (7th Cir. 1985); *United States v. James*, 708 F.2d 40, 44 (2d Cir. 1983).

[61] *Supra*, note 53 at 44.

[62] *Ibid.*

[63] *Ibid.*, see footnote 207 of article.

[64] *Ibid.*

[65] *Id.* at 45.

[66] *Id.* at 42.

[67] *Id.* at 42-43.

[68] *Id.* at 43.

CONCURRING OPINION

SANDOVAL - GUTIERREZ, J.:

I join Mr. Justice Reynato S. Puno in his ponencia. Motions to disqualify counsel from representing their clients must be viewed with jaundiced eyes, for oftentimes they pose the very threat to the integrity of the judicial process.[1] Such motions are filed to harass a particular counsel, to delay the litigation, to intimidate adversary, or for other strategic purposes. It therefore behooves the courts to always look for the parties' inner motivations in filing such motions.

This case illustrates the sad reality that the filing of motions for disqualification may be motivated, not by a fine sense of ethics or sincere desire to remove from litigation an unethical practitioner, but to achieve a tactical advantage.

The facts are undisputed.

Subsequent to the downfall of President Ferdinand E. Marcos in 1986, came the first edict[2] of President Corazon C. Aquino creating the Presidential Commission on Good Government (PCGG) to recover the ill-gotten wealth of the Marcoses, their subordinates, and associates.

PCGG's initial target was Lucio Tan and the above-named private respondents (Tan et al., for brevity). It issued several writs of sequestration on their properties and business enterprises. To nullify such writs, Tan et al. filed with this Court petitions for certiorari, prohibition and injunction. On February 15, 1990, after comments thereon were submitted, this Court referred the cases to the Sandiganbayan for proper disposition. These cases were raffled to its Fifth Division, docketed as follows:

(a) Civil Case No. 0095 - Sipalay Trading Corp. vs. PCGG, which seeks to nullify the PCGG's Order dated July 24, 1986 sequestering Lucio Tan's shares of stocks in Maranaw Hotels and Resort Corporation (Century Park Sheraton Hotel);

(b) Civil Case No. 0096 - Lucio Tan, Mariano Tanenglian, Allied Banking Corp., Iris Holding and Development Corp., Virgo Holdings Development Corp. and Jewel Holdings, Inc. v. PCGG, which seeks to nullify the PCGG's Order dated June 19, 1986 sequestering the shares of stocks in Allied Banking Corporation held by and/or in the name of respondents Lucio Tan, Mariano Tanenglian, Iris Holding and Development Corp., Virgo Holdings Development Corp. and Jewel Holdings, Inc.;

(c) Civil Case No. 0097 -- Lucio Tan, Carmen Khao Tan, Florencio T. Santos, Natividad Santos, Florencio N. Santos, Jr. and Foremost Farms, Inc. v. PCGG, which seeks to nullify the PCGG's Order dated August 12, 1986 sequestering the shares of stocks in Foremost Farms, Inc. held by and/or in the name of Lucio Tan, Carmen Khao Tan, Florencio T. Santos, Natividad Santos and Florencio N. Santos, Jr.;

(d) Civil Case No. 0098 - Lucio Tan, Carmen Khao Tan, Mariano Tanenglian, Florencio T. Santos, Natividad Santos, Florencio N. Santos, Jr., Shareholdings, Inc. and Fortune Tobacco Corp. v. PCGG., which seeks to nullify the PCGG's Order dated July 24, 1986 sequestering the shares of stocks in Fortune Tobacco Corp. held by and/or in the name of Lucio Tan, Carmen Khao Tan, Mariano Tanenglian, Florencio T. Santos, Natividad Santos, Florencio N. Santos, Jr., Shareholdings, Inc.; and

(e) Civil Case No. 0099 -- Lucio Tan, Carmen Khao Tan, Mariano Tanenglian, Florencio T. Santos, Natividad Santos and Shareholdings, Inc. v. PCGG, which seeks to nullify the PCGG's Order dated July 24, 1986 sequestering the shares of stocks in Shareholdings, Inc. held by and/or in the name of Lucio Tan, Carmen Khao Tan, Mariano Tanenglian, Florencio T. Santos and Natividad Santos.

(f) Civil Case No. 0100 - Allied Banking Corp. vs. PCGG, which seeks to nullify the PCGG's Search and

Seizure Order dated August 13, 1986, issued on bank documents of Allied Banking Corp. [3]

Civil Cases Nos. 0096 and 0100 involve Tan, et al.'s shares of stocks in the Allied Banking Corporation (Allied Bank).

Meanwhile, on July 17, 1987, the PCGG and the Office of the Solicitor General (OSG) filed with the Sandiganbayan a complaint for "reversion, reconveyance, restitution, accounting and damages" against Tan et al. This time, the case was raffled to the Second Division, docketed therein as Civil Case No. 0005. Among the properties sought to be reconveyed were Tan et al.'s shares of stocks in the Allied Bank.

Since 1987, Atty. Estelito P. Mendoza has been the counsel for Tan et al. in all the above cases. But it was not until February 5, 1991, or after four years, that the PCGG filed three (3) identical motions to disqualify Atty. Mendoza. In Civil Cases Nos. 0096-0099, PCGG filed a motion to disqualify him. It filed another similar motion in Civil Case No. 0100. The last motion was filed in Civil Case No. 0005. His disqualification was sought under Rule 6.03 of the Code of Professional Responsibility which reads:

Rule 6.03. - 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.

In each motion, PCGG alleged that Atty. Mendoza, then Solicitor General of the Marcos Administration, "actively intervened" in the liquidation of General Bank and Trust Company (GENBANK), subsequently acquired by Tan et al. and became Allied Bank. PCGG's allegations are similar in every aspect, thus:

"(1) He was the former Solicitor General of the Republic of the Philippines for almost 14 years appearing on behalf of the Republic in multitudes of cases.

(2) The records show that, as then Solicitor General, Atty. Estelito P. Mendoza appeared as counsel for the Central Bank of the Philippines in Special Proceedings No. 107812, pending before the Regional Trial Court of Manila, in connection with the Central Bank's Petition for assistance in the Liquidation of General bank and Trust Company (herein called "Genbank", for brevity). The records also show that Defendant Lucio Tan and his group were the same persons who acquired Genbank's assets, liabilities and interest.

(3) Consequently, Atty. Mendoza's appearance as counsel for the Defendant herein runs counter to the long-cherished ethical canon of the legal profession which prohibits a counsel to appear in litigation adverse to the interests of his former client. Interpreting this sanction, jurisprudence has held, that:
'The lawyer's obligation to represent the client with undivided fidelity and to keep his confidences, also forbid the lawyer from accepting retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed in him. (Canon of Professional Ethics, 6). The prohibition stands even if the adverse interest is very slight; neither is it material that the intention and motive of the attorney may have been honest. (5 Am. Jur. 296).'

(4) The reason for the prohibition is obvious. Apart from the obligation to keep inviolate the prior relationship between counsel and his former client, such counsel obtains material information in confidence. Consequently, he should not be allowed to represent a party with adverse interest to his former client, arising out of the very transaction subject of the former relationship.

(5) In the case at bar, it should be stressed that Defendant Lucio Tan and his group acquired the assets and liabilities of Genbank. This manner of acquisition has been alleged to have been fraudulent, arbitrary and a product of collusion between them and the Central Bank officials. (Refer to Criminal Case No. 005 pending before this Honorable Court.) Atty. Mendoza's appearance as counsel for Defendants, clearly violates the Code of Professional Responsibility, which provides that:

'A lawyer shall not after leaving the government service accept engagement or employment in connection with any matter in which he had intervened while in said service.' (Code of Professional Responsibility, Canon 6, Rule 6.03)'

(6) In the liquidation of Genbank and its eventual acquisition by Lucio Tan and his group, Atty. Mendoza, as Solicitor-General, personally advised the Central Bank officials on the procedure to bring about Genbank's liquidation. In the Memorandum for the Governor of the Central Bank dated March 29, 1977 (signed by the following subordinates of then CB Governor Gregorio Licaros, namely: Senior Deputy Governor Amado R. Brinas (deceased), Deputy Governor Jaime C. Laya, Deputy Governor & General Counsel Gabriel C. Singson, Special Asst. to the Governor Carlota P. Valenzuela, Asst. to the Governor Arnulfo B. Aurellano and Director Antonio T. Castro, Jr.), the following portion disclosed Atty. Mendoza's participation:

'Immediately after said meeting, we had a conference with the Solicitor General (atty. Mendoza) and he advised that the following procedure should be taken:

'(1) Management should submit a memorandum to the Monetary Board reporting that studies and evaluation had been made since the last examination of the bank as of August 31, 1976 and it is believed that the bank cannot be reorganized or placed in a condition so that it may be permitted to resume business with safety to its depositors and creditors and the general public.

'(2) If the said report is confirmed by the Monetary Board, it shall order the liquidation of the bank and indicate the manner of its liquidation and approve a liquidation plan.

(3) The Central Bank shall inform the principal stockholders of Genbank of the foregoing decision to liquidate the bank and the liquidation plan approved by the Monetary Board.

(4) The Solicitor General shall then file a petition in the Court of First Instance reciting the proceedings which had been taken and praying the assistance of the Court in the liquidation of Genbank."

Plainly stated, it was Atty. Mendoza who was the legal author of the closure of Genbank and the eventual sale to Mr. Lucio Tan and his Group. Clearly, Atty. Mendoza should be disqualified in this case."

On April 22, 1991, the Sandiganbayan issued a Resolution[4] in Civil Case No. 0005 denying PCGG's motion to disqualify Atty. Mendoza.

On May 7, 1991, the Sandiganbayan issued a Resolution[5] in Civil Case No. 0100 also denying PCGG's similar motion.

Motions for reconsideration were filed but to no avail. The PCGG took no further action. These Resolutions, therefore, became final and executory.

Subsequently, in a Decision dated August 23, 1996, the Sandiganbayan jointly granted Tan et al.'s petitions in Civil Cases Nos. 0095 and 0100. On March 29, 1996, this Court, in G.R. Nos. 112708-09[6] affirmed the said Decision. The PCGG neither assigned as error nor mentioned the Sandiganbayan's denial of its motion to disqualify Atty. Mendoza in Civil Case No. 0100.

In the interim, the PCGG's motion to disqualify Atty. Mendoza in Civil Cases Nos. 0096-0099 remained pending with the Sandiganbayan. It was only on July 11, 2001, or after ten (10) years, that it denied the PCGG's motion by merely adopting its Resolution dated April 22, 1991 in Civil Case No. 0005 denying a similar motion, thus:

"Acting on the PCGG's "MOTION TO DISQUALIFY ATTY. ESTELITO P. MENDOZA AS COUNSEL FOR PETITIONER" dated February 5, 1991 which appears not to have been resolved by then Second Division of this Court, and it appearing that (1) the motion is exactly the same in substance as that motion filed in Civil

Case No. 0005 as in fact, Atty. Mendoza in his "OPPOSITION" dated March 5, 1991 manifested that he was just adopting his opposition to the same motion filed by PCGG in Civil Case No. 0005 and (2) in the Court's Order dated March 7, 1991, the herein incident was taken-up jointly with the said same incident in Civil Case No. 0005 (pp.134-135, Vol. I, Record of Civil Case No. 0096), this Division hereby reiterates and adopts the Resolution dated April 22, 1991 in Civil Case No. 0005 of the Second Division (pp.1418-1424, Vol. III, Record of Civil Case No. 0005) denying the said motion as its Resolution in the case at bar." [7]

The PCGG moved for the reconsideration of the foregoing Resolution, but was denied. In the Resolution dated December 5, 2001, the Sandiganbayan ruled:

"Acting on respondent PCGG's "MOTION FOR RECONSIDERATION" dated August 1, 2001 praying for the reconsideration of the Court's Resolution dated July 12, 2001 denying its motion to disqualify Atty. Estelito P. Mendoza as counsel for petitioners, to which petitioners have filed an "OPPOSITION TO MOTION FOR RECONSIDERATION DATED AUGUST 1, 2001" dated August 29, 2001, as well as the respondent's "REPLY (To Opposition to Motion for Reconsideration)" dated November 16, 2001, it appearing that the main motion to disqualify Atty. Mendoza as counsel in these cases was exactly the same in substance as that motion to disqualify Atty. Mendoza filed by the PCGG in Civil Case No. 0005 (re: Republic vs. Lucio Tan, et al.) and the resolutions of this Court (Second Division) in Civil Case No. 0005 denying the main motion as well as of the motion for reconsideration thereof had become final and executory when PCGG failed to elevate the said resolutions to the Supreme Court, the instant motion is hereby DENIED. [8]

Hence, the PCGG's present petition for certiorari and prohibition alleging that the Sandiganbayan committed grave abuse of discretion in denying its motion to disqualify Atty. Mendoza in Civil Cases Nos. 0096-0099.

Mr. Justice Romeo J. Callejo, Sr., in his Dissent, granted the petition. On the procedural issues, he ruled that the assailed Resolutions dated July 11 and December 5, 2001 denying PCGG's motion to disqualify Atty. Mendoza are interlocutory orders, hence, in challenging such Resolutions, certiorari is the proper remedy, not appeal, as invoked by Tan et al. Based on the same premise, he likewise rejected Tan et al.'s claim that the Resolution dated April 22, 1991 in Civil Case No. 0005 constitutes a bar to similar motions to disqualify Atty. Mendoza under the doctrine of res judicata.

On the substantive aspect, Mr. Justice Callejo's Dissent states that Atty. Mendoza violated Rule 6.03 of the Code of Professional Responsibility. According to him, Atty. Mendoza's acts of (a) advising the Central Bank on how to proceed with the liquidation of GENBANK, and (b) filing Special Proceedings No. 107812, a petition by the Central Bank for assistance in the liquidation of GENBANK, with the then Court of First Instance (CFI) of Manila, constitute "intervention." And that while it may be true that his posture in Civil Cases Nos. 0096-0099 is not adverse to the interest of the Central Bank, still, he violated the proscription under the "congruent-interest representation conflict" doctrine.

Crucial to the resolution of the present controversy are the following queries:

- (1) Is certiorari the proper remedy to assail the Sandiganbayan Resolutions dated July 11 and December 5, 2001 denying the PCGG's motion to disqualify Atty. Mendoza in Civil Cases Nos. 0096-0099?
- (2) May Sandiganbayan Resolution dated April 22, 1991 in Civil Case No. 0005 be considered a bar to similar motions to disqualify Atty. Mendoza under the doctrine of res judicata?
- (3) Does Atty. Mendoza's participation in the liquidation of GENBANK constitute intervention?

There are some important points I wish to stress at this incipient stage. I believe they should be considered if we are to arrive at a fair resolution of this case. 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. It may be recalled that the PCGG filed

three (3) identical motions, one in Civil Cases Nos. 0096-0099, another in Civil Case No. 0100 and the last one in Civil Case No. 0005. Of these cases, only Civil Cases Nos. 0096, 0100 and 0005 actually involve Tan et al.'s shares of stocks in the Allied Bank. Civil Cases Nos. 0097, 0098 and 0099 have entirely different subject matter. Thus, insofar as these cases are concerned, the motions to disqualify lack substantive merit. Why then would the PCGG file identical motions to disqualify Atty. Mendoza in these unrelated cases? Its intention is suspect. To subject Tan et al. to numerous and baseless motions to disqualify their lawyer is, no doubt, a form of harassment.

As this juncture, it is important to emphasize that in evaluating motions to disqualify a lawyer, our minds are not bound by stringent rules. There is room for consideration of the combined effect of a party's right to counsel of his own choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel, and any tactical abuse underlying a disqualification proceeding.[9]

I. Whether the PCGG's proper
remedy to assail the Sandiganbayan
Resolutions dated July 11 and
December 5, 2001 is appeal, not
certiorari.

The bottom line of this issue lies on how we categorize an order denying a motion to disqualify an opposing party's counsel. Is it interlocutory or final?

An order is deemed final when it finally disposes of the pending action so that nothing more can be done with it in the lower court.[10] On the other hand, an interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.[11]

In Antonio vs. Samonte,[12] this Court defined a final judgment, order or decree as "one that finally disposes of, adjudicates, or determines the rights, or some rights or rights of the parties, either on the entire controversy or on some definite and separate branch, thereof and which concludes them until it is reversed or set aside x x x." In De la Cruz v. Paras,[13] it was held that a court order is final in character if "it puts an end to the particular matter resolved or settles definitely the matter therein disposed of," such that no further questions can come before the court except the execution of the order. In Day v. Regional Trial Court of Zamboanga City,[14] this Court ruled that an order which decides an issue or issues in a complaint is final and appealable, although the other issue or issues have not been resolved, if the latter issues are distinct and separate from others.

With the foregoing disquisition as basis, it is my view that an order denying a motion to disqualify counsel is final and, therefore, appealable. The issue of whether or not Atty. Mendoza should be disqualified from representing Tan et al. is separable from, independent of and collateral to the main issues in Civil Cases Nos. 0096-0099. In short, it is separable from the merits. Clearly, the present petition for certiorari, to my mind, is dismissible.

II. Whether the Resolution dated April
22, 1991 in Civil Case No. 0005
constitutes a bar to similar motions to
disqualify Atty. Mendoza under the
doctrine of res judicata.

I am convinced that the factual circumstances of this case justify the application of res judicata.

The ponente refuses to apply res judicata on the ground that the Sandiganbayan Resolution dated April 22, 1991 in

Civil Case No. 0005 is just an interlocutory order.

Assuming *arguendo* that an order denying a motion to disqualify Atty. Mendoza is indeed an interlocutory order, still, I believe that *res judicata* applies.

It will be recalled that on August 23, 1996, the Sandiganbayan rendered a Decision granting Tan et al.'s petitions in Civil Cases Nos. 0095 and 0100. Such Decision reached this Court in G.R. Nos. 112708-09.[15] On March 29, 1996, we affirmed it. The PCGG could have assigned or raised as error in G.R. Nos. 112708-09 the Sandiganbayan Resolution dated May 7, 1991 in Civil Case No. 0100 denying its motion to disqualify Atty. Mendoza but it did not. The fact that a final Decision therein has been promulgated by this Court renders the Resolution dated May 7, 1991 beyond review. The PCGG may not relitigate such issue of disqualification as it was actually litigated and finally decided in G.R. Nos. 112707-09.[16] To rule otherwise is to encourage the risk of inconsistent judicial rulings on the basis of the same set of facts. This should not be countenanced. Public policy, judicial orderliness, economy of judicial time and the interest of litigants, as well as the peace and order of society, all require that stability should be accorded judicial rulings and that controversies once decided shall remain in repose, and that there be an end to litigation.[17]

III. Whether Atty. Mendoza's participation in the liquidation of GENBANK constitutes intervention.

As stated earlier, Atty. Mendoza is sought to be disqualified under Rule 6.03 of the Code of Professional Responsibility which states:

Rule 6.03. - 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.

In determining whether Atty. Mendoza committed a breach of this Rule, certain factual predicates should be established, thus: (a) in connection with what "matter" has Atty. Mendoza accepted an engagement or employment after leaving the government service?; (b) in connection with what "matter" did he intervene while in government service?; and (c) what acts did he particularly perform in "intervening" in connection with such "matter"?

The PCGG insists that Atty. Mendoza, as Solicitor General, "actively intervened" in the closure and liquidation of GENBANK. As primary evidence of such intervention, it cited his act of filing Special Proceedings No. 107812 with the then Court of First Instance (CFI) of Manila; and the Memorandum dated March 29, 1977 of certain key officials of the Central Bank stating that he (Atty. Mendoza) advised them of the procedure to be taken in the liquidation of GENBANK and that he was furnished copies of pertinent documents relating to such liquidation.

Tan et al. denied Atty. Mendoza's alleged "intervention," claiming that when he filed Special Proceedings No. 107812 with the CFI of Manila, the decision to prohibit GENBANK from doing business had already been made by the Central Bank Monetary Board. Also, Atty. Mendoza, in appearing as their counsel in Civil Cases Nos. 0096-0099, does not take a position adverse to his former client, the Central Bank.

The first concern in assessing the applicability of the Rule is the definition of "matter." The American Bar Association Committee on Ethics and Professional Responsibility stated in its Formal Opinion 342 that:

"Although a precise definition of "matter" as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same

matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101 (B) from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transaction or conduct involving a particular situation and specific parties.

In the case at bar, the Court's task is to determine whether Special Proceedings No. 107812 falls within the concept of "matter." This must be analyzed in relation with Civil Case No. 0096. Anent Civil Cases Nos. 0097, 0098 and 0099, there is no doubt that they do not involve the shares of stocks of Tan et al. in Allied Bank. Thus, only Special Proceedings No. 107812 and Civil Case No. 0096 must be considered.

Special Proceedings No. 107812 is a "petition by the Central Bank for Assistance in the Liquidation of General Bank and Trust Company" filed by Atty. Mendoza as Solicitor General. The parties therein are the Central Bank of the Philippines and Arnulfo B. Aurellano, on the one hand, and the Worldwide Insurance & Surety Company, Midland Insurance Corporation, Standard Insurance Co., Inc and General Bank & Trust Company, on the other. The issues, among others, are whether or not the Central Bank acted in good faith in ordering the liquidation of GENBANK; and, whether the bidding for GENBANK is a sham.

Civil Case No. 0096 is for the annulment of various sequestration orders issued by the PCGG over Tan et al.'s properties. The parties therein are Lucio Tan, Mariano Tanenglian, Allied Banking Corporation, Iris Holdings & Development Corp., Virgo Holdings & Development Corp., and Jewel Holdings, Inc., as petitioners, and the PCGG, as respondent. The issues here are "whether the Sequestration Order issued by the PCGG on June 19, 1986 over the shares of stocks in Allied Bank of Lucio C. Tan and his co-petitioners in Civil Case No. 0096 was issued without notice, hearing and evidence."

A careful perusal of the above distinctions shows that the two cases are different in all aspects, such as the parties, issues, facts and relief sought. Special Proceedings No. 107812 cannot therefore be considered a "matter" in connection with which Atty. Mendoza accepted his engagement as counsel in Civil Case No. 0096. The connection between the two cases, if there be, is very minimal as to give rise to the application of the proscription.

As aptly stated by Justice Puno:

"But more important, the "matter" involved in Sp. Proc. No. 107812 is entirely different from the "matter" involved in Civil Case No. 0096. Again the bald facts speak for themselves. It is given that Atty. Mendoza had nothing to do with the decision of the Central Bank to liquidate GENBANK. It is also given that he did not participate in the sale of GENBANK to Allied Bank. The "matter" where he got himself involved was in informing Central Bank on the procedure provided by law to liquidate GENBANK through the courts and in filing the necessary petition in Sp. Proc. No. 107812 in the then Court of First Instance. The subject "matter" Sp. Proc. No. 107812, however, is not the same nor related to but different from the subject "matter" in Civil Case No. 0096. Civil Case No. 0096 involves the sequestration of the stocks owned by Tan, et al., in Allied Bank on the alleged ground that they are ill- gotten. The case does not involve the liquidation of GENBANK. Nor does it involve the sale of GENBANK to Allied Bank. Whether the shares of stocks of the reorganized Allied Bank are ill-gotten is far removed from the issue of the dissolution and liquidation of GENBANK. GENBANK was liquidated by the Central Bank due, among others, to the banking malpractices of its owners and officers. In other words, the legality of the liquidation of GENBANK is not an issue in the sequestration cases. Indeed, the jurisdiction of the PCGG does not include the dissolution and liquidation of banks. It goes without saying that Code 6.03 of the Code of Professional Responsibility cannot apply to Atty. Mendoza because his alleged intervention while a Solicitor General in Sp. Proc. No. 107812 is an intervention on a matter different from the matter involved in Civil Case No. 0096."

As Solicitor General, Atty. Mendoza represented the Republic of the Philippines in every case where it was

involved. As a matter of practice and procedure, he signed every pleading prepared by his Associates. Taking this into consideration, will it be just to disqualify him in all the cases containing pleadings bearing his signature? The answer must be in the negative. His disqualification might be too harsh a penalty for one who had served the government during the best years of his life and with all his legal expertise.

Webster Dictionary[18] defines "intervene" as "to come or happen between two points of time or events;" "to come or be in between as something unnecessary or irrelevant;" or "to come between as an influencing force. The ponencia defines "to intervene" as "to enter or appear as an irrelevant or extraneous feature or circumstance." "Intervention" is interference that may affect the interest of others. Corollarily, the counterpart of Rule 6.03 is the Disciplinary Rule (DR) 9-101 (B) of the American Bar Association (ABA), thus:

A lawyer shall not accept private employment in a manner in which he had "substantial responsibility" while he was a public employee.

Substantial responsibility envisages a lawyer having such a heavy responsibility for the matter in question that it is likely he becomes

personally and substantially involve in the investigative or deliberative processes regarding the matter.[19] Since the word "intervene" has two connotations, one affecting interest of others and one done merely in influencing others, Rule 6.03 should be read in the context of the former. To interpret it otherwise is to enlarge the coverage of Rule 6.03. Surely, this could not have been the intention of the drafters of our Code of Professional Responsibility.

Further, that Atty. Mendoza was furnished copies of pertinent papers relative to the liquidation of GENBANK is not sufficient to disqualify him in Civil Case No. 0096. In *Laker Airway Limited v. Pan American World Airways*,[20] it was held that:

"Like the case law, policy considerations do not support the disqualification of a government attorney merely because during his government service he had access to information about a corporation which subsequently turned out to become an opponent in a private lawsuit. If the law were otherwise, the limiting language of the Disciplinary Rule could be bypassed altogether by the simple claim that an attorney may have viewed confidential information while employed by the government, and government lawyers would face perpetual disqualification in their subsequent practices."

In fine, I fully concur in Justice Puno's Dissent that "Rule 6.03 of the Code of Professional Responsibility cannot apply to Atty. Mendoza because his alleged intervention while a Solicitor General in Special Proceedings No. 107812 is an intervention in a matter different from the matter involved in Civil Case No. 0096.

WHEREFORE, I vote to dismiss the instant petition for certiorari.

[1] *Gregori v. Bank of America*, 207 Cal.App. 3d 291 (1989); *McPhearson v. Michaels Co.*, No. CO34390, March 4, 2002.

[2] Executive order No. 1, issued on February 28, 1986.

[3] Resolution, at 3-4. See also Memorandum for Respondents, rollo, at 397-398.

[4] Attachment "F" of the Petition, rollo, at 57-63. Civil Case No. 0005 involved the PCGG's and the OSG's complaint for "reversion, reconveyance, restitution, accounting and damages" against Tan et al.'s shares of stock in Allied Bank.

[5] Comment on the Petition, rollo, at 148. Civil Case No. 0100 involved Allied Bank's petition seeking to nullify

PCGG's Search and Seizure Order against Tan, et al.'s shares of stock.

[6] Entitled Republic of the Philippines, represented by Presidential Commission on Good Government, petitioner, vs. Sandiganbayan, Sipalay Trading Corporation and Allied Banking Corporation, respondents. 255 SCRA 438, March 29, 1996.

[7] Attachment "A" of the Petition, rollo, at 42.

[8] Attachment "A-1" of the Petition, rollo, at 43.

[9] 7 Am Jur 2d §197 citing Higdon v. Superior Court (5[th] Dist) 227 Cal App 3d 1667, 278 Cal Rptr 588, 91 CDOS 1622, 91 Daily Journal DAR 2595.

[10] Mejia v. Alimorong, 4 Phil. 573, 1905, Insular Government v. Bishop of Nueva Segovia, 17 Phil. 487, (1910); People v. Makaraig, 54 Phil. 904, 1930.

[11] Tambaoan v. Court of Appeals, 365 SCRA 359 (2001); Halili v. Court of Industrial Relations, 22 SCRA 785 (1968).

[12] 111 Phil. 699 (1961).

[13] 69 SCRA 556, G.R. No. L-41053. February 27, 1976.

[14] 191 SCRA 610, G.R. No. 79119. November 22, 1990.

[15] Entitled Republic of the Philippines, represented by Presidential Commission on Good Government, vs. Sandiganbayan, Sipalay Trading Corporation and Allied Banking Corporation, 255 SCRA 438, March 29, 1996.

[16] 46 Am Jur 2d § 516.

[17] 46 Am Jur 2d § 515

[18] Second Edition, New Twentieth Century Dictionary, Unabridged, 183.

[19] ABA Formal Opinion 342 (November 24, 1975).

[20] 103 F.R.D. 22; 1984 U.S. Dist. LEXIS 15513, June 26, 1984.

SEPARATE OPINION

PANGANIBAN, J.:

The Petition in this case should be DISMISSED on two grounds: (1) res judicata, specifically, conclusiveness of judgment; and (2) prescription.

In his Dissent, the esteemed Justice Romeo J. Callejo Sr. argues that Atty. Estelito P. Mendoza violated Rule 6.03 of the Code of Professional Responsibility,^[1] because after leaving his post as solicitor general, he appeared as counsel in a "matter in which he had intervened while he was in said service" (as solicitor general). He postulates that the Code of Professional Responsibility should be a beacon to assist good lawyers "in navigating an ethical course through the sometimes murky waters of professional conduct," in order "to avoid any appearance of impropriety." He adds that the Code should be strictly construed and stringently enforced.

On the other hand, the distinguished Justice Reynato S. Puno contends in his ponencia that Rule 6.03 of the Code has been incorrectly applied by Justice Callejo, because the "procedural advice" given by Atty. Mendoza is not the

"matter" contemplated by the said Rule. The ponencia explains that an "ultra restrictive reading of the Rule" would have "ill-effects in our jurisdiction."

With due respect to both Justices Puno and Callejo, I respectfully submit that there is no need to delve into the question of whether Rule 6.03 has been transgressed; there is no need to discuss the merits of the questioned Sandiganbayan Resolutions allowing Atty. Mendoza to represent private respondents in Civil Case Nos. 0096-0099. After all, a Resolution issued by the same court resolving the very same issue on the "disqualification" of Atty. Mendoza in a case involving the same parties and the same subject matter has already become final and immutable. It can no longer be altered or changed.

I believe that the material issue in the present controversy is whether Atty. Mendoza may still be barred from representing these respondents despite (1) a final Order in another case resolving the very same ground for disqualification involving the same parties and the same subject matter as the present case; and (2) the passage of a sufficient period of time from the date he ceased to be solicitor general to the date when the supposed disqualification (for violation of the Code) was raised.

Conclusiveness of Judgment

The doctrine of res judicata is set forth in Section 47 of Rule 39 of the Rules of Court, the relevant part of which I quote as follows:

"Sec. 47. Effect of judgments or final orders.

" The effect of a judgment or final order rendered by a court of the Philippines, having jurisdiction to pronounce the judgment or final order, may be as follows:

x x x x x x x x

"(b) In other cases, the judgment or final order is, with respect to the matter directly adjudged or as to any other matter that could have been raised in relation thereto, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing and under the same title and in the same capacity; and

"(c) In any other litigation between the same parties or their successors in interest, that only is deemed to have been adjudged in a former judgment or final order which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

The above provision comprehends two distinct concepts of res judicata: (1) bar by former judgment and (2) conclusiveness of judgment. Under the first concept, res judicata serves as an absolute proscription of a subsequent action when the following requisites concur: (1) the former judgment or order was final; (2) it adjudged the pertinent issue or issues on their merits; (3) it was rendered by a court that had jurisdiction over the subject matter and the parties; and (4) between the first and the second actions, there was identity of parties, of subject matter, and of causes of action.[2]

In regard to the fourth requirement, if there is no identity of causes of action but only an identity of issues, res judicata exists under the second concept; that is, under conclusiveness of judgment. In the latter concept, the rule bars the re-litigation of particular facts or issues involving the same parties but on different claims or causes of action.[3] Such rule, however, does not have the same effect as a bar by former judgment, which prohibits the prosecution of a second action upon the same claim, demand or cause of action.

In other words, conclusiveness of judgment finds application when a fact or question has been squarely put in issue, judicially passed upon, and adjudged in a former suit by a court of competent jurisdiction; it has thus been

conclusively settled by a judgment or final order issued therein. Insofar as the parties to that action (and persons in privity with them) are concerned, and while the judgment or order remains unreversed or un-vacated by a proper authority upon a timely motion or petition, such conclusively settled fact or question cannot again be litigated in any future or other action between the same parties or their privies, in the same or in any other court of concurrent jurisdiction, either for the same or for a different cause of action. Thus, the only identities required for the operation of the principle of conclusiveness of judgment is that between parties and issues.[4]

While it does not have the same effect as a bar by former judgment, which proscribes subsequent actions, conclusiveness of judgment nonetheless operates as an estoppel to issues or points controverted, on which the determination of the earlier finding or judgment has been anchored.[5] The dictum laid down in such a finding or judgment becomes conclusive and continues to be binding between the same parties, as long as the facts on which that judgment was predicated continue to be the facts of the case or incident before the court. The binding effect and enforceability of that dictum can no longer be re-litigated, since the said issue or matter has already been resolved and finally laid to rest in the earlier case.[6]

Relevant Antecedents

Showing the Application of the Conclusiveness Doctrine

Let me now discuss some relevant antecedents to show the application to this case of *res judicata*, specifically the principle of conclusiveness of judgment.

Pursuant to Executive Order No. 1 of then President Corazon C. Aquino, the Presidential Commission on Good Government (PCGG) issued sometime in June to August 1986 several Writs of Sequestration over certain properties of Respondents Lucio Tan et al., properties they had supposedly acquired by taking advantage of their close relationship with former President Ferdinand E. Marcos.

On August 17, 1987, the PCGG instituted before the Sandiganbayan a Complaint against the same respondents for "reversion, reconveyance, restitution, accounting and damages" vis-à-vis their sequestered properties. The Complaint was docketed as Civil Case No. 0005 and raffled to the Second Division of the Sandiganbayan (SBN).

Meanwhile, in separate Petitions before this Court, the validity of the sequestration Writs was questioned by herein respondents, but said Petitions were referred by the Court to the Sandiganbayan for proper disposition. These cases were raffled to the SBN Fifth Division and docketed as Civil Case Nos. 0096, 0097, 0098 and 0099. Civil Case No. 0096, in particular, involved the validity of the Writ of Sequestration issued by the PCGG over herein private respondents' shares of stock in Allied Banking Corporation (formerly General Bank and Trust Company or "GenBank").

In all the above-mentioned cases, Atty. Estelito P. Mendoza was the counsel of Tan et al.

On February 5, 1991, the PCGG filed in Civil Case No. 0005 a Motion[7] to disqualify Atty. Mendoza as counsel for therein Respondents Tan et al. In a Resolution[8] dated April 22, 1991, the Sandiganbayan (Second Division) denied that Motion. The anti-graft court likewise denied the Motion for Reconsideration filed by the PCGG.[9] Because the latter did not appeal the denial, the Resolution became final and executory.

Similarly, in Civil Case Nos. 0096-0099, PCGG filed a Motion[10] to disqualify Atty. Mendoza as counsel for Respondents Lucio Tan et al. According to respondent court, "the motion is exactly the same in substance as that motion filed in Civil Case No. 0005"; in fact, both incidents were taken up jointly by the Second and the Fifth Divisions of the Sandiganbayan.[11] Indeed, a perusal of both Motions reveals that, except as to their respective captions, the contents of the Motions are identically worded. Both Motions were anchored essentially on the same

ground: that by virtue of Rule 6.03 of the Code of Professional Responsibility, Atty. Mendoza was prohibited from acting as counsel of Tan et al. in the pending cases. During his tenure as solicitor general, Atty. Mendoza had allegedly "intervened" in the dissolution of GenBank, Allied Bank's predecessor.

Thus, in its herein assailed July 11, 2001 Resolution, respondent court resolved to reiterate and adopt "the Resolution dated April 22, 1991 in Civil Case No. 0005 of the Second Division x x x denying the motion."

Resolution in Civil Case
No. 0005 a Final Order

As distinguished from an interlocutory order, a final judgment or order decisively puts an end to (or disposes of) a case or a disputed issue; in respect thereto, nothing else -- except its execution -- is left for the court to do. Once that judgment or order is rendered, the adjudicative task of the court on the particular matter involved is likewise ended.[12] Such an order may refer to the entire controversy or to some defined and separate branch thereof.[13] On the other hand, an order is interlocutory if its effects are merely provisional in character and still leave substantial proceedings to be further conducted by the issuing court in order to put the issue or controversy to rest.[14]

I have no quarrel with the general test -- expounded, with acknowledged authorities, in the Dissenting Opinions of Justices Conchita Carpio Morales and Callejo -- for determining whether an order is interlocutory. Such test, however, applies to orders that dispose of incidents or issues that are intimately related to the very cause of action or merits of the case. The exception lies when the order refers to a "definite and separate branch" of the main controversy, as held by the Court in *Republic v. Tacloban City Ice Plant*. [15]

Under the present factual milieu, the matter of disqualification of Atty. Mendoza as counsel for respondents is a "defined and separate branch" of the main case for "reversion, reconveyance, and restitution" of the sequestered properties. This matter has no direct bearing on the adjudication of the substantive issues in the principal controversy. The final judgment resolving the main case does not depend on the determination of the particular question raised in the Motion. The April 22, 1991 Resolution of the Sandiganbayan (Second Division) in Civil Case No. 0005 had finally and definitively determined the issue of Atty. Mendoza's disqualification to act as counsel for Tan et al. Since that Resolution was not appealed, it became final and executory. It became a conclusive judgment insofar as that particular question was concerned.

Applying the Doctrine of
Conclusiveness of Judgment

There is no question as regards the identity of the parties involved in Civil Case Nos. 0005 and 0096. Neither has the jurisdiction of the Second and the Fifth Divisions of the Sandiganbayan been placed at issue. Clearly, the matter raised in the two Motions to Disqualify, though separately filed at different times in those two cases, are likewise the same or identical. Also undisputed is the fact that no appeal or certiorari petition was taken from the April 22, 1991 Resolution of the Second Division in Civil Case No. 0005, which had denied PCGG's Motion.

To counter the application of *res judicata*, Justices Morales and Callejo opine that the said April 22, 1991 Resolution was merely interlocutory. It "merely settled an incidental or collateral matter x x x; it cannot operate to bar the filing of another motion to disqualify Atty. Mendoza in the other cases x x x," Justice Callejo explains. I beg to disagree.

True, there is, as yet, no final adjudication of the merits of the main issues of "reversion, reconveyance and restitution." However, I submit that the question with respect to the disqualification of Atty. Mendoza had

nonetheless been conclusively settled. Indeed, the April 22, 1991 SBN Resolution had definitively disposed of the Motion to Disqualify on its merits. Since no appeal was taken therefrom, it became final and executory after the lapse of the reglementary period.[16]

While it merely disposed of a question that was collateral to the main controversy, the Resolution should be differentiated from an ordinary interlocutory order that resolves an incident arising from the very subject matter or cause of action, or one that is related to the disposition of the main substantive issues of the case itself. Such an order is not appealable, but may still be modified or rescinded upon sufficient grounds adduced before final judgment. Verily, *res judicata* would not apply therein.[17]

But, as illustrated earlier, the issue of the disqualification of Atty. Mendoza is separate from and independent of the substantive issues in the main case for "reversion, reconveyance and restitution." This particular question, in relation to Rule 6.03 of the Code of Professional Responsibility, was finally settled in the Resolution of April 22, 1991, issued by the SBN Second Division. In fact, I submit that this question had to be squarely resolved before trial proceeded, so as not to prejudice the movant in case its arguments were found to be meritorious. Otherwise, the Motion would be rendered naught.

In 2001, ten years after its filing, the identical Motion to Disqualify Atty. Mendoza in Civil Case Nos. 0096-0099 finally came up for deliberation before the Fifth Division of the Sandiganbayan. The Fifth Division correctly noted that the pending Motion was "exactly the same in substance as that Motion filed in Civil Case No. 0005." Thus, it resolved to reiterate and adopt the Second Division's April 22, 1991 Resolution denying the Motion. Interestingly and understandably, the Fifth Division of the anti-graft court no longer separately reviewed the merits of the Motion before it, because the Second Division's Resolution disposing of exactly the same Motion and involving the same parties and subject matter had long attained finality. That Resolution became a conclusive judgment between the parties with respect to the subject matter involved therein.

Exception to Application of Conclusiveness of Judgment

Justice Morales further cites *Kilosbayan v. Morato*,[18] in which the Court[19] said that "the rule on conclusiveness of judgment or preclusion of issues or collateral estoppel does not apply to issues of law, at least when substantially unrelated claims are involved." Explaining further, the Court cited therein the "authoritative formulation" of the exception in Restatement of the Law 2d, on Judgments, thus:

"§28. Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

x x x x x x x x

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; x x x. [Emphasis and omissions in the original.]"

In accordance with the above exception to the rule, Justice Morales believes that the doctrine of conclusiveness of judgment does not apply to this case, because the issue at bar -- disqualification of counsel -- "is undoubtedly a legal question" and "Civil Case No. 005 and Civil Case No. 0096 involve two different substantially unrelated claims."

I respectfully disagree with respect to her second point, which actually qualifies the exception. I believe that the two cases involve substantially related claims. Civil Case No. 0005 seeks to recover alleged ill-gotten shares of

stock of respondents Tan et al. in Allied Bank. Civil Case No. 0096 questions the validity of the Sequestration Writ over the same shares of stock involved in Civil Case No. 0005. In the ultimate analysis, both cases refer to the determination of who has a valid ownership claim over said stockholdings.

In any event and as earlier discussed, in our jurisdiction, the only identities required for the principle of conclusiveness of judgment to operate as an estoppel are those of parties and issues.[20]

Similar Motions in Other PCGG Cases

Parenthetically, it is worth mentioning that in their Memorandum,[21] Respondents Tan et al. aver that similar Motions to Disqualify Atty. Mendoza were likewise filed in Sandiganbayan Civil Case Nos. 0095 and 0100. The former case, Sipalay Trading v. PCGG, involved shares of stock of Lucio Tan in Maranaw Hotels and Resort Corporation; the latter case, Allied Banking Corporation v. PCGG, sought the invalidation of an Order for the search and seizure of certain documents of Allied Bank.

In both cases, the Sandiganbayan denied the separate Motions to Disqualify, as well as the Motions for Reconsideration. No further actions were taken by the PCGG on such denials, which thus became executory. Consequently, Atty. Mendoza was allowed to represent Lucio Tan in those cases.

On the merits of the said cases, which were consolidated, the Sandiganbayan granted both Petitions on August 23, 1993, by nullifying the Writ of Sequestration questioned in Civil Case No. 0095, as well as the Search and Seizure Order assailed in Civil Case No. 0100. On March 29, 1996, the Supreme Court affirmed the SBN's Decision in the aforementioned consolidated cases.[22] Consequently, now deemed *res judicata* are all issues raised in Civil Case Nos. 0095 and 0100 -- principal, incidental and corollary issues, including the matter of the alleged disqualification of Atty. Mendoza.

Presence of Identities of Parties and Issues

As earlier discussed, the only identities required for the principle of conclusiveness of judgment to operate as an estoppel are those of parties and issues. In the case before us, both identities are clearly present. Hence, the principle of conclusiveness of judgment applies and bars the present Petition.

From the foregoing, I submit that this Petition should be dismissed on the ground of conclusiveness of judgment. Parenthetically, the proper recourse to assail the July 11, 2001 and the December 5, 2001 Resolutions of the Sandiganbayan (Fifth Division) should have been a Petition for Review under Rule 45 of the Rules of Court. The certiorari proceeding before this Court is apparently a substitute for a lost appeal, deserving only of outright dismissal.[23] In any event, contrary to the allegations of petitioner, respondent court did not commit grave abuse of discretion amounting to lack or excess of jurisdiction when it issued the assailed Resolutions.

Proscription Time-Barred

True, Rule 6.03 of the Code of Professional Responsibility does not expressly specify the period of its applicability or enforceability. However, I submit that one cannot infer that, ergo, the prohibition is absolute, perpetual and permanent.

All civil actions have a prescriptive period.[24] Unless a law makes an action imprescriptible or lays down no other period, the action is subject to a bar by prescription five (5) years after the right of action accrued.[25] Criminal offenses -- even the most heinous ones -- as well as the penalties therefor, likewise prescribe.[26]

Relatedly, even so-called perpetual penalties and multiple sentences have maximum periods.[27]

Relevantly, it is worth pointing out that Republic Act No. 6713 prohibits public officers and employees from practicing their profession for only one year after their resignation, retirement or separation from public office, in connection with any matter before their former office.[28]

Prescription is intended to suppress stale and fraudulent claims arising from transactions or facts that have been obscured by defective memory or the lapse of time.[29] It was designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until relevant proofs are lost, memories faded, and witnesses no longer available.[30] Consistent with law and jurisprudence and the purpose of statutes of limitations, the prohibition on former government attorneys from involvement in matters in which they took part long ago, pursuant to their official functions while in public service, should likewise have an expiry or duration.

In the present case, the liquidation of GenBank, in which Atty. Mendoza purportedly participated as then solicitor general, took place in 1977 or more than a quarter of a century ago. Since early 1986, he has ceased to be solicitor general and has since engaged in the private practice of law. In 1987, he became counsel for Respondents Tan et al. in Civil Case No. 0005 and, since 1990, in Civil Case Nos. 0095 to 0100.[31] At the time, at least ten (10) years had passed since his alleged involvement in the GenBank liquidation. Moreover, in 1991 when the separate Motions to Disqualify were filed by PCGG in these aforementioned cases, he had been outside government service for about five (5) years, and fifteen years had gone by since the said liquidation.

Now it is already 2005. If we go by the rationale behind prescription, the extent of the individual participation of government officials in the GenBank liquidation may indeed "have become so obscure from the lapse of time," if not from "defective memory."

It is undeniable that government lawyers usually handle a multitude of cases simultaneously or within overlapping periods of time. This is in fact a common remonstrance, especially among prosecutors, public attorneys, solicitors, government corporate counsels, labor arbiters, even trial and appellate judges. Yet, as dutiful public servants, they cannot reject or shrink from assignments even if they are already overloaded with work. Similarly, lawyers in private practice, whether by themselves or employed in law firms, are in a comparative plight.

It would not be strange or uncommon that, in a period of five years, an attorney in government service would have handled or interfered in hundreds of legal matters involving varied parties.[32] Thousands of attorneys who have chosen to dedicate their service to the government for some years are in such a situation. Hence, to perpetually and absolutely ban them from taking part in all cases involving some matter in which they have taken part in some distant past, pursuant to their official functions then, would be unduly harsh, unreasonable and unfair. It would be tantamount to an unwarranted deprivation of the exercise of their profession. Be it remembered that a profession, trade or calling partakes of the nature of a property right within the meaning of our constitutional guarantees.[33]

Moreover, to attribute to a former government lawyer a violation of some ethical rule because of participation in a matter that has been forgotten in good faith due to the lapse of a long period of time and does not involve interest adverse to the government would likewise be harsh, unreasonable and unfair.

Similarly, there are many competent private practitioners who, at some point in their long careers, would wish to serve the government. Would their fine and wide-ranging practice and experience, which would otherwise be beneficial to the government, likewise forever bar them from getting involved in matters that concern a party with whom they have had dealings several years ago and whose interests are not adversely affected? In the case of acknowledged experts in specific fields of law, of what use would their needed expertise be to the government if they have to inhibit themselves from every case involving a party they have served in the distant past, considering

the limited number of parties that may actually be involved in a specific field (for instance, intellectual property or bioethics law)?

I submit that the restraint on the exercise of one's profession, or right of employment including that of attorneys formerly in government service, must survive the test of fairness and reasonableness. The restriction should not be as pervasive and longer than is necessary to afford a fair and reasonable protection to the interests of the government. After all, the disqualification of government attorneys is a drastic measure, and courts should hesitate to impose it except when necessary.[34]

Thus, I submit that the restriction on government lawyers --specifically with respect to subsequent engagement or employment in connection with matters falling under the "congruent-interest representation" -- should be allowed to expire after a reasonable period when no further prejudice to the public may be contemplated. The duration of this prohibition should be no more than five (5) years from retirement or separation from government service. Five years is the prescriptive period for suits for which no period is prescribed by law.[35]

It would be reasonable to assume that five years after separation from the service, one would most likely have lost the loyalty of one's former personal contacts, if not the loyal associates themselves, who may be able to facilitate the acquisition of important information from the former office. In all probability, the lapse of the said period would also naturally obscure to a reasonable extent a lawyer's memory of details of a specific case despite active participation in the proceedings therein. This principle holds if, in the interval, one has handled countless other legal matters as is so common among lawyers in government offices.

Consequently, after the said period, former government attorneys should be allowed to take up cases involving matters that were brought before them during their incumbency in public office, so long as such matters do not come within the "adverse-interest conflict" doctrine and the conflict-of-interest rule[36] applicable to all lawyers in general.

For the same reasons, the disqualification of members of the judiciary under Section 5(b) and (d)[37] of Canon 3 of the New Code of Judicial Conduct[38] should also prescribe in five (5) years from the time they assumed their judicial position; or from the time they retire from or otherwise end their government service.

I realize that the application of Rule 6.03 of the Code of Professional Responsibility and Section 5 of Canon 3 of the New Code of Judicial Conduct is quite important to many members of the bar who have served, or who aspire to serve, the government.

On the one hand, our rules of discipline should protect the interest of the public by discouraging attorneys in government from so shaping their practice as to give unfair advantage to their future private clients, or from jeopardizing confidential information learned while in government service. On the other hand, government service should not be discouraged by overly strict ethical rules that perpetually prohibit government lawyers from later making reasonable and appropriate use in private practice of the expertise or experience they have gained.[39]

The reality is that the best lawyers will want to join the more lucrative private sector sooner or later, and the government will hardly be able to attract them if they would later be unreasonably restricted from putting their government experience to some use.[40] After all, government service should afford lawyers the opportunity to improve their subsequent private employment. The nature of the job brings such lawyers into inevitable contact with clients interested in their fields of expertise. Because the practice of law is becoming increasingly specialized, the likely consequence of a wholesale approach to disqualification would be encouragement of a two-track professional structure: government lawyer, private lawyer. The suspicion, and the reality, of ethical

improprieties unrelated to particular government cases would be eliminated -- but at the cost of creating an insular, static legal bureaucracy.[41]

Such a pervasive, perpetual ban would deter too many competent attorneys from entering government service, to the detriment of the public.[42] The Court must strike a balance. I believe that the adoption of the aforementioned period of limitation would achieve the purpose behind Rule 6.03 of the Code of Professional Responsibility, as well as Section 5 of Canon 3 of the New Code of Judicial Conduct.

To summarize, the present Petition is barred by the principle of conclusiveness of judgment, because the April 22, 1991 Resolution of the SBN Second Division in Civil Case No. 0005 -- which resolved on the merits the very same ground for the disqualification of Atty. Mendoza, and which involved essentially the same parties and the same subject matter as the present case -- constituted a final and executory order, no timely appeal having been taken therefrom.

Furthermore, the disqualification of former government lawyers from congruent-interest representation under Rule 6.03 of the Code of Professional Responsibility should be effective only for a period of five (5) years from the retirement or the separation from government service of the official concerned. The purpose of such prescriptive period is to prevent undue restraint on former government lawyers from the private practice of their profession, especially in the field of expertise that they may have gained while in public office. Similarly, the disqualification of members of the judiciary, under Section 5 (b) and (d) of Canon 3 of the New Code of Judicial Conduct should end five (5) years after they assumed their judicial position.

Implications of the Dissenting Opinions

Endless re-litigations of the same question, as well as forum shopping, are invited by the opinion of the dissenters that the April 22, 1991 Resolution of the Sandiganbayan's Second Division in Civil Case No. 0005 does not bar the filing of another motion to disqualify Atty. Mendoza from other cases between the same parties. Such a holding would effectively allow herein petitioner to file exactly the same Motion in each of other and future cases involving the same parties or their privies and the same subject matters, even after the first Motion involving the same question or issue will have already been finally resolved in one of like cases.

Further, it would also allow petitioner to let a contrary resolution of the incident in one case become final through petitioner's withholding recourse to a higher court in order to await a possible favorable ruling in one of the other cases. As it is, absurdity already surrounds the handling of Civil Case No. 0005 and No. 0096, both of which involve the same parties and the same subject matter.

In Civil Case No. 0005, which seeks to recover allegedly unlawfully acquired properties consisting of shares of stock of Respondent Tan et al. in Allied Bank, Atty. Mendoza is allowed to serve as their counsel. However, in Civil Case No. 0096, which merely questions the validity of the Writ of Sequestration issued against the shares of stock in Allied Bank of the same respondents, he is prohibited, per the dissenters, from acting as their counsel. This is preposterous.

Moreover, treating the first Resolution as not yet final and executory, even if no appeal or certiorari has timely been taken therefrom, would allow the questioned counsel to act as such throughout the trial period until final judgment by the court a quo. Thereafter, on appeal, his alleged "disqualification" may still be raised by the other party as an issue. If the appeals court or this Tribunal ultimately finds that the said counsel is indeed disqualified on the ground of conflict of interest or "congruent-interest representation conflict" and thus reverses the trial court's ruling, the case would necessarily be remanded for new trial. As a result, the entire proceedings would

become naught and thereby unnecessarily waste the precious time, effort and resources of the courts as well as the parties. Worse, the evidence (or defense) adduced by the "disqualified" counsel through his prior connections with the government (or the adverse party) could have already created bias in the court or in the public mind.

These are precisely the procedural absurdities abhorred by the doctrine of *res judicata*, the fundamental principle of due process and of the rule proscribing forum shopping.

Having already shown that Atty. Mendoza can no longer be disqualified at this point for his alleged violation of Rule 6.03 of the Code of Professional Responsibility, due to *res judicata* and prescription, I submit that there is no more need to discuss on the merits whether indeed there was in fact such violation. Such discussion would be merely academic and moot.

May I close this Opinion with this oft-quoted ruling of former Chief Justice Pedro L. Yap, who was himself a former PCGG commissioner, on the soundness of upholding final judgments even "at the risk of occasional errors":

"It is a general rule common to all civilized system of jurisprudence, that the solemn and deliberate sentence of the law, pronounced by its appointed organs, upon a disputed fact or a state of facts, should be regarded as a final and conclusive determination of the question litigated, and should forever set the controversy at rest. Indeed, it has been well said that this maxim is more than a mere rule of law, more than an important principle of public policy: and that it is not too much to say that it is a fundamental concept in the organization of the jural sytem. Public policy and sound practice demand that, at the risk of occasional errors, judgments of courts should become final at some definite date fixed by law. The very object for which courts were constituted was to put an end to controversies." [43]

WHEREFORE, I vote to DISMISS the Petition.

[1]"Rule 6.03 - 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."

[2] *Sta. Lucia Realty and Development v. Cabrigas*, 358 SCRA 715, June 19, 2001.

[3] *Ibid*.

[4] *Nabus v. Court of Appeals*, 193 SCRA 732, February 7, 1991 (reiterated in *Calalang v. Register of Deeds*, 231 SCRA 88, March 11, 1994; and in *Intestate Estate of San Pedro v. Court of Appeals*, 265 SCRA 733, December 18, 1996).

[5] *Camara v. Court of Appeals*, 310 SCRA 608, July 20, 1999.

[6] *Miranda v. Court of Appeals*, 141 SCRA 302, February 11, 1986; *Vda. De Sta. Romana v. Philippine Commercial and Industrial Bank*, 118 SCRA 330, November 15, 1982.

[7] *Rollo*, pp. 216-220.

[8] Penned by Justice Romeo M. Escareal (chairman) and concurred in by Justices Jose S. Balajadia and Nathanael M. Grospe (members); *rollo*, pp. 57-63.

[9] Resolution dated July 24, 1991; *rollo*, pp. 233-237.

[10] *Rollo*, pp. 221-225.

[11] Resolution dated July 11, 2001 of the Sandiganbayan (Fifth Division), referring to the Record of Civil Case

No. 0096, Vol. I, pp. 134-135; rollo, p. 42. This unsigned Resolution was unanimously approved by Justices Minita V. Chico-Nazario (Division chairperson, now a member of this Court), Rodolfo G. Palattao and Ma. Cristina Cortez-Estrada (members).

[12] *Santo Tomas University Hospital v. Surla*, 355 Phil. 804, August 17, 1998 (citing *Investments, Inc. v. Court of Appeals*, 147 SCRA 334, January 27, 1987; and *Denso [Phils.], Inc. v. Intermediate Appellate Court*, 148 SCRA 280, February 27, 1987). In this case, the Court held:

"The order of the trial court dismissing petitioner's counterclaim was a final order since the dismissal, although based on a technicality, would require nothing else to be done by the court with respect to that specific subject except only to await the possible filing during the reglementary period of a motion for reconsideration or the taking of an appeal therefrom."

The Court further said that errors of judgment, as well as procedure, that do not relate to the jurisdiction of the court or involve grave abuse of discretion are reviewable by timely appeal, not by a special civil action for certiorari, unless for valid and compelling reasons.

[13] *Tambaoan v. Court of Appeals*, 417 Phil. 683, September 17, 2001 (citing *Republic v. Tacloban City Ice Plant*, 258 SCRA 145, July 5, 1996; and *Dela Cruz v. Paras*, 69 SCRA 556, February 27, 1976).

[14] *Santo Tomas University Hospital v. Surla*, supra (citing *Bairan v. Tan Siu Lay*, 18 SCRA 1235, December 28, 1966).

[15] *Supra*, p. 155.

[16] *Pascual v. Court of Appeals*, 300 SCRA 214, December 16, 1998; *Navarro v. NLRC*, 327 SCRA 22, March 1, 2000; *Testate Estate of Manuel v. Biascarr*, 347 SCRA 621, December 11, 2000; *People v. Alay-ay*, 363 SCRA 603, August 23, 2001; *Vda. de Sta. Romana v. Philippine Commercial & Industrial Bank*, supra.

[17] *Manila Electric Co. v. Arciaga*, 50 Phil. 144, March 18, 1927 (citing *Reilly v. Perkins*, 56 Pac 734).

[18] 246 SCRA 540, 561, July 17, 1995, per Mendoza, J.

[19] Voting here was close (5 justices fully concurred in the ponencia, 2 wrote separate concurring opinions, while 5 dissented.)

[20] *Nabus v. Court of Appeals*, supra.

[21] Rollo, pp. 391-471.

[22] GR Nos. 112708-09, 255 SCRA 438, March 29, 1996.

[23] *Spouses Morales v. Court of Appeals*, 285 SCRA 337, January 28, 1998; *Cabellan v. Court of Appeals*, 304 SCRA 119, March 3, 1999; *Republic v. Court of Appeals*, 322 SCRA 81, January 18, 2000.

[24] See Arts. 1140-1149, Civil Code.

[25] *Tolentino v. Court of Appeals*, 162 SCRA 66, June 10, 1988.

[26] Arts. 90 & 92 of the Revised Penal Code provide as follows:

"Art. 90. Prescription of crime. - Crimes punishable by death, reclusion perpetua or reclusion temporal shall prescribe in twenty years.

Crimes punishable by other afflictive penalties shall prescribe in fifteen years.

Those punishable by a correctional penalty shall prescribe in ten years; with the exception of those punishable by arresto mayor, which shall prescribe in five years.

The crime of libel or other similar offenses shall prescribe in one year.

The crime of oral defamation and slander by deed shall prescribe in six months.

Light offenses prescribe in two months."

"Art. 92. When and how penalties prescribe. - The penalties imposed by final sentence prescribe as follows:

- Death and reclusion perpetua, in twenty years;
- Other afflictive penalties, in fifteen years;
- Correctional penalties, in ten years; with the exception of the penalty of arresto mayor, which prescribes in five years;
- Light penalties, in one year."

See also Act No. 3326, as amended.

[27] "Art. 70 [Revised Penal Code]. x x x.

"Notwithstanding the provisions of the rule next preceding, the maximum duration of the convict's sentence shall not be more than three-fold the length of time corresponding to the most severe of the penalties imposed upon him. No other penalty to which he may be liable shall be inflicted after the sum total of those imposed equals the same maximum period.

"Such maximum period shall in no case exceed forty years.

"In applying the provisions of this rule the duration of perpetual penalties (pena perpetua) shall be computed at thirty years."

[28] "Sec. 7. Prohibited Acts and Transactions. x x x.

"These prohibitions shall continue to apply for a period of one (1) year after resignation, retirement, or separation from public office, except in the case of subparagraph (b); (2) above, but the professional concerned cannot practice his profession in connection with any matter before the office he used to be with, in which case the one-year prohibition shall likewise apply."

[29] *Ochagabia v. Court of Appeals*, 364 Phil. 233, March 11, 1999; *Peñales v. IAC*, 229 Phil. 245, October 27, 1986.

[30] *Order of R. Telegraphers v. Railway Express Agency, Inc.*, 321 US 342 (1944); *Alcorn v. City of Baton Rouge*, 2004 WL 3016015, December 30, 2004.

[31] Memorandum for Respondents, pp. 9-10; rollo, pp. 399-400.

[32] Modesty aside, in my nearly ten (10) years in this Court, I have disposed of about a thousand cases in full-length ponencias and countless cases by way of unsigned minute or extended Resolutions. This does not include the thousands of other cases, assigned to other members of the Court, in which I actively took part during their deliberations. In all honesty, I must admit that I cannot with certainty recall the details of the facts and issues in each of these cases, especially in the earlier ones.

[33] *JMM Promotion and Management, Inc. v. Court of Appeals*, 329 Phil. 87, August 5, 1996.

[34] *Bullock v. Carver*, 910 F. Supp 551, 1995.

[35] Art. 1149, Civil Code.

[36] Rule 15.03, Code of Professional Responsibility:

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

[37] "Sec. 5. Judges shall disqualify themselves from participating in any proceedings in which they are unable to decide the matter impartially or in which it may appear to a reasonable observer that they are unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

x x x x x x x x

(b) The judge previously served as lawyer or was a material witness in the matter in controversy;

x x x x x x x x

(d) The judge served as executor, administrator, guardian, trustee or lawyer in the case or matter in controversy, or a former associate of the judge served as counsel during their association, or the judge or lawyer was a material witness therein;

x x x x x x x x"

[Rule 3.12 of Canon 3 of the old Code of Judicial Conduct.]

[38] AM No. 03-05-01-SC, promulgated on April 27, 2004 and effective June 1, 2004.

[39] *In re Sofaer*, 728 A2d 625, April 22, 1999.

[40] *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A2d 37, December 21, 1984.

[41] *Ibid.* (citing *Developments in the Law: Conflicts of Interest*, 94 Harv.L.Rev. 1244, 1428-30 [1981]).

[42] *Ibid.*

[43] *Legarda v. Savellano*, 158 SCRA 194, February 26, 1988, per Yap, J. (later CJ).

DISSENTING OPINION

CARPIO-MORALES, J.:

While I concur in the scholarly and ably-written dissent of Justice Romeo J. Callejo, Sr., I feel compelled to write a separate dissenting opinion to reflect the additional reasons behind my position.

Justices Artemio V. Panganiban and Angelina Sandoval-Gutierrez are of the opinion that the petition can be dismissed on procedural grounds, they contending that the Presidential Commission on Government (PCGG) is precluded from filing a motion to disqualify Atty. Estelito P. Mendoza as counsel in Civil Case Nos. 0096 since the Sandiganbayan (Second Division) had already denied PCGG's motion to disqualify Atty. Mendoza as counsel in Civil Case No. 0005. In short, they are invoking the doctrines of conclusiveness of judgment and law of the case.

I believe *Kilosbayan, Incorporated v. Morato*[1] penned by the distinguished Justice Vicente V. Mendoza is instructive.

To recall, Kilosbayan, Incorporated (Kilosbayan, Inc.), et al. filed on January 28, 1994 a petition with this Court challenging the validity of the Contract of Lease between the Philippine Charity Sweepstakes Office (PCSO) and the Philippine Gaming Management Corporation (PGMC) on the ground that the same was made in violation of the charter of the PCSO. This Court in *Kilosbayan, Incorporated v. Guingona, Jr.*[2] invalidated the contract.

One of the issues raised before this Court in *Kilosbayan, Incorporated v. Guingona, Jr.* was the standing of petitioners to maintain the suit. On that score, this Court held through Associate Justice (now Chief Justice) Hilario G. Davide, Jr. that petitioners had standing to sue.

As a result of the decision in *Kilosbayan, Incorporated v. Guingona, Jr.*, PCSO and PGMC entered into negotiations for a new agreement which would conform to the Court's decision.

On January 25, 1995, PCSO and PGMC signed an Equipment Lease Agreement (ELA).

On February 21, 1995, Kilosbayan, Inc, et al. filed a petition against then PCSO Chair Manuel Morato seeking to declare the ELA invalid on the ground that it was substantially the same as the Contract of Lease nullified in *Kilosbayan, Incorporated v. Guingona, Jr.*

Its ruling in *Kilosbayan, Incorporated v. Guingona, Jr.* notwithstanding, this Court in *Kilosbayan, Incorporated v. Morato* ruled that the therein petitioners did not have standing to sue.

It explained that the doctrines of law of the case and conclusiveness of judgment do not pose a barrier to the determination of petitioners' right to maintain the suit:

Petitioners argue that inquiry into their right to bring this suit is barred by the doctrine of "law of the case." We do not think this doctrine is applicable considering the fact that while this case is a sequel to G.R. No. 113375, it is not its continuation: The doctrine applies only when a case is before a court a second time after a ruling by an appellate court. Thus in *People v. Pinuila*, 103 Phil. 992 999 (1958), it was stated:

"'Law of the case' has been defined as the opinion delivered on a former appeal. More specifically, it means that whatever is once irrevocably established as the controlling legal rule of decision between the same parties in the same case continues to be the law of these case, whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be facts of the case before the court." (21 C.J.S. 330)

"It may be stated as a rule of general application that, where the evidence on a second or succeeding appeal is substantially the same as that on the first or preceding appeal, all matters, questions, points, or issues adjudicated on the prior appeal are the law of the case on all subsequent appeals and will not be considered or re-adjudicated therein. (5 C.J.S. 1267)

"In accordance with the general rule stated in Section 1821, where after a definite determination, the court has remanded the cause for further action below, it will refuse to examine question other than those arising subsequently to such determination and remand, or other than the propriety of the compliance with its mandate; and if the court below has proceeded in substantial conformity to the directions of the appellate court, its action will not be questioned on a second appeal . . .

"As a general rule a decision on a prior appeal of the same is held to be the law of the case whether that decision is right or wrong, the remedy of the party deeming himself aggrieved to seek a rehearing. (5 C.J.S. 1276-77)

"Questions necessarily involved in the decision on a former appeal will be regarded as the law of the case on a subsequent appeal, although the questions are not expressly treated in the opinion of the court, as the presumption is that all the facts in the case bearing on the point decided have received due consideration

whether all or none of them are mentioned in the opinion. (5 C.J.S. 1286-87)"

As this Court explained in another case. "The law of the case, as applied to a former decision of an appellate court, merely expresses the practice of the courts in refusing to reopen what has been decided. It differs from res judicata in that the conclusive of the first judgment is not dependent upon its finality. The first judgment is generally, if not universally, not final, It relates entirely to questions of law, and is confined in its questions of law, and is confined in its operation to subsequent proceedings in the same case" (Municipality of Daet v. Court of Appeals, 93 SCRA 503, 521 (1979))

It follows that since the present case is not the same one litigated by he parties before in G.R. No. 113375, the ruling there cannot in any sense be regarded as "the law of this case." The parties are the same but the cases are not.

Nor is inquiry into petitioners; right to maintain this suit foreclosed by the related doctrine of "conclusiveness of judgment." [3] According to the doctrine, an issue actually and directly passed upon and determined in a former suit cannot again be drawn in question in any future action between the same parties involving a different of action. (Peñalosa v. Tuason, 22 Phil. 303, 313 (1912); Heirs of Roxas v. Galido, 108. 582 [1960])

It has been held that the rule on conclusiveness of judgment or preclusion of issues or collateral estoppel does not apply to issues of law, at least when substantially unrelated claims are involved. (Montana v. United States, 440 U.S. 147, 162, 59 L. Ed. 2d 210, 222 (1979); BATOR, MELTZER, MISHKIN AND SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1058, n. 2 (3rd Ed., 1988)) Following this ruling it was held in Commissioner v. Sunnen, 333 U.S. 591, 92 L. Ed. 898 (1947) that where a taxpayer assigned to his wife interest in a patent in 1928 and in a suit it was determined that the money paid to his wife for the years 1929-1931 under the 1928 assignment was not part of his taxable income, this determination is not preclusive in a second action for collection of taxes on amounts to his wife under another deed of assignment for other years (1937 to 1941). For income tax purposes what is decided with respect to one contract is not conclusive as to any other contract which was not then in issue, however similar or identical it may be. The rule on collateral estoppel it was held, "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first preceding and where the controlling facts and applicable legal rules remain unchanged." (333 U.S. at 599-600, 92 L. Ed. at 907) Consequently, "if the relevant facts in the two cases are separate even though they may be similar or identical, collateral estoppel does not govern the legal issues which occur in the second case. Thus the second proceeding may involve an instrument or transaction identical with but in a form separable form, the one dealt with in the first proceeding. In that situation a court is free in the second proceeding to make an independent examination of the legal matters at issue. . . ." (333 U.S. at 601, 92 L. Ed. at 908)

This exception to the General Rule of the Issue Preclusion is authoritatively formulated in Restatement of the Law 2d, on Judgments, as follows:

§28. Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

. . . .

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; . . .

Illustration:

. . . .

2. A brings an action against the municipality of B for tortious injury. The court sustain B's defense of sovereign immunity and dismisses the action. Several years later A brings the second action against B for an unrelated tortious injury occurring after the dismissal. The judgment in the first action is not conclusive on the question whether the defense immunity is available to B. Note: The doctrine of stare decisis may lead the court to refuse to reconsider the question of sovereign immunity. See §29, Comment i.

The question whether the petitioners have standing to question the Equipment or ELA is a legal question. As will presently be shown, the ELA, which the petitioners seek to declare invalid in this proceeding, is essentially different from the 1993 Contract of lease entered into by the PCSO with the PGMG. Hence the determination in the prior case (G.R. No. 113375) that the petitioner had standing to challenge the validity of the 1993 Contract of Lease of the parties does not preclude determination of their standing in the present suit. (Emphasis and underscoring supplied; italics in the original)

The doctrine of law of the case does not, I believe, apply to the present case for this is the first time that the issue to disqualify Atty. Mendoza has been elevated before this Court. It is the decision in this case which will be the law of the case. A reading of *Republic v. Sandiganbayan*[4] cited by Justice Sandoval-Gutierrez shows that the issue currently before this Court was not passed upon. Thus, this Court in *Republic v. Sandiganbayan* stated:

The key issues, in query form, are:

- (1) Was the SANDIGANBAYAN's denial of the PCGG's motion to dismiss proper?
- (2) Should the SANDIGANBAYAN have disposed first such motion to dismiss rather than resolving it as part of the judgment?
- (3) Was the nullification of the sequestration order issued against SIPALAY and of the search and seizure order issued against ALLIED correct?
- (4) Were the sequestration and search and seizure orders deemed automatically lifted for failure to bring an action in court against SIPALAY and ALLIED within the constitutionally prescribed period?[5]

I also believe that the doctrine of conclusiveness of judgment does not apply since in the case at bar, the question of whether the motion to disqualify Atty. Mendoza should be granted is undoubtedly a legal question. Moreover, Civil Case No. 005 and Civil Case No. 0096 involve two different substantially unrelated claims.

Justices Panganiban and Sandoval-Gutierrez further opine that the order of the Sandiganbayan in Civil Case No. 0005 denying PCGG's motion to disqualify Atty. Mendoza is not an interlocutory order but a final order, and that as a result, the principle of res judicata applies.

With all due respect, I believe that we cannot characterize the denial of PCGG's motion to disqualify Atty. Mendoza as a final order. Black's Law Dictionary defines interlocutory in the following manner:

Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy. An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.[6] (Emphasis and underscoring supplied)

Justice Oscar M. Herrera, an authority in remedial law, distinguishes between a final judgment and interlocutory order in this wise:

The concept of final judgment, as distinguished from one which has become final or executory as of right (final and executory), is definite and settled. A final judgment or order is one that finally disposes of a case, leaving nothing more to be done by the Court in respect thereto, e.g., an adjudication on the merits which, on

the basis of the evidence presented at the trial, declares categorically what the rights and obligations of the parties are and which party is in the right; or a judgment or order that dismisses an action on the ground, for instance, of res judicata or prescription. Once rendered, the task of the Court is ended, as far as deciding the controversy or determining the rights and liabilities of the litigants is concerned. Nothing more remains to be done by the Court except to await the parties' next move (which among others, may consist of the filing of a motion for new trial or reconsideration, or the taking of an appeal) and ultimately, of course, to cause the execution of the judgment once it becomes final, or to use the established and more distinctive term, final and executory. (*Investment, Inc. v. Court of Appeals* cited in *Denso [Phils.], Inc. v. Intermediate Appellate Court*, 148 SCRA 280; see also *Bank of America NT & SA*, G.R. No. 78017, June 8, 1990 186 SCRA 417)

An interlocutory order refers to something between the commencement and end of the suit which decides some point or matter but it is not the final decision of the whole controversy.[7] (*Bitong v. Court of Appeals*, G.R. No. 123553, July 13, 1998, 96 SCAD 205) (Emphasis and underscoring supplied)

Justice Florenz D. Regalado is of the same view:

An order is considered interlocutory if it does not dispose of the case but leaves something else to be done by the trial court on the merits of the case. An order is final, for purposes of appeal, if it disposes of the entire case.

Where the order is interlocutory, the movant has to wait for the judgment and then appeal from the judgment, in the course of which appeal he can assign as error the said interlocutory order. The interlocutory order cannot be appealed from separately from the judgment. The general rule is that where the interlocutory order was rendered without or in excess of jurisdiction or with grave abuse of discretion, the remedy is certiorari, prohibition or mandamus depending on the facts of the case.

Where the order appealed from is interlocutory, the appellate court can dismiss the appeal even if no objection thereto was filed by the appellee in either the trial or appellate court.[8] (Emphasis and underscoring supplied)

Another respected scholar of remedial law, Justice Jose Y. Feria, has formulated this guideline in determining whether an order is final or interlocutory:

The test to ascertain whether or not an order or a judgment is interlocutory or final: Does it leave something to be done in the trial court with respect to the merits of the case? If it does, it is interlocutory; if it does not, it is final. The key test to what is interlocutory is when there is something more to be done on the merits of the case.[9] (Emphasis and underscoring)

In fact, this same test was used in *Tambaoan v. Court of Appeals*,[10] cited by Justice Panganiban to determine whether the trial court's order was interlocutory or final:

In this particular instance, the test to determine whether the order of 06 January 1995 is interlocutory or final would be: Does it leave something else to be done by the trial court on the case? If it does, it is interlocutory, if it does not, it is final. Evidently, the trial court would still have to hear the parties on the merits of the case...

x x x

Indeed, the word "interlocutory" refers to "something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." An interlocutory order does not terminate nor does it finally dispose of the is (sic) case; it does not end the task of the court in adjudicating the parties' contentions and determining their rights and liabilities as against each other but leaves something yet to be done by the court before the case is finally decided on its merits. (Emphasis and underscoring supplied)

Applying the foregoing test, it is clear that the order denying PCGG's motion to disqualify Atty. Mendoza is

interlocutory because it does not finally dispose of the case.

Interestingly enough, the U.S. Supreme Court is in agreement with Justice Callejo's conclusion that the Sandiganbayan's denial of PCGG's motion to disqualify Atty. Mendoza is an interlocutory order. In *Firestone Tire & Rubber Company v. Risjord*,^[11] the American Court ruled that an order denying motions to disqualify the opposing party's counsel in a civil case are not appealable prior to final judgment in underlying litigation since such an order does not fall within the collateral order exception of *Cohen v. Beneficial Industrial Loan Corporation*,^[12] which is cited by Justice Sandoval-Gutierrez.

Under § 1291, the courts of appeals are vested with "jurisdiction of appeals from all final decisions of the district courts ... except where a direct review may be had in the Supreme Court." We have consistently interpreted this language as indicating that a party may not take an appeal under this section until there has been "a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978), quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick v. United States*, 309 U.S. 323, 325, 60 S.Ct. 540, 541, 84 L.Ed. 783 (1940). See *DiBella v. United States*, 369 U.S. 121, 124, 82 S.Ct. 654, 656, 7 L.Ed.2d 614 (1962). The rule also serves the important purpose of promoting efficient judicial administration. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170, 94 S.Ct. 2140, 2149, 40 L.Ed.2d 732 (1974).

Our decisions have recognized, however, a narrow exception to the requirement that all appeals under § 1291 await final judgment on the merits. In *Cohen v. Beneficial Industrial Loan Corp.*, *supra*, we held that a "small class" of orders that did not end the main litigation were nevertheless final and appealable pursuant to § 1291. *Cohen* was a shareholder's derivative action in which the Federal District Court refused to apply a state statute requiring a plaintiff in such a suit to post security for costs. The defendant appealed the ruling without awaiting final judgment on the merits, and the Court of Appeals ordered the trial court to require that costs be posted. We held that the Court of Appeals properly assumed jurisdiction of the appeal pursuant to § 1291 because the District Court's order constituted a final determination of a claim "separable from, and collateral to," the merits of the main proceeding, because it was "too important to be denied review," and because it was "too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*, at 546, 69 S.Ct. at 1225. *Cohen* did not establish new law; rather, it continued a tradition of giving "§ 1291 a 'practical rather than a technical construction.'" *Ibid.* See, e.g., *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413-414, 46 S.Ct. 144, 70 L.Ed. 339 (1926); *Bronson v. LaCrosse & Milwaukee R. Co.*, 67 U.S. 524-531, 2 Black 524, 530-531, 17 L.Ed. 347 (1863); *Forgay v. Conrad*, 47 U.S. 201, 203, 6 How. 201, 203, 12 L.Ed.2d 404 (1848); *Whiting v. Bank of the United States*, 38 U.S. 6, 15, 13 Pet. 6, 15, 10 L.Ed. 33 (1839). We have recently defined this limited class of final "collateral orders" in these terms: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, *supra*, 437 U.S. at 468, 98 S.Ct. at 2457 (footnote omitted). See *Abney v. United States*, 431 U.S. 651, 658, 97 S.Ct. 2034, 2039, 52 L.Ed.2d 651 (1977).

[1] Because the litigation from which the instant petition arises had not reached final judgment at the time the notice of appeal was filed. [FN11] the order denying petitioner's motion to disqualify respondent is appealable under § 1291 only if it falls within the *Cohen* doctrine. The Court of Appeals held that it does not, and 5 of the

other 10 Circuits have also reached the conclusion that denials of disqualification motions are not immediately appealable "collateral orders." [FN12] We agree with these courts that under *Cohen* such an order is not subject to appeal prior to resolution of the merits.

FN11. Counsel for respondent represented at oral argument in this Court that the case was, at that time, in the discovery stage. Tr. of Oral Arg. 35-36.

FN12. See n. 10, *supra*.

An order denying a disqualification motion meets the first part of the "collateral order" test. It "conclusively determine[s] the disputed question," because the only issue is whether challenged counsel will be permitted to continue his representation. In addition, we will assume, although we do not decide, that the disqualification question "resolve [s] an important issue completely separate from the merits of the action," the second part of the test. Nevertheless, petitioner is unable to demonstrate that an order denying disqualification is "effectively unreviewable on appeal from a final judgment" within the meaning of our cases.

In attempting to show why the challenged order will be effectively unreviewable on final appeal, petitioner alleges that denying immediate review will cause it irreparable harm. It is true that the finality requirement should "be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered," *Mathews v. Eldridge*, 424 U.S. 319, 331, n. 11, 96 S.Ct. 893, 901, n. 11, 47 L.Ed.2d 18 (1976). In support of its assertion that it will be irreparably harmed, petitioner hints at "the possibility that the course of the proceedings may be indelibly stamped or shaped with the fruits of a breach of confidence or by acts or omissions prompted by a divided loyalty," Brief for Petitioner 15, and at "the effect of such a tainted proceeding in frustrating public policy," *id.*, at 16. But petitioner fails to supply a single concrete example of the indelible stamp or taint of which it warns. The only ground that petitioner urged in the District Court was that respondent might shape the products-liability plaintiffs' claims for relief in such a way as to increase the burden on petitioner. Our cases, however, require much more before a ruling may be considered "effectively unreviewable" absent immediate appeal.

[2] To be appealable as a final collateral order, the challenged order must constitute "a complete, formal and, in the trial court, final rejection," *Abney v. United States*, *supra*, 431 U.S. at 659, 97 S.Ct. at 2040, of a claimed right "where denial of immediate review would render impossible any review whatsoever," *United States v. Ryan*, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971). Thus we have permitted appeals prior to criminal trials when a defendant has claimed that he is about to be subjected to forbidden double jeopardy, *Abney v. United States*, *supra*, or a violation of his constitutional right to bail, *Stack v. Boyle*, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951) because those situations, like the posting of security for costs involved in *Cohen*, "each involved an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald*, 435 U.S. 850, 860, 98 S.Ct. 1547, 1552, 56 L.Ed.2d 18 (1978). By way of contrast, we have generally denied review of pretrial discovery orders, see, e. g., *United States v. Ryan*, *supra*; *Cobbledick v. United States*, *supra*. Our rationale has been that in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling. See *Cobbledick v. United States*, *supra*, at 327, 60 S.Ct. at 542. We have also rejected immediate appealability under § 1291 of claims that "may fairly be assessed" only after trial, *United States v. MacDonald*, *supra*, at 860, and those involving "considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesay*, 437 U.S., at 469, 98 S.Ct., at 2458, quoting *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558, 83 S.Ct. 520, 522, 9 L.Ed.2d 523 (1963).

An order refusing to disqualify counsel plainly falls within the large class of orders that are indeed reviewable on appeal after final judgment, and not within the much smaller class of those that are not. The propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. The decision whether to

disqualify an attorney ordinarily turns on the peculiar factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits. In the case before us, petitioner has made no showing that its opportunity for meaningful review will perish unless immediate appeal is permitted. On the contrary, should the Court of Appeals conclude after the trial has ended that permitting continuing representation was prejudicial error, it would retain its usual authority to vacate the judgment appealed from and order a new trial. That remedy seems plainly adequate should petitioner's concerns of possible injury ultimately prove well founded. As the Second Circuit has recently observed, the potential harm that might be caused by requiring that a party await final judgment before it may appeal even when the denial of its disqualification motion was erroneous does not "diffe[r] in any significant way from the harm resulting from other interlocutory orders that may be erroneous, such as orders requiring discovery over a work-product objection or orders denying motions for recusal of the trial judge." *Armstrong v. McAlpin*, 625 F.2d 433, 438 (1980), cert. pending, No. 80-431. But interlocutory orders are not appealable "on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 98, n. 6, 88 S.Ct. 269, 275, n. 6, 19 L.Ed.2d 305 (1967). Permitting wholesale appeals on that ground not only would constitute an unjustified waste of scarce judicial resources, but also would transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291. This we decline to do. [FN13]

FN13. Although there may be situations in which a party will be irreparably damaged if forced to wait until final resolution of the underlying litigation before securing review of an order denying its motion to disqualify opposing counsel, it is not necessary, in order to resolve those situations, to create a general rule permitting the appeal of all such orders. In the proper circumstances, the moving party may seek sanctions short of disqualification, such as a protective order limiting counsel's ability to disclose or to act on purportedly confidential information. If additional facts in support of the motion develop in the course of the litigation, the moving party might ask the trial court to reconsider its decision. Ultimately, if dissatisfied with the result in the District Court and absolutely determined that it will be harmed irreparably, a party may seek to have the question certified for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b), see n. 7, *supra*, and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available. See *In re Continental Investment Corp.*, *supra*, 637 F.2d, at 7; *Community Broadcasting of Boston, Inc. v. FCC*, 178 U.S.App.D.C., at 262, 546 F.2d, at 1028. See generally Comment, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U.Chi.L.Rev. 450, 468-480 (1978). We need not be concerned with the availability of such extraordinary procedures in the case before us, because petitioner has made no colorable claim that the harm it might suffer if forced to await the final outcome of the litigation before appealing the denial of its disqualification motion is any greater than the harm suffered by any litigant forced to wait until the termination of the trial before challenging interlocutory orders it considers erroneous.

III

[3][4][5] We hold that a district court's order denying a motion to disqualify counsel is not appealable under § 1291 prior to final judgment in the underlying litigation. [FN14]

FN14. The United States in its brief *amicus curiae*, has challenged petitioner's standing to attack the order permitting respondent to continue his representation of the plaintiffs. In light of our conclusion that the Eighth Circuit was without jurisdiction to hear petitioner's appeal, we have no occasion to address the standing issue.[13] (Emphasis and underscoring supplied; italics in the original)

The ruling in *Firestone* was subsequently reiterated in *Flanagan v. United States*[14] and *Richardson-Merrell, Inc. v. Koller*.[15]

Justice Panganiban further suggests that the prohibition in Rule 6.03 of the Code of Professional Responsibility is not perpetual but merely lasts for five years primarily relying on the Civil Code provisions on prescription and the

doctrine that the right to practice law is a property right protected by the Constitution.

I do not agree with this framework of analysis. Carried to its logical conclusion, Justice Panganiban's proposal would mean that after five years from the termination of the attorney-client relationship, all lawyers would be able to represent an interest in conflict with that of the former client and that they would no longer be bound by the rule on privileged communication.

It bears emphasis that the law is not trade nor a craft but a profession, a noble profession at that.

The practice of law is a profession, a form of public trust, the performance of which is entrusted only to those who are qualified and who possess good moral character. If the respect of the people in the honor and integrity of the legal profession is to be retained, both lawyers and laymen must recognize and realize that the legal profession is a profession and not a trade, and that the basic ideal of that profession is to render public service and secure justice for those who seek its aid. It is not a business, using bargain counter methods to reap large profits for those who conduct it. From the professional standpoint, it is expressive of three ideals - organization, learning and public service. The gaining of a livelihood is not a professional but a secondary consideration. The professional spirit - the spirit of public service - constantly curbs the urge of that instinct.

The law as a profession proceeds from the basic premise that membership in the bar is a privilege burdened with conditions and carries with it the responsibility to live up to its exacting standards and honored traditions. A person enrolled in its ranks is called upon to aid in the performance of one of the basic purposes of the state - the administration of justice. That the practice of law is a profession explains why lawyers repute and of eminence welcome their designation as counsel de oficio, as an opportunity to manifest fidelity to the concept that law is a profession.

The law must be thought of as ignoring commercial standards of success. The lawyer's conduct is to be measured not by the standards of trade and counting house but by those of his profession. The Code of Professional Responsibility, particularly the ethical rule against advertising or solicitation of professional employment, rests on the fundamental postulate that the practice of law is a profession.

In the matter of fixing his fees, an attorney should never forget that "the profession is a branch of the administration of justice and not a mere money-making trade" and that his standing as a member of the bar "is not enhanced by quibbling relative to just fees, equivalent to the bargaining between a prospective purchaser and a merchant in the market before a sale is made." Law advocacy is not capital that yields profits. The returns are simple rewards for a job done or service rendered. It is a calling that, unlike mercantile pursuits which enjoy a greater deal of freedom from government interference, is impressed with public interest, for which it is subject to State regulation. However, while the practice of law is a profession and an attorney is primarily an officer of the court, he is as much entitled to protection from the against any attempt by his client to escape payment of his just fees, as the client against exaction by his counsel of excessive fees.

To summarize, the primary characteristics which distinguish the legal profession from business are: (a) "a duty of public service, of which emolument is a by-product, and in which one may attain the highest eminence without making much money;" (b) "a relation as officer of the court to the administration of justice involving thorough sincerity, integrity, and reliability;" (c) "a relation to client in the highest degree fiduciary;" and (d) "a relation to colleagues at the bar characterized by candor, fairness, and unwillingness to resort to current business methods of advertising and encroachment on their practice, or dealing directly with their clients.

These characteristics make the law a noble profession, and the privilege to practice it is bestowed only upon individuals who are competent intellectually, academically and morally. Its basic ideal is to render service and to secure justice for those who seek its aid. If it has to remain a noble and honorable profession and attain its ideal, those enrolled in its ranks should not only master its tenets and principles but should also, by their lives, accord continuing fidelity to them. And because they are the vanguards of the law and the legal systems, lawyers must at all times conduct themselves in their professional and private dealings with honesty and

integrity in a manner beyond reproach.[16]

Moreover, the relation of attorney and client is, however, one of trust and confidence of the highest order. It is highly fiduciary in nature and demands utmost fidelity and good faith.

... A lawyer becomes familiar with all the facts connected with his client's case. He learns from his client the weak points of the action as well as the strong ones. Such knowledge must be considered sacred and guarded with care. No opportunity must be given him to take advantage of the client's secrets.

The rule is a rigid one designed not alone to prevent the dishonest practitioner from fraudulent conduct but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, and to protect him from unfounded suspicion of professional misconduct. The question is not necessarily one of right of the parties but of adhere to proper professional standards. An attorney should not only keep inviolate his client's confidence but should likewise avoid the appearance of treachery and double-dealing.[17] (Emphasis and underscoring supplied; citations omitted)

Thus, in *Nakpil v. Valdes*,[18] this Court through Justice Reynato S. Puno held that the test to determine whether there is a conflict of interest in the representation is probability, not certainty of conflict.[19]

Justice Panganiban justifies his theory on the ground that in 5 years time, the lawyer will develop a mild case of amnesia such that "in all probability, the lapse of the said period would also naturally obscure to a reasonable extent a lawyer's memory of details of a specific case despite active participation in the proceedings therein." He thus cites his own personal experience as a member of this Court:

Modesty aside, in my nearly ten (10) years in this Court, I have disposed of about a thousand cases in full-length ponencias and countless cases by way of unsigned minute or extended Resolutions. This does not include the thousands of other cases, assigned to other members of the Court, in which I actively took part during their deliberations. In all honesty, I must admit that I cannot with certainty recall the details of the facts and issues in each of these cases, especially in their earlier ones.

While it is true that over time memory does fade, the ravages of time have been mitigated with the invention of the paper and pen and its modern offspring - the computer. It is not uncommon for lawyers to resort to note taking in the course of handling legal matters.

The proposition that "a profession, trade or calling is a property right within the meaning of our constitutional guarantees" is not unqualified. In *JMM Promotion and Management, Inc. v. Court of Appeals*[20] which Justice Panganiban relies on, this Court held:

A profession, trade or calling is a property within the meaning of our constitutional guarantees. One cannot be deprived of the right to work and the right to make a living because these rights are property rights, the arbitrary and unwarranted deprivation of which normally constitutes an actionable wrong.

Nevertheless, no right is absolute, and the proper regulation of a profession, calling, business or trade has always been upheld as a legitimate subject of a valid exercise of the police power by the state particularly when their conduct affects either the execution of legitimate governmental functions, the preservation of the State, the public health and welfare and public morals. According to the maxim, *sic utere tuo ut alienum non laedas*, it must of course be within the legitimate range of legislative action to define the mode and manner in which every one may so use his own property so as not to pose injury to himself or others.

In any case, where the liberty curtailed affects at most the rights of property, the permissible scope of regulatory measures is certainly much wider. (Emphasis and underscoring supplied; italics in the original; citations omitted)

Under the foregoing, the perpetual application of Rule 6.03 is clearly a valid and proper regulation.

In his ponencia, Justice Reynato S. Puno labels as insignificant the role of then Solicitor General in the liquidation of General Bank and Trust Company (GENBANK), saying that "it is indubitable from the facts that Atty. Mendoza had no iota of participation in the decision of the Central Bank to liquidate GENBANK" and that his only involvement was "advising the Central Bank on how to proceed with the said bank's liquidation and even filing the petition for its liquidation with the CFI of Manila." Justice Puno observes that "the procedure of liquidation is simple and is given in black and white in Republic Act No. 265, section 29."

Atty. Mendoza's lack of participation in the decision of the Central Bank to liquidate GENBANK is to me not material. What is material is his role in facilitating the liquidation of GENBANK through his legal expertise. In advising the Central Bank, Atty. Mendoza did not just mechanically point to section 29 of Republic 265. As then Solicitor General, and as a lawyer known for his keen legal acumen, Atty. Mendoza synthesized facts, which by reason of his position he was privy to, and law with a view to successfully liquidate the bank.

Ultimately, Justice Puno advocates for a liberal interpretation of Rule 6.03 since a strict interpretation would cause "a chilling effect on government recruitment of able legal talent."

With all due respect, I cannot subscribe to this position which is grounded on the premise that this is "the only card that the government may play to recruit lawyers." Effectively, this is likely to result in the compromising of ethical standards which this Court must never allow. While it is desirable to recruit competent lawyers into government service, this does not justify the disturbance of our mores.

The canons and rules of the Code of Professional Responsibility must be strictly construed. Admittedly the salary for serving in government often pales in comparison to that of the private sector. I submit, however, that while financial considerations are important, they are not the sole factor affecting recruitment of lawyers to the government sector. I would like to think that serving in government is its own reward. One needs only to look at all of us members of this Court to know that money is not everything. All of us have, at one point in our legal careers, been tempted by the promise of financial success that private practice usually brings. But in the end, we decided to take the road less traveled and serve in government. And I would like to believe that each and everyone of us has made a difference. There is more to this mortal coil than the pursuit of material wealth. As Winston Churchill puts it: "What is the use of living if it be not to strive for noble causes and make this muddled world a better place for those who will live in it after we are gone?"

ACCORDINGLY, concurring in the dissenting opinion of Justice Romeo J. Callejo, Sr., I vote to grant the petition insofar as Civil Case No. 0096 is concerned, thus granting the motion to disqualify Atty. Estelito P. Mendoza in the said case.

[1] 246 SCRA 540 (1995).

[2] 232 SCRA 110 (1994).

[3] The doctrine of "conclusiveness of judgment" is also called "collateral estoppel" or "preclusion of issues," as distinguished from "preclusion of claims" or *res judicata*. In the Rules of Court, the first (conclusiveness of judgment, collateral estoppel or preclusion of issues) is governed by Rule 39, §49 (c) while the second (*res judicata* or preclusion of claims) is found in Rule 39, §49 (b).

[4] 255 SCRA 438 (1996).

[5] Id. at 448-449.

[6] BLACK'S LAW DICTIONARY 815 [1991], 6[th] ed.

[7] II O. HERRERA, REMEDIAL LAW 528 (2000).

[8] I F. REGALADO, REMEDIAL LAW COMPENDIUM 492 (1997), 6[th] ed.

[9] 2 J. FERIA & M. NOCHE, CIVIL PROCEDURE ANNOTATED 152 (2000).

[10] 365 SCRA 359 (2001).

[11] 449 U.S. 368 (1981).

[12] 337 U.S. 541 (1949).

[13] 449 U.S. 368, 373-380 (1981).

[14] 465 U.S. 259 (1984).

[15] 472 U.S. 424 (1985).

[16] R. AGPALO, COMMENTS ON THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE CODE OF JUDICIAL CONDUCT 3-5 (2004).

[17] Id. at 165.

[18] 286 SCRA 758 (1998).

[19] Id. at 773.

[20] 260 SCRA 319 (1996).

DISSENTING OPINION

CALLEJO, SR., J.:

The Code of Professional Responsibility is not designed for Holmes' proverbial "bad man" who wants to know just how many corners he may cut, how close to the line he may play, without running into trouble with the law. Rather, it is drawn for the "good man" as a beacon to assist him in navigating an ethical course through the sometimes murky waters of professional conduct.[1]

With due respect, I dissent from the majority opinion. I believe that the present case behooves the Court to strictly apply the Code of Professional Responsibility and provide an ethical compass to lawyers who, in the pursuit of the profession, often find themselves in the uncharted sea of conflicting ideas and interests. There is certainly, without exception, no profession in which so many temptations beset the path to swerve from the line of strict integrity; in which so many delicate and difficult questions of duty are continually arising.[2] The Code of Professional Responsibility establishes the norms of conduct and ethical standards in the legal profession and the

Court must not shirk from its duty to ensure that all lawyers live up to its provisions. Moreover, the Court must not tolerate any departure from the "straight and narrow" path demanded by the ethics of the legal profession and enjoin all lawyers to be like Caesar's wife - to be pure and appear to be so.[3]

Factual and Procedural Antecedents

On July 17, 1987, pursuant to its mandate under Executive Order No. 1[4] of then President Corazon C. Aquino, the PCGG, on behalf of the Republic of the Philippines, filed with the Sandiganbayan a complaint for "reversion, reconveyance, restitution, accounting and damages" against respondents Lucio Tan, Carmen Khao Tan, Florencio T. Santos, Natividad P. Santos, Domingo Chua, Tan Hui Nee, Mariano Tanenglian,[5] Estate of Benito Tan Kee Hiong (represented by Tarciana C. Tan), Florencio N. Santos, Jr., Harry C. Tan, Tan Eng Chan, Chung Poe Kee, Mariano Khoo, Manuel Khoo, Miguel Khoo, Jaime Khoo, Elizabeth Khoo, Celso Ranola, William T. Wong, Ernesto B. Lim, Benjamin T. Albacita, Willy Co, Allied Banking Corporation, Allied Leasing and Finance Corporation, Asia Brewery, Inc., Basic Holdings Corp., Foremost Farms, Inc., Fortune Tobacco Corporation, Grandspan Development Corp., Himmel Industries, Iris Holdings and Development Corp., Jewel Holdings, Inc., Manufacturing Services and Trade Corp., Maranaw Hotels and Resort Corp., Northern Tobacco Redrying Plant, Progressive Farms, Inc., Shareholdings, Inc., Sipalay Trading Corp., Virgo Holdings and Development Corp. (collectively referred to herein as respondents Tan, et al., for brevity), then President Ferdinand E. Marcos and Imelda R. Marcos, Panfilo O. Domingo, Cesar Zalamea, Don Ferry and Gregorio Licaros. The case was docketed as Civil Case No. 0005 of the Sandiganbayan (Second Division). In connection therewith, the PCGG issued several writs of sequestration on properties allegedly acquired by the above-named persons by means of taking advantage of their close relationship and influence with former President Marcos.

Shortly thereafter, respondents Tan, et al. filed with this Court petitions for certiorari, prohibition and injunction seeking to, among others, nullify the writs of sequestration issued by the PCGG. After the filing of the comments thereon, this Court referred the cases to the Sandiganbayan (Fifth Division) for proper disposition, docketed therein as follows:

- Civil Case No. 0096 - Lucio Tan, Mariano Tanenglian, Allied Banking Corp., Iris Holding and Development Corp., Virgo Holdings Development Corp. and Jewel Holdings, Inc. v. PCGG, which seeks to nullify the PCGG's Order dated June 19, 1986 sequestering the shares of stock in Allied Banking Corporation held by and/or in the name of respondents Lucio Tan, Mariano Tanenglian, Iris Holding and Development Corp., Virgo Holdings Development Corp. and Jewel Holdings, Inc.;
- Civil Case No. 0097 - Lucio Tan, Carmen Khao Tan, Florencio T. Santos, Natividad Santos, Florencio N. Santos, Jr., and Foremost Farms, Inc. v. PCGG, which seeks to nullify the PCGG's Order dated August 12, 1986 sequestering the shares of stock in Foremost Farms, Inc. held by and/or in the name of Lucio Tan, Carmen Khao Tan, Florencio T. Santos, Natividad Santos and Florencio N. Santos, Jr.;
- Civil Case No. 0098 - Lucio Tan, Carmen Khao Tan, Mariano Tanenglian, Florencio T. Santos, Natividad Santos, Florencio N. Santos, Jr., Shareholdings, Inc. and Fortune Tobacco Corp. v. PCGG, which seeks to nullify the PCGG's Order dated July 24, 1986 sequestering the shares of stock in Fortune Tobacco Corp. held by and/or in the name of Lucio Tan, Carmen Khao Tan, Mariano Tanenglian, Florencio T. Santos, Natividad Santos, Florencio N. Santos, Jr., Shareholdings, Inc.; and
- Civil Case No. 0099 - Lucio Tan, Carmen Khao Tan, Mariano Tanenglian, Florencio T. Santos, Natividad Santos and Shareholdings, Inc. v. PCGG, which seeks to nullify the PCGG's Order dated July 24, 1986 sequestering the shares of stock in Shareholdings, Inc. held by and/or in the name of Lucio Tan, Carmen Khao Tan, Mariano Tanenglian, Florencio T. Santos and Natividad Santos.

In all these cases, respondents Tan, et al. are represented by their counsel Atty. Estelito P. Mendoza, who served

as the Solicitor General from 1972 to 1986 during the administration of former President Marcos.

The PCGG filed with the Sandiganbayan (Fifth Division) a motion to disqualify Atty. Mendoza as counsel for respondents Tan, et al. The PCGG alleged that Atty. Mendoza, as then Solicitor General and counsel to the Central Bank, "actively intervened" in the liquidation of General Bank and Trust Company (GENBANK), which was subsequently acquired by respondents Tan, et al. and became Allied Banking Corporation. As shown above, among the litigated properties are the sequestered shares of stocks in Allied Banking Corp. (Civil Case No. 0096).

The acquisition of GENBANK by respondents Tan, et al. is outlined by the PCGG as follows:

- In 1976, General Bank and Trust Company (GENBANK) got into financial difficulties. The Central Bank then extended an emergency loan to GENBANK reaching a total of P310 million. In extending this loan, the Central Bank, however, took control of GENBANK with the execution of an irrevocable proxy by 2/3 of GENBANK's outstanding shares in favor of the Central Bank and the election of seven (7) Central Bank nominees to the 11-member Board of Directors of GENBANK. Subsequently, on March 25, 1977, the Monetary Board of the Central Bank issued a Resolution declaring GENBANK insolvent, forbidding it to do business and placing it under receivership.

- In the meantime, a public bidding for the sale of GENBANK assets and liabilities was scheduled at 7:00 P.M. on March 28, 1977. Among the conditions for the bidding were: (a) submission by the bidder of a letter of credit issued by a bank acceptable to Central Bank to guaranty payment or as collateral of the Central Bank emergency loan; and (b) a 2-year period to repay the said Central Bank emergency loan. On March 29, 1977, the Central Bank, through a Monetary Board Resolution, approved the bid of the group of respondents Lucio Tan and Willy Co. This bid, among other things, offered to pay only P500,000.00 for GENBANK assets estimated at P688,201,301.45; Capital Accounts of P103,984,477.55; Cash of P25,698,473.00; and the takeover of the GENBANK Head Office and branch offices. The required letter of credit was also not attached to the bid. What was attached to the bid was a letter of Panfilo O. Domingo, as PNB President, promising to open an irrevocable letter of credit to secure the advances of the Central Bank in the amount of P310 million. Without this letter of commitment, the Lucio Tan bid would not have been approved. But such letter of commitment was a fraud because it was not meant to be fulfilled. Ferdinand E. Marcos, Gregorio Licaros and Panfilo O. Domingo conspired together in giving the Lucio Tan group undue favors such as the doing away with the required irrevocable letter of credit, the extension of the term of payment from two years to five years, the approval of second mortgage as collateral for the Central Bank advances which was deficient by more than P90 Million, and many other concessions to the great prejudice of the government and of the GENBANK stockholders.

- GENBANK eventually became the Allied Banking Corporation in April 1977. Respondents Lucio Tan, Willy S. Co and Florencio T. Santos are not only incorporators and directors but they are also the major shareholders of this new bank.[6]

Atty. Mendoza allegedly "intervened" in the acquisition of GENBANK by respondents Tan, et al. since Atty. Mendoza, in his capacity as the Solicitor General, advised the Central Bank's officials on the procedure to bring about GENBANK's liquidation. Further, he appeared as counsel for the Central Bank in connection with its petition for assistance in the liquidation of GENBANK. He filed the said petition with the Court of First Instance (now Regional Trial Court) of Manila and docketed therein as Special Proceeding No. 107812.[7]

The PCGG opined that Atty. Mendoza's present appearance as counsel for respondents Tan, et al. in the case involving the sequestered shares of stock in Allied Banking Corp. runs afoul of Rule 6.03 of the Code of Professional Responsibility proscribing former government lawyers from accepting "engagement or employment in connection with any matter in which he had intervened while in said service."

Acting on the said motion, the Sandiganbayan (Fifth Division) issued the assailed Resolution dated July 11, 2001

stating:

Acting on the PCGG's "MOTION TO DISQUALIFY ATTY. ESTELITO P. MENDOZA AS COUNSEL FOR PETITIONER" dated February 5, 1991 which appears not to have been resolved by then Second Division of this Court, and it appearing that (1) the motion is exactly the same in substance as that motion filed in Civil Case No. 0005 as in fact, Atty. Mendoza in his "OPPOSITION" dated March 5, 1991 manifested that he was just adopting his opposition to the same motion filed by PCGG in Civil Case No. 0005 and (2) in the Court's Order dated March 7, 1991, the herein incident was taken-up jointly with the said same incident in Civil Case No. 0005 (pp. 134-135, Vol. I, Record of Civil Case No. 0096), this Division hereby reiterates and adopts the Resolution dated April 22, 1991 in Civil Case No. 0005 of the Second Division (pp. 1418-1424, Vol. III, Record of Civil Case No. 0005) denying the said motion as its Resolution in the case at bar.[8]

The PCGG sought the reconsideration thereof but its motion was denied in the assailed Resolution dated December 5, 2001, which reads:

Acting on respondent PCGG's "MOTION FOR RECONSIDERATION" dated August 1, 2001 praying for the reconsideration of the Court's Resolution dated July 12, 2001 denying its motion to disqualify Atty. Estelito P. Mendoza as counsel for petitioners, to which petitioners have filed an "OPPOSITION TO MOTION FOR RECONSIDERATION DATED AUGUST 1, 2001" dated August 29, 2001, as well as the respondent's "REPLY (To Opposition to Motion for Reconsideration) dated November 16, 2001, it appearing that the main motion to disqualify Atty. Mendoza as counsel in these cases was exactly the same in substance as that motion to disqualify Atty. Mendoza filed by the PCGG in Civil Case No. 0005 (re: Republic vs. Lucio Tan, et al.) and the resolutions of this Court (Second Division) in Civil Case No. 0005 denying the main motion as well as of the motion for reconsideration thereof had become final and executory when PCGG failed to elevate the said resolutions to the Supreme Court, the instant motion is hereby DENIED.[9]

The Resolution[10] dated April 22, 1991 of the Sandiganbayan (Second Division) in Civil Case No. 0005, which was adopted by the Fifth Division in Civil Cases Nos. 0096-0099, denied the similar motion to disqualify Atty. Mendoza as counsel for respondents Tan, et al. holding, in essence, that the PCGG "has failed to prove that there exists an inconsistency between Atty. Mendoza's former function as Solicitor General and his present employment as counsel of the Lucio Tan group." [11] The Sandiganbayan (Second Division) explained, thus:

... It has been said that the test of inconsistency in cases of the character under consideration is not whether the attorney has ever appeared for the party against whom he proposes to appear, but whether his accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented against him, and whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection. Nor does the rule imposing disability on the attorney mean that he, having once been employed by a client, shall never thereafter appear in any matter against him but merely forbids the attorney's appearance or acting against the client where the attorney can use, to the detriment of such client, the information and confidences acquired during the existence of their relation as attorney and client (7 C.J.S., Pp. 828-829, cited in *Primavera Farms, Inc., et al. vs. PCGG*, supra). Significantly, PCGG's "Reply" does not controvert Atty. Mendoza's claim that in appearing in the instant case, he does not take a position adverse to that he had taken in behalf of the Central Bank of the Philippines in SP No. 107812. Neither did it challenge Atty. Mendoza's claim that the position he took as Solicitor General in behalf of the Central Bank in 1977 when he filed the said case (SP No. 107812) has been maintained by his successors in office. In fact, even incumbent Central Bank Governor Jose Cuisia had interposed no objection to Atty. Mendoza's appearance as counsel for the Lucio Tan group for as long as he maintains the same position he has taken on behalf of the Central Bank of the Philippines as Solicitor General, which position refers to the various resolutions of the Monetary Board and actions of the Central Bank in regard General Bank and Trust Co. as being regular and in accordance with law (Annex "A", Rejoinder, Records, Pp. 1404-1405).[12]

The Sandiganbayan (Second Division) further observed that Atty. Mendoza's appearance as counsel for respondents Tan, et al. was well beyond the one-year prohibited period under Section 7(b) of Republic Act No. 6713 since he ceased to be the Solicitor General in the year 1986. The said provision prohibits a former public official or employee from practicing his profession in connection with any matter before the office he used to be with within one year from his resignation, retirement or separation from public office.

As earlier stated, the April 22, 1991 Resolution of the Sandiganbayan (Second Division) was adopted by the Fifth Division in the resolutions now being assailed by the PCGG. Hence, the recourse to this Court by the PCGG.

Procedural Issues

The following procedural issues are raised by respondents Tan, et al.: (1) whether the assailed Sandiganbayan (Fifth Division) Resolutions dated July 11, 2001 and December 5, 2001 are final and executory; hence, the PCGG should have filed a petition for review on certiorari under Rule 45 of the Rules of Court and not the instant petition for certiorari under Rule 65 thereof; and (2) whether the instant petition is already barred by the Sandiganbayan (Second Division) Resolution dated April 22, 1991 under the doctrine of res judicata.

In contending that the PCGG availed itself of the wrong remedy in filing the instant petition for certiorari, respondents Tan, et al. rely on Section 1, Rule 45 of the Rules of Court which reads:

Section 1. Filing of petition with Supreme Court. - A party desiring to appeal by certiorari from a judgment or final order or resolution of the Court of Appeals, the Sandiganbayan, the Regional Trial Court or other courts whenever authorized by law, may file with the Supreme Court a verified petition for review on certiorari. The petition shall raise only questions of law which must be distinctly set forth.

Section 7 of Presidential Decree No. 1606, as amended by Section 3 of Rep. Act No. 7975, likewise, states:

Sec. 7. Form, Finality and Enforcement of Decisions. -

...

Decisions and final orders of the Sandiganbayan shall be appealable to the Supreme Court.

I am not persuaded by the arguments proffered by respondents Tan, et al. The above-mentioned rules do not preclude the resort to this Court by way of a petition for certiorari under Rule 65 of the Rules of Court of orders or resolutions of the Sandiganbayan. The special civil action of certiorari may be availed of where there is no appeal or any plain, speedy and adequate remedy in the ordinary course of law.[13]

In this case, the remedy of appeal is not available to the PCGG because the denial of its motion to disqualify Atty. Mendoza as counsel for respondents Tan, et al. is an interlocutory order; hence, not appealable. The word "interlocutory" refers to "something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." [14] An interlocutory order does not terminate nor does it finally dispose of the case; it does not end the task of the court in adjudicating the parties' contentions and determining their rights and liabilities as against each other but leaves something yet to be done by the court before the case is finally decided on the merits.[15]

Accordingly, this Court, in not a few cases, had taken cognizance of petitions for certiorari of resolutions of the Sandiganbayan which were in the nature of interlocutory orders. For example, in *Serapio v. Sandiganbayan*, [16] we took cognizance of, albeit dismissed, the petition for certiorari which assailed the resolutions of the Sandiganbayan denying the petition for bail, motion for a reinvestigation and motion to quash filed by accused Edward Serapio. Also, in *San Miguel Corporation v. Sandiganbayan*, [17] we took cognizance of, albeit dismissed, the petitions for certiorari of several resolutions of the Sandiganbayan involving the sequestered shares of stock in

the San Miguel Corp.

To my mind, the PCGG properly filed the instant petition for certiorari under Rule 65 to assail the resolutions of the Sandiganbayan (Fifth Division) denying its motion to disqualify Atty. Mendoza as counsel for respondents Tan, et al. in Civil Cases Nos. 0096-0099.

With respect to the second procedural issue raised by respondents Tan, et al., i.e., the instant petition is already barred by the Sandiganbayan (Second Division) Resolution dated April 22, 1991 in Civil Case No. 0005 under the doctrine of res judicata, I submit that the doctrine of res judicata finds no application in this case.

Section 47, Rule 39 of the Revised Rules of Court reads in part:

Sec. 47. Effect of judgments or final orders. - The effect of a judgment or final order rendered by a court of the Philippines, having jurisdiction to pronounce the judgment or final order, may be as follows:

...

(b) In other cases, the judgment or final order is, with respect to the matter directly adjudged or as to any other matter that could have been raised in relation thereto, conclusive between the parties and their successors-in-interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing and under the same title and in the same capacity; and

(c) In any other litigation between the same parties or their successors-in-interest, that only is deemed to have been adjudged in a former judgment or final order which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

The doctrine of res judicata comprehends two distinct concepts - (1) bar by former judgment and (2) conclusiveness of judgment.[18] Paragraph (b) embodies the doctrine of res judicata or res adjudicata or bar by prior judgment, while paragraph (c) estoppel by judgment or conclusiveness of judgment.[19] In *Macahilig v. Heirs of Grace M. Magalit*, [20] Justice Artemio Panganiban explained that the term "final" in the phrase judgments or final orders in the above section has two accepted interpretations. In the first sense, it is an order that one can no longer appeal because the period to do so has expired, or because the order has been affirmed by the highest possible tribunal involved.[21] The second sense connotes that it is an order that leaves nothing else to be done, as distinguished from one that is interlocutory.[22] The phrase refers to a final determination as opposed to a judgment or an order that settles only some incidental, subsidiary or collateral matter arising in an action; for example, an order postponing a trial, denying a motion to dismiss or allowing intervention. Orders that give rise to res judicata or conclusiveness of judgment apply only to those falling under the second category.[23]

For res judicata to serve as an absolute bar to a subsequent action, the following elements must concur: (1) there is a final judgment or order; (2) the court rendering it has jurisdiction over the subject matter and the parties; (3) the judgment is one on the merits; and (4) there is, between the two cases, identity of parties, subject matter and cause of action.[24] When there is no identity of causes of action, but only an identity of issues, there exists res judicata in the concept of conclusiveness of judgment.[25]

In any case, whether as a bar by prior judgment or in the concept of conclusiveness of judgment, the doctrine of res judicata applies only when there is a judgment or final order which, as earlier discussed, leaves nothing else to be done. As explained by Justice Panganiban, a judgment or an order on the merits is one rendered after a determination of which party is upheld, as distinguished from an order rendered upon some preliminary or formal or merely technical point.[26] To reiterate, the said judgment or order is not interlocutory and does not settle only some incidental, subsidiary or collateral matter arising in an action.

The Resolution dated April 22, 1991 of the Sandiganbayan (Second Division) in Civil Case No. 0005 denying the

PCGG's similar motion to disqualify Atty. Mendoza as counsel for respondents Tan, et al. therein was evidently an interlocutory order as it did not terminate or finally dispose of the said case. It merely settled an incidental or collateral matter arising therein. As such, it cannot operate to bar the filing of another motion to disqualify Atty. Mendoza in the other cases because, strictly speaking, the doctrine of *res judicata*, whether to serve as a bar by prior judgment or in the concept of conclusiveness of judgment, does not apply to decisions or orders adjudicating interlocutory motions.[27]

Substantive Issue

The substantive issue in this case is whether the present engagement of Atty. Mendoza as counsel for respondents Tan, et al. in Civil Cases Nos. 0096-0099 violates the interdiction embodied in Rule 6.03 of the Code of Professional Responsibility.

Canon 6 of our Code of Professional Responsibility reads:

CANON 6 - THESE CANONS SHALL APPLY TO LAWYERS IN GOVERNMENT SERVICE IN THE DISCHARGE OF THEIR OFFICIAL DUTIES.

Rule 6.01 - The primary duty of a lawyer in public prosecution is not to convict but to see that justice is done. The suppression of facts or the concealment of witnesses capable of establishing the innocence of the accused is highly reprehensible and is cause for disciplinary action.

Rule 6.02 - A lawyer in government service shall not use his public position to promote or advance his private interests, nor allow the latter to interfere with his public duties.

Rule 6.03 - 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.

A good number of the Canons in our present Code of Professional Responsibility were adopted from the Canons of Professional Ethics of the American Bar Association (ABA).[28] Rule 6.03, in particular, is a restatement of Canon 36 of the Canons of Professional Ethics which provided:

36. RETIREMENT FROM JUDICIAL POSITION OR PUBLIC EMPLOYMENT.

A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

Indeed, the restriction against a public official from using his public position as a vehicle to promote or advance his private interests extends beyond his tenure on certain matters in which he intervened as a public official.[29] Rule 6.03 makes this restriction specifically applicable to lawyers who once held public office. A plain reading of the rule shows that the interdiction (1) applies to a lawyer who once served in the government, and (2) relates to his accepting "engagement or employment in connection with any matter in which he had intervened while in said service."

In the United States, an area of concern involving ethical considerations applicable to former government lawyers is called the "revolving door" - the process by which lawyers temporarily enter government service from private life then leave it for large fees in private practice, where they can exploit information, contacts, and influence garnered in government service.[30] To address this, the disqualification of a former government lawyer who has entered private practice may be sought based either on "adverse-interest conflict" or "congruent-interest

representation conflict."

In the "adverse-interest conflict," a former government lawyer is enjoined from representing a client in private practice if the matter is substantially related to a matter that the lawyer dealt with while employed by the government and if the interests of the current and former clients are adverse.[31] It must be observed that the "adverse-interest conflict" applies to all lawyers in that they are generally disqualified from accepting employment in a subsequent representation if the interests of the former client and the present client are adverse and the matters involved are the same or substantially related.[32] On the other hand, in "congruent-interest representation conflict," the disqualification does not really involve a conflict at all, because it prohibits the lawyer from representing a private practice client even if the interests of the former government client and the new client are entirely parallel.[33] The "congruent-interest representation conflict," unlike the "adverse-interest conflict," is unique to former government lawyers.

I believe that Atty. Mendoza's present engagement as counsel for respondents Tan, et al. in Civil Case No. 0096, which involves the sequestered shares of stocks in Allied Banking Corp., violates the ethical precept embodied in Rule 6.03 of our Code of Professional Responsibility, which is akin to the doctrine of "congruent-interest representation conflict."

Contrary to the majority opinion, the subject matter in Civil Case No. 0096 is connected with or related to a "matter," i.e. the liquidation of GENBANK, in which Atty. Mendoza had intervened as the Solicitor General

The qualifying words or phrases that define the prohibition in Rule 6.03 are (1) "any matter" and (2) "he had intervened" thereon while he was in the government service.[34]

The United States' ABA Formal Opinion No. 324 recognized that it is difficult to formulate a precise definition of "matter" as used in their Disciplinary Rule (DR), nonetheless, it suggested that the term "contemplates a discrete and isolatable transaction or set of transaction between identifiable parties." [35]

There is no dispute that Atty. Mendoza, as the Solicitor General, advised the Central Bank on the procedure to bring about the liquidation of GENBANK. It is, likewise, admitted by respondents Tan, et al. that Atty. Mendoza filed with the then CFI of Manila, the petition for assistance in the liquidation of GENBANK (Special Proceeding No. 107812).[36] GENBANK was subsequently acquired by respondents Tan, et al. and became Allied Banking Corp., whose shares of stocks have been sequestered by the PCGG and presently subject of Civil Case No. 0096.

The majority opinion downplays the role of Atty. Mendoza by stating that he "merely advised the Central Bank on the legal procedure to liquidate GENBANK" which procedure is "given in black and white in R.A. No. 265, section 29." This procedural advice, according to the majority opinion, "is not the matter contemplated by Rule 6.03 of the Code of Professional Responsibility."

On the contrary, the acts of Atty. Mendoza may be rightfully considered as falling within the contemplation of the term "matter" within the meaning of Rule 6.03. Specifically, Atty. Mendoza's giving counsel to the Central Bank on the procedure to go about GENBANK's liquidation and the filing of the petition therefor in Special Proceedings No. 107812 did not merely involve the drafting, enforcing or interpreting government or agency procedures, regulations or laws, or briefing abstract principles of law.[37] These acts were discrete, isolatable as well as identifiable transactions or conduct involving a particular situation and specific party, i.e., the procedure for the liquidation of GENBANK. Consequently, the same can be properly considered "matter" within the

contemplation of Rule 6.03.

Moreover, contrary to the contention of respondents Tan, et al., the interdiction in Rule 6.03 does not only apply if precisely the same legal issues are involved in each representation.[38] The Comments of the Integrated Bar of the Philippines (IBP) that drafted our Code of Professional Responsibility explained that the restriction covers "engagement or employment, which means that he cannot accept any work or employment from anyone that will involve or relate to the matter in which he intervened as a public official." [39] The sequestration of the shares of stock in Allied Banking Corp. in the names of respondents Tan, et al., which is subject of Civil Case No. 0096, necessarily involves or relates to their acquisition of GENBANK upon its liquidation, in which Atty. Mendoza had intervened as the Solicitor General.

It should be emphasized that Atty. Mendoza's participation in GENBANK's liquidation is sufficient to place his present engagement as counsel for respondents Tan, et al. in Civil Case No. 0096 within the ambit of Rule 6.03. His role was significant and substantial. The Memorandum dated March 29, 1977 prepared by certain key officials[40] of the Central Bank, is revealing:

Immediately after said meeting, we had a conference with the Solicitor General and he advised that the following procedure should be taken:

- Management should submit a memorandum to the Monetary Board reporting that studies and evaluation had been made since the last examination of the bank as of August 31, 1976 and it is believed that the bank can not be reorganized or placed in a condition so that it may be permitted to resume business with safety to its depositors and creditors and the general public.
- If the said report is confirmed by the Monetary Board, it shall order the liquidation of the bank and indicate the manner of its liquidation and approve a liquidation plan.
- The Central Bank shall inform the principal stockholders of Genbank of the foregoing decision to liquidate the bank and the liquidation plan approved by the Monetary Board.
- The Solicitor General shall then file a petition in the Court of First Instance reciting the proceedings which had been taken and praying the assistance of the Court in the liquidation of Genbank.[41]

The Minutes No. 13 dated March 29, 1977 of the Monetary Board likewise shows that Atty. Mendoza was furnished copies of pertinent documents relating to GENBANK in order to aid him in filing with the court the petition for assistance in the bank's liquidation. The pertinent portion of the said minutes reads:

The Board decided as follows:

...

E. To authorize Management to furnish the Solicitor General with a copy of the subject memorandum of the Director, Department of Commercial and Savings Bank dated March 29, 1977, together with copies of:

- Memorandum of the Deputy Governor, Supervision and Examination Sector, to the Monetary Board, dated March 25, 1977, containing a report on the current situation of Genbank;
- Aide Memoire on the Antecedent Facts Re: General Bank and Trust Co., dated March 23, 1977;
- Memorandum of the Director, Department of Commercial and Savings Bank, to the Monetary Board, dated March 24, 1977, submitting, pursuant to Section 29 of R.A. No. 265, as amended by P.D. No. 1007, a report on the state of insolvency of Genbank, together with its attachments; and
- Such other documents as may be necessary or needed by the Solicitor General.

for his use in filing a petition in the Court of First Instance praying the assistance of the Court in the liquidation of Genbank." [42]

By advising the Central Bank on the procedure to bring about the liquidation of GENBANK and, more significantly, by filing the petition for assistance in its liquidation, Atty. Mendoza had clearly intervened in the liquidation of GENBANK and its subsequent acquisition by respondents Tan, et al.

I disagree with the ponencia's holding that Atty. Mendoza could not be considered as having intervened as it describes the participation of Atty. Mendoza by stating that he "had no iota of participation in the decision of the Central Bank to liquidate GENBANK."

That the decision to declare GENBANK insolvent was made wholly by the Central Bank, without the participation of Atty. Mendoza, is not in question. Rather, it was his participation in the proceedings taken subsequent to such declaration, i.e., his giving advise to the Central Bank on how to proceed with GENBANK's liquidation and his filing of the petition in Special Proceeding No. 107812 pursuant to Section 29[43] of Rep. Act No. 265, that constitutes "intervention" as to place him within the contemplation of Rule 6.03. To intervene means "

1: to enter or appear as an irrelevant or extraneous feature or circumstance; 2: to occur, fall or come between points of time or events; 3: to come in or between by way of hindrance or modification: INTERPOSE; 4: to occur or lie between two things "[44]

Further, "intervention" is defined as -

1: the act or fact of intervening; INTERPOSITION; 2: interference that may affect the interests of others ...[45]

With the foregoing definitions, it is not difficult to see that by giving counsel to the Central Bank on how to proceed with GENBANK's liquidation and filing the necessary petition therefor with the court, Atty. Mendoza "had intervened," "had come in," or "had interfered," in the liquidation of GENBANK and the subsequent acquisition by respondents Tan, et al. of the said banking institution. Moreover, his acts clearly affected the interests of GENBANK as well as its stockholders.

Contrary to the majority opinion, Rule 6.03 applies even if Atty. Mendoza did not "switch sides" or did not take inconsistent sides. Rule 6.03 applies even if no conflict of interest exists between Atty. Mendoza's former government client (Central Bank) and his present private practice clients (respondents Tan, et al.)

As earlier intimated, Rule 6.03 is a restatement of Canon 36 of the ABA's Canons of Professional Ethics, now superseded by the ABA's Code of Professional Responsibility. In lieu of the old Canon 36, Canon 9 of the ABA's Code of Professional Responsibility mandates that:

A lawyer should avoid even the appearance of professional impropriety.

Providing specificity to this general caveat, Disciplinary Rule (DR) 9-101(B) commands, thus:

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

The purpose of the interdiction, as stated in the ABA Committee on Professional Ethics, Opinion No. 37, is -

"[to avoid] the manifest possibility that - [a former Government lawyer's] action as a public legal official might

be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to uphold or upset what he had done.[46]

The old Canon 36, as well as the present Canon 9 and DR9-101(B), rest on the policy consideration that an attorney must seek to avoid even the appearance of evil.[47]

Being undoubtedly of American origin, the interpretation adopted by the American courts and the ABA has persuasive effect on the interpretation of Rule 6.03.[48] Accordingly, I find the case of *General Motors Corporation v. City of New York*,[49] where the pertinent ethical precepts were applied by the United States Court of Appeals (2nd Circuit), particularly instructive. The said US court disqualified the privately retained counsel of the City of New York in the antitrust case it filed against the General Motors Corp. because the said counsel, a former lawyer of the US Department of Justice, had not only participated in the latter's case against General Motors Corp. but signed the complaint in that action.

George D. Reycraft, the counsel whose disqualification was sought in that case, served as a trial attorney assigned at the General Litigation Services of the Antitrust Division of the US Department of Justice from 1952 to 1962. Sometime in 1954, he participated in the investigation of the alleged monopolization by General Motors Corp. of the city and intercity bus business. The investigation culminated with the filing of the antitrust complaint against General Motors Corp. in 1956. Reycraft signed the said complaint but alleged that after 1958 through the time that he left the Department of Justice in 1962, he no longer had any participation in that case.

In disqualifying Reycraft, the US Court gave short shrift to the argument that Reycraft "has not changed sides" - i.e. "there is nothing antithetical in the postures of the two governments in question," stating that, per Opinion No. 37 of the ABA Commission on Professional Ethics, the ethical precepts of Canon 9 and DR9-101(B) apply irrespective of the side chosen in private practice. The said court believed that it "is as it should be for there lurks great potential for lucrative returns in following into private practice the course already charted with the aid of governmental resources." [50]

The US Court stressed that Reycraft not only participated in the investigation, but he signed the complaint in that action and admittedly had "substantial responsibility" in its investigatory and preparatory stages. It thus concluded that "where the overlap of issues is so plain and the involvement while in Government employ is so direct, the appearance of impropriety must be avoided through disqualification." [51]

The General Motors case is illustrative of the "congruent-interest representation conflict" doctrine. It bears stressing that this doctrine applies uniquely to former government lawyers and has been distinguished from the normal rule applicable for non-government lawyers in this wise -

To illustrate the normal rule for non-government lawyers, imagine that the lawyer has represented passenger A and has recovered substantial damages in a suit against a driver. No conflict of interest principle or rule restricts the lawyer from later representing passenger B against the driver with respect to exactly the same accident. B may obtain the benefits of the lawyer's help regardless of the fact that the lawyer might be able to employ to B's advantage information and strategies developed in the representation of A. The critical element is that the interest of A and B do not conflict.

The analysis does not change if we move from an area that is entirely private into one that is arguably more connected with the public interest. Suppose a lawyer in private practice represents Small Soap Company in its suit for damages under the federal antitrust laws against Giant Soap Company. The lawyer would not be disqualified from representing Medium Soap Company against Giant Soap in a succeeding suit for damages based on precisely the same conspiracy. The congruence of interests between Small Soap and Medium Soap would almost certainly mean that the lawyer could represent both clients. In the absence of a conflict - an opposing interest between the two clients - the existence of a substantial relationship between the matters

involved in both cases is irrelevant.

Now, suppose the lawyer has filed suit in behalf of the government against Giant Soap Company to force divestiture of an acquired company on a theory that, because of the acquisition, Giant Soap has monopolized an industry in conflict with antitrust laws. May the lawyer, after leaving government service and while in private practice, represent Medium Soap Company against Giant Soap in a suit for damages based on the same antitrust conspiracy? Does the absence of opposing interests between Medium Soap and the lawyer's former government client similarly mean that there should be no disqualification?

At this point, the rules for the former government lawyer diverge sharply from the normal former-client conflict rules: the lawyer is disqualified from representing the successive client in private practice, despite the fact that the interests of the client and the lawyer's former government client are apparently aligned. All that is required for disqualification is the relationship between the former and the succeeding representations.[52]

The rationale for the "congruent-interest representation conflict" doctrine has been explained, thus:

The rationale for disqualification is rooted in a concern with the impact that any other rule would have upon the decisions and actions taken by the government lawyer during the course of the earlier representation of the government. Both courts and commentators have expressed the fear that permitting a lawyer to take action in behalf of a government client that later could be to the advantage of private practice client would present grave dangers that a government lawyer's largely discretionary actions would be wrongly influenced by the temptation to secure private practice employment or to favor parties who might later become private practice clients ...

The fear that government lawyers will misuse government power in that way is not idle. Lawyers who represent the government often exercise enormous discretion unchecked by an actual client who oversees the lawyer's work. For that reason a special rule is needed to remove the incentive for government lawyers to take discretionary decisions with an eye cast toward advantages in future, nongovernmental employment. The broad disqualification accomplishes that and, particularly under rubrics that do not invariably require disqualification of the entire firm with which the former government lawyer practices, does it without unnecessarily discouraging lawyers from entering temporary public service.[53]

The foregoing disquisition applies to the case of Atty. Mendoza. Indeed, a textual reading of Rule 6.03 of our Code of Professional Responsibility reveals that no conflict of interests or adverse interests is required for the interdiction to apply. If it were so, or if conflict of interests were an element, then the general conflict of interests rule (Rule 15.03)[54] would apply. Rather, the interdiction in Rule 6.03 broadly covers "engagement or employment in connection with any matter in which he had intervened while in the said service." To reiterate, the drafters of our Code of Professional Responsibility had construed this to mean that a lawyer "cannot accept any work or employment from anyone that will involve or relate to the matter in which he intervened as a public official, except on behalf of the body or authority which he served during his public employment." [55]

In Civil Case No. 0096, Atty. Mendoza is certainly not representing the Central Bank but respondents Tan, et al. Granting arguendo that the interests of his present private practice clients (respondents Tan, et al.) and former government client (Central Bank) are apparently aligned, the interdiction in Rule 6.03 applies.

Rule 6.03 purposely does not contain an explicit temporal limitation because cases have to be resolved based on their peculiar circumstances

Unless the Code itself provides, the Court cannot set a prescriptive period for any of the provisions therein. That Rule 6.03, in particular, contains no explicit temporal limitation is deliberate. It recognizes that while passage of time is a factor to consider in determining its applicability, the peculiarities of each case have to be considered.

For example, in *Control Data Corp. v. International Business Mach. Corp.*,^[56] the US District Court of Minnesota held that the lawyer who, 15 years earlier, while an employee of the Department of Justice had been in charge of negotiations in antitrust case against a corporation, was not disqualified from acting as counsel for the plaintiffs suing such corporation. On the other hand, the lawyer whose conduct was the subject of the ABA Opinion No. 37, earlier cited, was himself 10 years removed from the matter over which he had substantial responsibility while in public employ at the time he accepted the private engagement relating to the same matter.^[57] Clearly, it is the degree of involvement or participation in the matter while in government service, not the passage of time, which is the crucial element in Rule 6.03.

The Code of Professional Responsibility is a codification of legal ethics, that "body of principles by which the conduct of members of the legal profession is controlled. More specifically and practically considered, legal ethics may be defined as that branch of moral science which treats of the duties which the attorney-at-law owes to his clients, to the courts, to the bar, and to the public."^[58] In this connection, the Court has consistently characterized disciplinary proceedings, including disqualification cases, against lawyers as *sui generis*, neither purely civil nor purely criminal, thus:

[D]isciplinary proceedings against lawyers are *sui generis*. Neither purely civil nor pure criminal, they do not involve a trial of an action or a suit, but are rather investigations by the Court into the conduct of one of its officers. Not being intended to inflict punishment, [they are] in no sense a criminal prosecution. Accordingly, there is neither a plaintiff nor a prosecutor therein. [They] may be initiated by the Court *motu proprio*. Public interest is [their] primary objective, and the real question for determination is whether or not the attorney is still a fit person be allowed the privileges as such. Hence, in the exercise of its disciplinary powers, the Court merely calls upon a member of the Bar to account for his actuations as an officer of the Court with the end view of preserving the purity of the legal profession and the proper and honest administration of justice...^[59]

For this reason, the civil law concept of prescription of actions finds no application in disqualification cases against lawyers.

In this case, while the liquidation of GENBANK took place in 1977, the period that had lapsed is not sufficient to consider it far removed from the present engagement of Atty. Mendoza as counsel for respondents Tan, et al. in Civil Case No. 0096. In fact, the validity of the said liquidation is still pending with the Court.^[60] The validity of the sequestration of the shares in Allied Banking Corp., which is the subject matter of Civil Case No. 0096, is necessarily intertwined with Special Proceeding No. 107812 involving the liquidation of GENBANK and the acquisition thereof by respondents Tan, et al. The issues presented in the two proceedings are so overlapping and the involvement of Atty. Mendoza while in government employ is so plain, direct and substantial, his disqualification as counsel for respondents Tan, et al. in Civil Case No. 0095 is warranted under Rule 6.03.

Contrary to the majority opinion, the peculiar circumstances of this case justify the strict application of Rule 6.03

The ponencia cautions against the strict application of Rule 6.03 because it would have a "chilling effect on the right of government to recruit competent counsel to defend its interests." This concern is similar to that raised by the City of New York in the *General Motors* case where it argued that if Reycraft was disqualified, the US court would "chill the ardor for Government service by rendering worthless the experience gained in Government employ."^[61] It appeared that the City of New York relied on the pronouncement in the earlier case of *United States v. Standard Oil Co.*,^[62] known as the *Esso Export Case*, thus:

If the government service will tend to sterilize an attorney in too large an area of law for too long a time, or will prevent him from engaging in the practice of a technical specialty which he has devoted years in

acquiring, and if that sterilization will spread to the firm which he becomes associated, the sacrifice of entering government service will be too great for most men to make.[63]

Addressing this argument in *General Motors*, the same US court, through Justice Irving F. Kaufman, also the ponente of the *Esso Export Case*, distinguished the two cases. It noted that the said court denied the motion to disqualify the former government lawyer in *Esso Export Case* because the lawyer therein "never investigated or passed upon the subject matter of the pending case ... never rendered or had any specific duty to render any legal advice in relation to the regulations involved in the litigation." [64] Hence, the accommodation between maintaining high ethical standards for former Government employees, on the one hand, and encouraging entry into Government service, on the other, was struck under far different circumstances of the *Esso Export Case*.

In *General Motors*, the admonition voiced by Justice Kaufman in his article *The Former Government Attorney and the Canons of Professional Ethics* [65] was considered more to the point:

If there was a likelihood that information pertaining to the pending matter reached the attorney, although he did not "investigate" or "pass upon" it, ..., there would undoubtedly be an appearance of evil if he were not disqualified.[66]

Thus, it was concluded that the *Esso Export Case* unquestionably presented a case for the cautious application of the "appearance-of-evil doctrine" because the former Government lawyer's connection with the matter at issue was the tenuous one of mere employment in the same Government agency.

In contrast, in *General Motors*, Reycraft, not only participated in the investigatory and preparatory stages, but also signed the complaint in the action. Thus, according to the US court, where the overlap of issues is so plain, and the involvement while in Government employ so direct, the resulting appearance of impropriety must be avoided through disqualification.

From the foregoing disquisition, it can be gleaned that disqualification cases involving former government lawyers will have to be resolved on the basis of peculiar circumstances attending each case. A balance between the two seemingly conflicting policy considerations of maintaining high ethical standards for former Government employees, on the one hand, and encouraging entry into Government service, on the other, must be struck based on, inter alia, the relationship between the former and the succeeding representations of the former government lawyer. Likewise, as already discussed, the degree of his involvement in the matter while in Government employ is a crucial element in determining if his present representation is within the purview of Rule 6.03.

In this case, not unlike in *General Motors*, the involvement of Atty. Mendoza in the liquidation of GENBANK while he was the Solicitor General is so direct that the appearance of impropriety must be avoided through disqualification.

Conclusion

Let me just clarify that the record is free from any intimation that Atty. Mendoza was improperly influenced while in government service or that he is guilty of any impropriety in agreeing to represent respondents Tan, et al. However, I am constrained to vote for his disqualification in Civil Case No. 0096 in order to avoid any appearance of impropriety lest it taint both the public and private segments of the legal profession.

ACCORDINGLY, I vote to PARTIALLY GRANT the petition. The Motion to Disqualify Atty. Estelito P. Mendoza is GRANTED insofar as Civil Case No. 0096 is concerned.

[1] *General Motors Corp. v. City of New York*, 501 F.2d 639 (1974).

- [2] Foreword of Chief Justice Manuel V. Moran in Malcolm, Legal and Judicial Ethics.
- [3] *Abragan v. Rodriguez*, 380 SCRA 93 (2001).
- [4] EO No. 1, promulgated on February 29, 1986, created the PCGG which was primarily tasked to recover all ill-gotten wealth of former President Ferdinand E. Marcos, his immediate family, relatives, subordinates and close associates.
- [5] Mariano Tan Eng Lian in some pleadings.
- [6] Memorandum of the PCGG, pp. 7-9.
- [7] The case is now pending with this Court docketed as G.R. No. 152551.
- [8] Rollo, p. 42.
- [9] *Id.* at 43.
- [10] Penned by Associate Justice Romeo M. Escareal (retired), with Associate Justices Jose S. Balajadia and Nathanael M. Grospe, concurring; *Id.* at 57.
- [11] Rollo, p. 61.
- [12] *Id.* at 61-62.
- [13] *People v. Sandiganbayan*, 408 SCRA 672 (2003).
- [14] *Tambaoan v. Court of Appeals*, 365 SCRA 359 (2001); *Halili v. Court of Industrial Relations*, 22 SCRA 785 (1968) citing BOUVIER'S LAW DICTIONARY, 3rd Revision, Vol. I, p. 1651.
- [15] *Ibid.*

[16] 396 SCRA 443 (2003).

[17] 340 SCRA 289 (2000).

- [18] *Sta. Lucia Realty and Development, Inc. v. Cabrigas*, 358 SCRA 715 (2000).
- [19] *FERIA*, II CIVIL PROCEDURE ANNOTATED, 2001 ed., p. 123.

[20] 344 SCRA 838 (2000).

- [21] *Ibid.*
- [22] *Id.*
- [23] *Id.*
- [24] *Id.*
- [25] *Sta. Lucia Realty and Development, Inc. v. Cabrigas*, *supra*.
- [26] *Macahilig v. Heirs of Grace M. Magalit*, *supra*.
- [27] *Id.*
- [28] The ABA first adopted the Canons of Professional Ethics on August 27, 1908. Canons 1 to 32 thereof were adopted by the Philippine Bar Association (PBA) in 1917. In 1946, the PBA again adopted as its own Canons 33

to 47 of the ABA's Canons of Professional Ethics. The ABA's Canons of Professional Ethics were superseded by the Code of Professional Responsibility on January 1, 1970. In 1980, the Integrated Bar of the Philippines (IBP) adopted a proposed Code of Professional Responsibility, which it later submitted to the Supreme Court for approval. On June 21, 1988, the Supreme Court promulgated the present Code of Professional Responsibility. (AGPALO, *infra*.)

[29] AGPALO, COMMENTS ON THE CODE OF PROFESSIONAL RESPONSIBILITY AND JUDICIAL CONDUCT, 2001 ed., p. 52.

[30] WOLFRAM, MODERN LEGAL ETHICS (1986), p. 456.

[31] *Ibid*.

[32] This prohibition is restated in Rule 15.03 of our Code of Professional Responsibility, thus:

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

[33] WOLFRAM, *supra*.

[34] AGPALO, *supra*.

[35] WOLFRAM, *supra*.

[36] MEMORANDUM for Respondents Tan, et al., p. 56; Rollo, p. 446.

[37] According to the ABA Formal Opinion No. 342, these acts do not fall within the scope of the term "matter" and do not disqualify a lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures or points of law. WOLFRAM, *supra*.

[38] In *United States v. Trafficante* (328 F.2d 117 [1964]), the United States Court of Appeals (Fifth Circuit) held that, under Canon 36, the attorney who was formerly employed in the office of the Regional Counsel of the Internal Revenue Service and who handled the tax claims against Trafficante which resulted in stipulated settlement in the tax court was disqualified from representing the latter in subsequent suits for foreclosure of liens for balance due on those income taxes and for other federal taxes. The court therein rejected the lawyer's claim that disqualification should be ordered only if precisely the same issues were involved in each representation.

[39] AGPALO, *supra*.

[40] Then Senior Deputy Governor Amado R. Brinas, then Deputy Governor Jaime C. Laya, then Deputy Governor and General Counsel Gabriel C. Singson, then Special Assistant to the Governor Carlota P. Valenzuela, then Assistant to the Governor Arnulfo B. Aurellano and then Director of the Department of Commercial and Savings Bank Antonio T. Castro, Jr.

[41] Rollo, p. 109.

[42] *Id.* at 113. (Emphasis supplied.)

[43] The provision reads in part:

SEC. 29. Proceedings upon insolvency. - Whenever, upon examination by the head of the appropriate supervising or examining department or his examiners or agents into the condition of any bank or non-bank financial intermediary performing quasi-banking functions, it shall be disclosed that the condition of the same is one of insolvency, or that its continuance in business would involve probable loss to its depositors or creditors, it shall be

the duty of the department head concerned forthwith, in writing, to inform the Monetary Board of the facts, and the Board may, upon finding the statements of the department head to be true, forbid the institution to do business in the Philippines and shall designate an official of the Central Bank or a person of recognized competence in banking or finance, as receiver to immediately take charge of its assets and liabilities, as expeditiously as possible collect and gather all the assets and administer the same for the benefit of its creditors, exercising all the powers necessary for these purposes including, but not limited to, bringing suits and foreclosing mortgages in the name of the bank or non-bank financial intermediary performing quasi-banking functions.

...

If the Monetary Board shall determine and confirm within the said period that the bank or non-bank financial intermediary performing quasi-banking functions is insolvent or cannot resume business with safety to its depositors, creditors and the general public, it shall, if the public interest requires, orders its liquidation, indicate the manner of its liquidation and approve a liquidation plan. The Central Bank shall, by the Solicitor General, file a petition in the Court of First Instance reciting the proceedings which have been taken and praying the assistance of the court in the liquidation of such institution. The court shall have jurisdiction in the same proceedings to adjudicate disputed claims against the bank or non-bank financial intermediary performing quasi-banking functions and enforce individual liabilities of the stockholders and do all that is necessary to preserve the assets of such institution and to implement the liquidation plan approved by the Monetary Board. The Monetary Board shall designate an official of the Central Bank, or a person of recognized competence in banking or finance, as liquidator who shall take over the functions of the receiver previously appointed by the Monetary Board under this Section. The liquidator shall, with all convenient speed, convert the assets of the banking institution or non-bank financial intermediary performing quasi-banking functions to money or sell, assign or otherwise dispose of the same to creditors and other parties for the purpose of paying the debts of such institution and he may, in the name of the bank or non-bank financial intermediary performing quasi-banking functions, institute such actions as may be necessary in the appropriate court to collect and recover accounts and assets of such institution.

The provisions of any law to the contrary notwithstanding, the actions of the Monetary Board under this Section and the second paragraph of Section 34 of this Act shall be final and executory, and can be set aside by the court only if there is convincing proof that the action is plainly arbitrary and made in bad faith. No restraining order or injunction shall be issued by the court enjoining the Central Bank from implementing its actions under this Section and the second paragraph of Section 34 of this Act, unless there is convincing proof that the action of the Monetary Board is plainly arbitrary and made in bad faith and the petitioner or plaintiff files with the clerk or judge of the court in which the action is pending a bond executed in favor of the Central Bank, in an amount to be fixed by the court. The restraining order or injunction shall be refused or, if granted, shall be dissolved upon filing by the Central Bank of a bond, which shall be in the form of cash or Central Bank cashier(s) check, in an amount twice the amount of the bond of the petitioner or plaintiff conditioned that it will pay the damages which the petitioner or plaintiff may suffer by the refusal or the dissolution of the injunction. The provisions of Rule 58 of the New Rules of Court insofar as they are applicable and not inconsistent with the provisions of this Section shall govern the issuance and dissolution of the restraining order or injunction contemplated in this Section.

Insolvency, under this Act, shall be understood to mean the inability of a bank or non-bank financial intermediary performing quasi-banking functions to pay its liabilities as they fall due in the usual and ordinary course of business: Provided, however, That this shall not include the inability to pay of an otherwise non-insolvent bank or non-bank financial intermediary performing quasi-banking functions caused by extraordinary demands induced by financial panic commonly evidenced by a run on the bank or non-bank financial intermediary performing quasi-banking functions in the banking or financial community.

The appointment of a conservator under Section 28-A of this Act or the appointment of a receiver under this Section shall be vested exclusively with the Monetary Board, the provision of any law, general or special, to the contrary notwithstanding. (As amended by PD Nos. 72, 1007, 1771 & PD No. 1827, Jan. 16, 1981)

[44] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993), p. 1183.

[45] Ibid.

[46] General Motors Corp. v. City of New York, *supra*.

[47] Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv.L.Rev. 657 (1957).

[48] See Bañas, Jr. v. Court of Appeals, 325 SCRA 259 (2000).

[49] *Supra*.

[50] *Id.* at 650.

[51] *Id.* at 652.

[52] WOLFRAM, *supra*.

[53] Ibid.

[54] See note 32.

[55] See note 39.

[56] 318 F.Supp. 145 (D.Minn.1970).

[57] General Motors Corp. v. City of New York, *supra*.

[58] MALCOLM, LEGAL AND JUDICIAL ETHICS ADAPTED FOR THE REPUBLIC OF THE PHILIPPINES (1949 ed.), p. 8.

[59] Heck v. Santos, 423 SCRA 329 (2004) citing In Re Almacen, 31 SCRA 562 (1970).

[60] See note 7.

[61] General Motors Corp. v. City of New York, *supra* at 651.

[62] 136 F.Supp. 345 (S.D.N.Y.1955).

[63] Quoted in General Motors Corp. v. City of New York, *supra* at 651.

[64] *Id.*

[65] See note 42.

[66] General Motors Corp. v. City of New York, *supra*.

SEPARATE OPINION

TINGA, J.:

My vote to grant the petition hinges on the reasons stated hereunder. They pertain to a significant and material dimension to this case which deserves greater illumination.

To sustain the view that Atty. Estelito Mendoza (Atty. Mendoza) should be disqualified as counsel in Civil Case No. 0096, as the dissenters are wont to hold, there should be a clear legal basis that would mandate such disqualification. The dissenters would hold Atty. Mendoza liable for violating Section 6.03 of the Code of Professional Responsibility, while the ponencia disputes the assertion that the provision was indeed transgressed. I maintain that Section 6.03 cannot be made applicable in the present case to Atty. Mendoza, as to do so would be violative of his right to due process.

I have qualms in holding any member of the Bar liable for violating Section 6.03 of the Code of Professional Responsibility, in connection with acts that they may have engaged in as government officials before the enactment of the said Code. In this case, at the time Atty. Mendoza entered the government service he had no idea of the kind of inhibition proposed to be foisted on him currently. Indeed, he is being faulted for representing the respondents in Civil Case No. 0096 notwithstanding the fact that as Solicitor General and in the discharge of his official functions, he had advised the Central Bank on the procedure to bring about the liquidation of General Bank and Trust Company, which was subsequently acquired by the respondents. However, whether it be at the time then Solicitor General Mendoza participated in the process of the dissolution of General Bank in 1977, or at sometime in 1987 when he agreed to represent the respondents, the Code of Professional Responsibility had not yet been promulgated.

The Code of Professional Responsibility was promulgated by the Supreme Court on 21 June 1988.[1] Prior to its official adoption, there was no similar official body of rules or guidelines enacted by the Supreme Court other than the provisions on Legal Ethics in the Rules of Court.

I fear it would set a dangerous precedent to hinge Atty. Mendoza's culpability on the Code of Professional Responsibility, as it would effectively imply that the Code of Professional Responsibility has application even as to acts performed prior to its enactment. Our laws frown upon the prospectivity of statutes. Article 4 of the Civil Code declares that "Laws shall have no retroactive effect, unless the contrary is provided." There is no declaration in the Code of Professional Responsibility that gives retroactive effect to its canons and rules. It is settled that the presumption is that all laws operate prospectively absent clear contrary language in the text,[2] and that in every case of doubt, the doubt will be resolved against the retroactive operation of laws.[3]

The Court in *Co v. Court of Appeals* provided an exhaustive disquisition on the scope of the rule on the prospective application of statutes:

The principle of prospectivity of statutes, original or amendatory, has been applied in many cases. These include: *Buyco v. PNB*, 961) 2 SCRA 682 (June 30, 1961), holding that Republic Act No. 1576 which divested the Philippine National Bank of authority to accept back pay certificates in payment of loans, does not apply to an offer of payment made before effectivity of the act; *Largado v. Masaganda, et al.*, 5 SCRA 522 (June 30, 1962), ruling that RA 2613, as amended by RA 3090 on June, 1961, granting to inferior courts jurisdiction over guardianship cases, could not be given retroactive effect, in the absence of a saving clause; *Larga v. Ranada, Jr.*, 64 SCRA 18, to the effect that Sections 9 and 10 of Executive Order No. 90, amending Section 4 of PD 1752, could have no retroactive application; *People v. Que Po Lay*, 94 Phil. 640, holding that a person cannot be convicted of violating Circular No. 20 of the Central Bank, when the alleged violation occurred before publication of the Circular in the Official Gazette; *Baltazar v. C.A.*, 104 SCRA 619, denying retroactive application to P.D. No. 27 decreeing the emancipation of tenants from the bondage of the soil, and P.D. No. 316 prohibiting ejectment of tenants from rice and corn farmholdings, pending the promulgation of rules and

regulations implementing P.D. No. 27; *Nilo v. Court of Appeals*, 128 SCRA 519, adjudging that RA 6389 which removed "personal cultivation" as a ground for the ejectment of a tenant cannot be given retroactive effect in the absence of a statutory statement for retroactivity; *Tac-An v. CA*, 129 SCRA 319, ruling that the repeal of the old Administrative Code by RA 4252 could not be accorded retroactive effect; *Ballardo v. Borromeo*, 161 SCRA 500, holding that RA 6389 should have only prospective application; (See also *Bonifacio v. Dizon*, 177 SCRA 294 and *Balatbat v. CA*, 205 SCRA 419).

The prospectivity principle has also been made to apply to administrative rulings and circulars, to wit: *ABS-CBN Broadcasting Corporation v. CTA*, Oct. 12, 1981, 108 SCRA 142, holding that a circular or ruling of the Commissioner of Internal Revenue may not be given retroactive effect adversely to a taxpayer; *Sanchez v. COMELEC*, 193 SCRA 317, ruling that Resolution No. 90-0590 of the Commission on Elections, which directed the holding of recall proceedings, had no retroactive application; *Romualdez v. CSC*, 197 SCRA 168, where it was ruled that CSC Memorandum Circular No. 29, s. 1989 cannot be given retrospective effect so as to entitle to permanent appointment an employee whose temporary appointment had expired before the Circular was issued.

The principle of prospectivity has also been applied to judicial decisions which, "although in themselves not laws, are nevertheless evidence of what the laws mean, . . . (this being) the reason why under Article 8 of the New Civil Code, 'Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system . . .'"[4]

I believe that there is a greater demand to ward off the retroactive application of the Code of Professional Responsibility for the Code is the source of penal liabilities against its infringers. It is well entrenched that generally, penal laws or those laws which define offenses and prescribe penalties for their violation operate prospectively.[5] The Constitution itself bars the enactment of ex-post facto laws.[6] I do not think it necessary to flirt with the constitutional issue whether the Code of Professional Responsibility operates as a penal statute within the definition of an ex-post facto law, but I am satisfied with the general rules, affirmed by jurisprudence, that abhor the retroactivity of statutes and regulations such as the Code of Professional Responsibility.

Hence, to impute culpability on the part of Atty. Mendoza, it would be necessary to ascertain whether his accession to represent the respondents violated any binding law or regulation at the time of the engagement. It is but proper to frame the question in such manner, for only then could it be ascertained whether Atty. Mendoza knew or should have known that his professional representation of the respondents was illegal. It would also be unfair to ascribe liability to any lawyer whom, at the time he/she was in government service, was not guided by any definitive rule prescribing the possible subsequent restrictions on the lawyer's professional activity as a consequence of the exercise of public office.

Ostensibly, Atty. Mendoza's actions violated Canon 36 of the Canons of Professional Ethics, which some authorities deemed as a source of legal ethics prior to the Code of Professional Responsibility.[7] Canon 36 states:

36. Retirement from judicial position or public employment

A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

A lawyer, having once held public office or having been in the public employ should not, after his retirement, accept employment in connection with any matter he has investigated or passed upon while in such office or employ.

Canon 36 would apparently cover the allegations imputed to Atty. Mendoza. However, a thorough review should first be examined on whether Canon 36 of the Canons of Professional Ethics may be used as legal basis in resolving this case.

The Canons of Professional Ethics originated from the American Bar Association.[8] They were adopted by the Philippine Bar Association as its own in 1917 and in 1946.[9] There is no denying the high regard enjoyed by the Philippine Bar Association in the legal community in its nearly one hundred years of existence. However, there is also no denying that the Philippine Bar Association, a civic non-profit association,[10] is a private entity of limited membership within the Philippine bar. The rules or canons it has adopted are per se binding only on its members, and the penalties for violation of the same could affect only the status or rights of the infringers as members of the association.

At the same time, reference has been had by this Court to the Canons of Professional Ethics in deciding administrative cases against lawyers, especially prior to the adoption of the Code of Professional Ethics. Hence, the belief by some commentators that the said Canons may serve as a source of legal ethics in this country. However, I think it would be grave error to declare that the Canons of Professional Ethics, on their own, serves as an indisputable source of obligations and basis of penalties imposable upon members of the Philippine legal profession. This would violate the long-established constitutional principle that it is the Supreme Court which is tasked with the promulgation of rules governing the admission to the practice of law, as well as the pleading, practice and procedure in all courts.[11] The task of formulating ethical rules governing the practice of law in the Philippines could not have been delegated to the Philippine Bar Association by the Supreme Court. Neither could such rules as adopted by the private body be binding on the Supreme Court or the members of the bar.

If provisions of the Canons of Professional Ethics of the Philippine Bar Association have jurisprudentially been enforced, or acknowledged as basis for legal liability by the Supreme Court, they may be recognized as a binding standard imposable upon members of the bar, but not because said Canons or the Philippine Bar Association itself said so, but because the Supreme Court said so. This is keeping in line with the entrenched rule, as evinced by Article 8 of the Civil Code, which states that "judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system."

Thus, I would be willing to consider Canon 36 as binding on Atty. Mendoza when he deigned to represent the respondents if at such time, this Court had expressly acknowledged Canon 36 as a rule or standard which deserves obeisance by members of the bar. After all, it would only be through such process of judicial recognition that these guidelines adopted by a private entity could be considered as a normative rule compulsory on all practitioners. Unfortunately, no such case exists in Philippine jurisprudence.

It might be possible to concede that this principle embodied under Canon 36 or even as stated in American case law, subsisted within that penumbra of ethical standards from which the Court could have derived a jurisprudential rule had one been called for by a particular case. However, it remains that none such was pronounced by this Court in jurisprudence, and indeed the prohibition under Canon 36 was not prescribed by this Court or by statute as a norm until the enactment of the Code of Professional Responsibility in 21 June 1988. Accordingly, when Atty. Mendoza agreed to represent the respondents, there was no definitive binding rule proscribing him from such engagement or penalizing him for such representation.

I am mindful that what the Court is called upon to decide is whether the Sandiganbayan committed grave abuse of discretion, and not just mere error in fact or law, in denying the motion to disqualify Atty. Mendoza. The absence of a definitive disqualificatory rule that would have guided Atty. Mendoza when he undertook the questioned acts sufficiently justifies the Sandiganbayan's denial of the motion.

We should not render insensate the concerns raised by the minority, arising as they do from an understandable concern that the line dividing the professional activities and the government services rendered by lawyers should remain distinct. Yet the majority likewise demonstrates that there is no unanimity on prevalent legal thought on

the matter, and a healthy debate on the issue will result in no harm. Still, the due process dimension, as highlighted by the absence of a definitive rule for which Atty. Mendoza could have been held accountable, proves determinative to my mind. The Court is the enforcer of the constitutional guarantees of due process to all persons, and my vote is but a consequence of this primordial duty.

[1] R. Agpalo, *The Code of Professional Responsibility for Lawyers* (1st ed., 1991), at 369.

[2] R. Agpalo, *Statutory Construction* (5th ed., 2003), at 355; citing *Iburan v. Labes*, 87 Phil. 234 (1950); *People v. Zeta*, 98 Phil. 143 (1955); *Castro v. Collector of Internal Revenue*, G.R. No. 12174, 28 December 1962, 6 SCRA 886; *Commissioner v. Lingayen Gulf Electric Power Co., Inc.*, 164 SCRA 27 (1988).

[3] *Id.*, citing *Montilla v. Agustina Corp.*, 24 Phil. 220 (1913); *Cebu Portland Cement Co. v. Collector of Internal Revenue*, G.R. No. 20563, 29 October 1968, 25 SCRA 789 (1968).

[4] *Co v. Court of Appeals*, G.R. No. 100776, October 28, 1993.

[5] Agpalo, *supra* note 2, at 357; citing *People v. Moran*, 44 Phil. 387 (1923).

[6] See Article III, Sec. 22, Constitution.

[7] See, e.g., G. Malcolm, *Legal and Judicial Ethics* (1949), at 9.

[8] Agpalo, *supra* note 1, at 381.

[9] *Ibid.*

[10] See *Juan F. Nakpil & Sons v. Court of Appeals*, 228 Phil. 564, 572 (1986).

[11] See Section 5(5), Article VIII, Constitution. See also Section 5(5), Article X, 1973 Constitution and Section 13, Article VIII, 1935 Constitution.

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