A.M. No. SB -14-21-J – Re: Allegations Made Under Oath at the Senate Blue Ribbon Committee Hearing Held on September 26, 2013 Against Justice Gregory S. Ong, Sandiganbayan.

Promulgated:

SEPTEMBER 23, 2014

SEPARATE CONCURRING OPINION

BRION, *J.*:

I write this Opinion to support Associate Justice Martin S. Villarama, Jr.'s conclusion that the respondent Justice Gregory Ong (*Justice Ong*), Chairman of the Fourth Division of the Sandiganbayan, should be dismissed from the service for **gross misconduct, dishonesty and impropriety**.

I likewise submit this Opinion to express my disagreement with the opinions of Associate Justices Lucas P. Bersamin, Jose P. Perez and Bienvenido L. Reyes that Justice Ong should only be penalized for simple misconduct and meted the lighter penalty of three to six months suspension.

I take this opportunity, too, to draw the Court's attention to the administrative offense of gross misconduct where the underlying act involved is bribery. If the Court is serious about its anti-corruption intentions, it is high time that it makes itself clear on the needed quantum of evidence to support a finding of administrative liability, in contrast with the quantum of evidence needed to find a public officer guilty of bribery in a criminal proceeding.

An administrative offense, as has been established, should be proven by substantial evidence as it involves an administrative proceeding; a criminal case, on the other hand, necessarily requires proof beyond reasonable doubt. Furthermore, we should clarify in the strongest terms that no need exists to apply in an administrative proceeding an amorphous quantum of evidence higher than substantial evidence – in the manner a Member of this Court advocates.

I likewise posit that the present case should serve as a wake-up call for us to re-examine the use of hearsay evidence in disciplinary proceedings, when the serious charge of bribery (or gross misconduct based on bribery) is involved. We have disallowed the use of hearsay evidence in the past. Should we continue with this rule?

Bribery, like rape, is a transgression that is almost never committed in public view. It thrives and prospers in the dark, in secrecy. But this

illegality is not totally unknown to the Members of this Court; we all know that bribery is happening in our midst. The media hints at it; law practitioners talk about it and do not even do so in whispers; clients accept it as a fact of litigation and readily accept their counsels' claim for extra expenses *"para kay justice, para kay judge o para kay fiscal"* – a grave injustice to many in the judiciary and the prosecution service who have strictly trodden the high road of morality in the public service.

In one recent administrative matter, we even asked a leading and high profile law practitioner to explain the claim she made in a leading radio station that bribery exists in the High Court.[1] She blithely escaped sanction by claiming that she only "heard" about the bribery she spoke about, but at the same time hinted that she could not speak about this charge because she has cases before this Court.

Thus, as a practical reality, this Court is now in a public denial mode about bribery and does so by maintaining the rule that disallows hearsay evidence in disciplinary proceedings, even if the hearsay testimony is already confirmed by the totality of the evidence on record.

Additionally, we should admit that judges, based on their knowledge, training and experience, should be adept at recognizing, proving (and consequently evading) the administrative offense of bribery. This reality should make us aware (if, for some reason, we have not yet reached this level of cognition) that we would effectively be condoning the presence of the offenders among us if from the very start we adopt the rule that we should not consider hearsay evidence at all. In this sense, all of us – the Members of this Court – may ourselves be worthy of blame for the proliferation of corruption in the judiciary.

The better approach, I believe, is to allow the investigating judges and justices sufficient discretion to admit hearsay evidence, subject to guidelines in determining its probative value. (I dwell at length on this point in the discussions below.)

This approach, in my view, gives the Court flexibility in disciplining its ranks without sacrificing both the fairness that should be accorded the respondent judges, judicial officials and employees, and the character of reliability that evidence must carry to support a finding of administrative liability.

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[1] *RE: Interview with Lorna Kapunan on Corruption in the Judiciary,* A.M. No. 13-11-09-SC, August 12, 2014.

I. Antecedents

The present administrative case against Justice Ong sprang from various testimonies given by whistleblowers Benhur Luy (*Luy*) and Marina Sula (*Sula*) at the height of the pork barrel scam scandal.

Both Luy and Sula had been employees of Janet Lim-Napoles (*Napoles*), the main personality involved in the high profile scandal, more popularly known as the pork barrel scam. Both claimed to have helped facilitate Napoles' nefarious schemes. In the course of offering their testimonies against Napoles, they claimed that Justice Ong was Napoles' ***"contact man"*** at the Sandiganbayan – the country's anti-graft court.

In a sworn statement filed before the National Bureau of Investigation (*NBI*), Sula narrated that Napoles urged her not to testify against her, and promised that she would help Sula once she is able to clear her name. Sula also named Justice Ong to be among those who had visited Napoles' office.

The day following the execution of Sula's sworn statement, Aries Rufo of the news network Rappler, published the article entitled ***"Exclusive: Napoles parties with Anti-graft Court Justice."*** The article showed the photograph of Senator Jinggoy Estrada (*Senator Estrada*, one of the main public figures now criminally charged in the pork barrel scam scandal) together with Napoles and Justice Ong. The article also noted that Justice Ong had been a member of the Sandiganbayan's Fourth Division that handled the Kevlar Helmet case where Napoles stood accused for the ghost purchase of 500 Kevlar helmets in 1998; the Fourth Division that Justice Ong chairs acquitted Napoles of the criminal charge.

Thereafter, the Senate Blue Ribbon Committee held committee hearings to investigate the pork barrel scam. At these hearings, Sula reiterated her statements about Justice Ong.

It was at this time that Justice Ong, unbidden, wrote Chief Justice Maria Lourdes P. A. Sereno (*Chief Justice Sereno*) a letter explaining the photo published in Rappler. The Court responded to the letter, the Rappler article, and Sula's testimony before the Senate Blue Ribbon Committee, by initiating a *motu proprio* investigation of Justice Ong.

The Court designated former Justice Angelina Sandoval-Gutierrez, a retired Member of this Court, as the investigating justice tasked to investigate Justice Ong's involvement with Napoles.

After hearing the testimonies of Sula, Luy and Justice Ong and considering their submitted Memoranda, Justice Sandoval-Gutierrez recommended in her Report to the Court that Justice Ong be found liable for gross misconduct, dishonesty and impropriety. She recommended that

Justice Ong be dismissed from service, with forfeiture of all retirement benefits and with prejudice to re-employment in any government agency or instrumentality.

Justice Villarama affirmed Justice Sandoval-Gutierrez's Report, holding that:

(1) Justice Ong is guilty of gross misconduct and impropriety, for violating **Canon 1 of the New Code of Judicial Conduct**, which requires judges to avoid acts and the appearance of impropriety in all their activities. The totality of the circumstances shows that Justice Ong associated with Napoles after the promulgation of the decision in the Kevlar Helmet case. To Justice Villarama, these circumstances strongly indicate Justice Ong's corrupt inclinations and heightened the public's perception of anomaly in the Judiciary's decision-making process.

Justice Villarama arrived at his conclusion by giving credit to the testimonies of Sula and Luy who both identified Justice Ong as Napoles' contact man at the Sandiganbayan. This finding is supported by the photographs showing him with Senator Estrada and Napoles at a party. Taken together, these pieces of evidence sufficiently proved that he had ***exposed himself to suspicion*** of partiality to Napoles.

Justice Villarama also noted that the financial accommodation that Napoles gave Justice Ong – which Luy testified to – could be the financial consideration for Justice Ong's assistance in Napoles' acquittal in the Kevlar Helmet case. The acquittal and Luy's testimony gave the public cause to doubt the honesty and fairness of Justice Ong's participation in the Kevlar Helmet case and the integrity of our justice system.

(2) Justice Ong committed dishonesty and violated **Canon 3 of the New Code of Judicial Conduct on Integrity**. In his letter to Chief Justice Sereno, he denied attending parties hosted by Napoles, and omitted to inform her that he had visited Napoles' office twice. It was only when Luy and Sula testified before the Senate and named him as the "contact man" of Napoles in the Sandiganbayan, that Justice Ong admitted that he had visited Napoles at her office once.

Justices Bersamin, Perez and Reyes argue on this point that the core of Luy and Sala's testimonies cannot be used to conclude that Justice Ong committed the offenses charged, as the testimonies of these witnesses are hearsay. According to them, Luy and Sula do not have personal knowledge of the alleged financial transaction between Napoles and Justice Ong. Neither should Justice Ong be held accountable for dishonesty because

Justice Villarama took out of context Justice Ong's statement that he visited Napoles only once. To the three magistrates, Justice Ong should thus be only found liable for ***simple misconduct*** for mingling with litigants before his court, which offense is punishable by suspension and a fine.

With due respect to my esteemed Colleagues, I believe that they failed to consider that Justice Ong's admitted "mingling" with Napoles came while the probation case of Napoles' co-accused in the Kevlar Helmet case was still pending at the Sandiganbayan's Fourth Division. These co-accused are all her close relatives – her mother Magdalena L. Francisco, her brother, Reynaldo L. Franscico and her sister-in-law Ana Marie Dulguime. My Colleagues apparently failed to consider that these co-accused/relatives, despite their conviction, never went to jail; when matters had sufficiently quieted down, Justice Ong granted them probation and even penned the ruling on reconsideration.

II. The nature of disciplinary proceedings of judges should allow us to admit hearsay evidence in appropriate cases

A. Disciplinary proceedings for members of the judiciary are sui generis investigative proceedings requiring substantial evidence to reach a conclusion

In evaluating the pieces of evidence relating to the charge of bribery against Justice Ong, Justice Reyes posits that a standard of evidence, *higher than substantial evidence*, should be used to arrive at the conclusion that Justice Ong had indeed been bribed by Napoles. Several Colleagues in the Court additionally argue that hearsay evidence against Justice Ong should not be admitted nor given probative value, and that, in any case, the remaining pieces of evidence are insufficient to prove the bribery charge.

Disciplinary proceedings against members of the bench have been characterized as administrative proceedings,[2] as the end result of these proceedings involves the determination of whether the respondent judge committed an administrative offense that carries a disciplinary penalty. The penalties range from the lightest penalty of admonition with warning, to the ultimate penalty of dismissal from the service.[3]

I submit that the characterization of disciplinary proceedings against members and officials of the judiciary as a mere administrative proceeding whose aim is the imposition of penalties, is a very simplistic view of what disciplinary proceedings are. Properly and critically viewed, they are closer to the *sui generis* nature of disbarment proceedings against lawyers, where

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[2] An administrative offense means every act or conduct or omission which amounts to, or constitutes, any of the grounds for disciplinary action. *Salalima v. Guingona*, G.R. Nos. 117589-92, May 22, 1996, 257 SCRA 55.

[3] See Section 11, Rule 140 of the Rules of Court.

the main objective of inquiry is not the infliction of punishment, but the investigation of **whether the respondent lawyer continues to possess the qualities required of members of the legal profession**.[4]

Lawyers assume a unique role in our society because they are officers of the court who directly participate in the administration of justice; judges' and justices' roles are no less and in fact are higher than those of lawyers as they directly act as the main principals in the administration of justice. Judges and justices directly interpret the law and determine how the scales of justice shall swing through the adjudicatory duties solely reserved for them by the Constitution.

Under these roles, the all-important question to be answered is **whether judges and justices are worthy of donning the judicial robes and of discharging the adjudicatory duties of a member of the bench.** When they err morally and legally in discharging their duties, they become pejoratively known as "hoodlums in robes" and thereby bring disrepute, not only to themselves, but to the institution they represent.

That disbarment of lawyers should be the take-off point in characterizing and calibrating the role of judges and justices cannot be avoided when it is considered that:

(1) The exercise of the legal professions and the higher calling of acting as a magistrate are both considered a privilege;

(2) Both professions are under the regulation and supervision of the Supreme Court;

(3) Both professions have crucial roles in the administration of justice – the lawyer as an officer of the court, while the judge is the embodiment of the court that directly acts in dispensing justice;

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[4] See, for comparison, the following discussion on disciplinary proceedings for lawyers in *In the Matter of Proceedings for Disciplinary Action Against Atty. Vicente Raul Almacen*, G.R. No. L-27654, February 18, 1970, 31 SCRA 562, 600 – 601:

> Accent should be laid on the fact that disciplinary proceedings like the present are *sui generis*. Neither purely civil nor purely criminal, this proceeding is not — and does not involve — a trial of an action or a suit, but is rather an investigation by the Court into the conduct of its officers. Not being intended to inflict punishment, it is in no sense a criminal prosecution. Accordingly, there is neither a plaintiff nor a prosecutor therein It may be initiated by the Court *motu proprio*. Public interest is its primary objective, and the real question for determination is whether or not the attorney is still a fit person to 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 in view of preserving the purity of the legal profession and the proper and honest administration of justice by purging the profession of members who by their misconduct have proved themselves no longer worthy to be entrusted with the duties and responsibilities pertaining to the office of an attorney. In such posture, there can thus be no occasion to speak of a complainant or a prosecutor. (Citations omitted)

(4) Both proceedings involve investigating officers appointed by the Supreme Court to inquire on the accusations against the respondent lawyer or judge, to be initiated *motu proprio* or upon the filing of a complaint;

(5) The ultimate penalty in both disciplinary proceedings involves divesting the respondent lawyer or judge of the privilege to practice law or adjudicate as a member of the judiciary, respectively.

Our focus in disciplinary proceedings for members of the judiciary must necessarily and unavoidably be the determination of whether the respondent judge is still fit for the judicial office, with the preservation of the public interest in an independent, incorruptible judiciary as the ultimate objective.

In this consideration, the Court calls upon the member of the bench charged with misfeasance or malfeasance, to account for accusations against him or her, with the end in view of keeping the proper and honest administration of justice untainted and immaculate in the public's view, by excluding from the judiciary those who, by their misconduct, have proven themselves unworthy to be entrusted with the duties and responsibilities of a judge.

Based on these objectives, the tighter and stricter procedural rules applicable to criminal proceedings, particularly the requirement for a quantum of evidence higher than substantial evidence, cannot and should not be used in disciplinary proceedings involving judges. By their higher evidentiary requirement, proof of wrongdoing becomes more difficult to achieve, ultimately defeating the objectives of disciplinary proceedings.

As the Court very well knows, our ruling in disciplinary proceedings will not result in the criminal conviction and the incarceration of the respondent judge or justice; our judgment is confined to the finding and declaration of the respondent Justice's unworthiness to be a member of the judiciary.[5] If imprisonment and criminal penalties will result at all from the judge's or justice's illegal acts, they will not arise from the disciplinary proceedings; they will arise from separate criminal proceedings that require a whole new and separate process of charges, trial and conviction upon proof beyond reasonable doubt.

Viewed from the perspectives of proportionality, higher evidentiary standards are properly required as stakes become higher in the spectrum of

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[5] *See* A.M. No. 01-8-10-SC amending Rule 140 of the Rules of Court on the Discipline of Judges of Regular and Special Courts and Justices of the Court of Appeals and the Sandiganbayan.

individual rights and liberties; proof beyond reasonable doubt is required in criminal proceedings as the life, liberty and property of the accused are at stake.

Conversely, as the stakes become lower (as when only the privilege to practice law or to act as judge or justice is involved) it is but proper that evidentiary standards should likewise be lower. To lose this proportion is to lay down a policy vastly in favor of the individual, but at the expense of the societal value of a judiciary whose integrity, fairness and independence must be at their highest.

In my view, these distinctions ought to be ever present in the Court's mind in order not to defeat the purpose for which disciplinary proceedings are instituted; forgetting them and setting impossibly high and impractical standards amount to giving up the first line of defense in preserving and maintaining the judiciary's independence and integrity.

In the context of the present case, I cannot but emphasize that the gauge for determining whether bribery (or gross misconduct based on bribery) had occurred should be confined to substantial evidence and not to any higher level of evidence. The bribery accusation should be adjudged in the same manner that other accusations of gross misconduct, dishonesty and impropriety should be weighed – through substantial evidence or such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[6]

B. The rules on hearsay should be relaxed in disciplinary proceedings against members of the judiciary

I likewise cannot accept the strict application of the hearsay rules in the present case as some of my Colleagues advocate. Given the nature of disciplinary proceedings and the indisputable circumstances present in bribery transactions, the demand for evidence executed by one who has strict personal knowledge of the illegal transaction is to ask for a near impossibility in many cases. It is for this reason perhaps that disciplinary findings of bribery or gross misconduct based on bribery come few and far between.

Indeed, as some of my Colleagues in the Court have pointed out, a bribery charge is easy to concoct. However, it should likewise not be lost to us that a bribery charge, by its very nature, is also very difficult to prove even in an administrative proceeding, more so under the view of some of our

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[6] Rule 133, Section 5 of the Rules of Court provides:

> Section 5. Substantial evidence. — In cases filed before administrative or quasi-judicial bodies, a fact may be deemed established if it is supported by substantial evidence, or that amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion.

Colleagues that a higher burden of proof should be required for a finding that bribery or acts indicating bribery indeed happened.

Bribery at the consummated stage, by its nature, requires a bribe-giver and a bribe-taker where both participants are parties to the crime. The public official who accepts money or other valuable consideration commits bribery, among other things,[7] while the person who offers and gives the bribe is guilty of corruption of a public official.[8]

Necessarily, the persons who have personal knowledge of the transaction would, more often than not, be limited to the offenders themselves who both risk prosecution for their misdeeds. Demanding as a matter of law that witnesses speak from their strict personal knowledge of the actual details of a bribery, would, under these circumstances, practically amount to the requirement that one of the participants turn on the other. Obviously, this requirement would make it extremely difficult to successfully prosecute the crime of bribery. Under these terms, bribery becomes a high percentage crime for the chances of success it offers.

Consider, too, that bribery cases become even more difficult to prove and establish when one of its participants has extensive knowledge of how bribery is committed and proven in court. ***Bribery is a crime that lawyers study from their first year in law school; its elements as well as the degree of proof required to convict are all drilled into lawyers' minds from the first course in Criminal Law and later in Remedial Law.*** This knowledge is honed as the lawyer takes the bar examination and as he or she goes into practice.

The specialized knowledge rises to the **level of expertise** when the lawyer enters the judiciary where criminal cases – bribery among them – are the daily fare of the cases he or she handles. This is particularly true for the Sandiganbayan, our anti-graft court, whose expertise and specialty are crimes committed by public officers in the course of their duties, bribery among them.

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[7] Article 210 of the Revised Penal Code provides:

> Art. 210. Direct bribery. — Any public officer who shall agree to perform an act constituting a crime, in connection with the performance of this official duties, in consideration of any offer, promise, gift or present received by such officer, personally or through the mediation of another, shall suffer the penalty of *prision mayor* in its medium and maximum periods and a fine of not less than the value of the gift and] not less than three times the value of the gift in addition to the penalty corresponding to the crime agreed upon, if the same shall have been committed.
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> Art. 211. Indirect bribery. — The penalties of prision correccional in its medium and maximum periods, and public censure shall be imposed upon any public officer who shall accept gifts offered to him by reason of his office. (As amended by Batas Pambansa Blg. 872, June 10, 1985).

[8] Article 212 of the Revised Penal Code provides:

> Art. 212. Corruption of public officials. — The same penalties imposed upon the officer corrupted, except those of disqualification and suspension, shall be imposed upon any person who shall have made the offers or promises or given the gifts or presents as described in the preceding articles.

I say all these with no intent to cast any pejorative aspersions on the members of the Sandiganbayan. I say these merely as a matter of fact - ***we have before us a respondent who had been schooled and trained on the elements of bribery, and necessarily, for those inclined to commit this crime, on the ways and means to avoid even the mere suspicion of bribery.*** (Note, for example, Luy's testimony that Justice Ong did not want checks paid out in his name; he wanted these paid "to cash." Note, too, the claim that he had merely been engaged in an investment transaction, *albeit* at very high interest rates. Without more and standing alone and by themselves, these ready excuses may possibly pass muster, but not when the other circumstances, discussed below, are considered.)

Given the nature of disciplinary proceedings for judges, as well as the nature of bribery transactions, I urge my Colleagues in the Court to reconsider and re-examine the need for applying the rules on hearsay evidence in disciplinary proceedings where a bribery allegation is involved.

In special situations such as this case, where the illegal transaction is cloaked in secrecy and the dramatis personae include an expert on the intricacies of bribery (particularly on how a charge is prosecuted and evaded), do we not owe the institution we serve and the Filipino people who rely on us for a fair and speedy system of justice, the duty to exhaust all fair and reasonable means necessary to determine if indeed there are corrupt officials within our ranks?

I submit that we cannot choose to ignore the special circumstances before us – particularly the confluence of facts before us that can be likened to a smoking gun staring us in the face – simply because an unsound evidentiary technicality tells us to do so. The proper approach, in my view, in order to be sensitive to all the interests involved in an administration of justice situation, is as I expressed in my Concurring Opinion in AM No. 13 – 11 – 09 – SC (*Re: Interview with Lorna Kapunan on Corruption in the Judiciary*):

> I believe and propose to the Court that it desist from declaring the matter in caption closed and terminated simply because the statements Atty. Lorna Kapunan turned out to be hearsay. Instead, the Court should ***proactively*** react to the ***smoke*** that Atty. Kapunan has raised; a ***fire*** must exist somewhere behind her statements. Even smoking embers, if left unattended to, may turn into a raging conflagration. [9]

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[9] *Supra* note 1, at 1.

1) The purpose of hearsay evidence and its decline in administrative proceedings in other jurisdictions.

Hearsay evidence, or evidence presented by a witness who has no personal knowledge of the fact being attested to – as a rule – is inadmissible as evidence[10] and, even if admitted, offers no probative value.[11]

The exclusion of hearsay evidence has been traditionally justified by the perceived unreliability of out-of-court statements. Traditionally, hearsay evidence poses four risks of unreliability: a ***narration* risk** (i.e., the risk that the declarant did not mean what he or she seemed to say); a ***sincerity* risk** (the risk that the declarant intentionally fabricated); a ***memory* risk** (the risk that the declarant misrecalled what happened); and a ***perception* risk** (the risk that the declarant misperceived things to begin with).[12]

While the recognition of these risks admittedly has empirical basis, I believe it equally undeniable that ***we encounter the same risks*** whenever we receive testimony ***from a person who has personal knowledge of the fact or the event sought to be proved.***

Indeed, both narrations – one made by a person outside of court (*i.e.*, by a declarant) and another made by a person testifying before the court (*i.e.*, by a witness) may be unreliable. The latter, however, is admitted as evidence before the court because the trial process subjects it to three safeguards that in the end, makes the information the witness recounted more credible: ***first***, the oath the witness takes to tell the truth, ***second***, the jury's ability to watch the witness's demeanor, and ***third***, the opportunity for cross-examination.[13]

Consider, however, that we admit other sources of evidence that may be unreliable and misleading even when subjected to the three safeguards of the trial process, such as the testimony of cooperating co-defendants. In this situation, we admit the testimony but evaluate its credibility and probative value *vis a vis* other pieces of evidence and the totality of the circumstances that the evidence points us to.

Legal history tells us that the exclusion of hearsay evidence first emerged as a rule after the introduction of the trial by jury system. Notable scholars observed that judges began excluding hearsay evidence because

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[10] The rule against admitting hearsay evidence is embodied in Section 36, Rule 130 of the Rules of Court:

> Section 36. Testimony generally confined to personal knowledge; hearsay excluded. — A witness can testify only to those facts which he knows of his personal knowledge; that is, which are derived from his own perception, except as otherwise provided in these rules. (30a)

[11] *Mallari v. People*, 487 Phil. 299, 321 (2004).

[12] David Alan Sklansky, Hearsay's Last Hurrah, 2009 Sup. Ct. Rev. 1, 7 (2009).

[13] Id.

untrained and inexperienced jurors tended to overvalue such evidence, and failed to fully appreciate the potential sources of weakness in testimonial evidence untested by cross-examination.[14]

Aware of this hearsay rule rationale and its history, administrative agencies in the United States do not exclude hearsay evidence in their quasi-judicial proceedings.[15] They have recognized that no reason exists to exclude

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[14] *See* JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 47 (1898) as cited in Gordon Van Kessel, *Hearsay Hazards in the American Criminal Trial: An Adversary–Oriented Approach*, 49 Hastings L.J. 477, 489 (1998), *available at* http://librarysource.uchastings.edu/repository/Van%20Kessel/49HastingsLJ477.pdf.:

> Traditionalists contend that, along with other common law exclusionary rules, hearsay restrictions arose with the development of the modem independent jury and that current exclusion of hearsay is justified primarily by the weaknesses of lay, as opposed to professional, factfinding with respect to evaluating second-hand evidence, which suffers from the four declarant-oriented weaknesses.

See also Lisa Dufraimont, *Evidence Law and the Jury: A Reassessment*, 53 McGill Law Journal 199, 223 (2008), where she notes that:

> The idea that the hearsay rule was developed to prevent untrained and inexperienced lay juries from overvaluing unreliable second-hand information was popular among nineteenth century judges, and has regularly been advanced by scholars up to the present day.

In so doing, Dufraimont cites *Wright v. Doe d. Tatham* (1837), 7 Ad. & E. 313, 112 E.R. 488 at 512 (Exch. Ct.) *Berkeley, In re* (1837), 4 Camp. 401, 171 E.R. 128 at 135 to support her statement about the judges' apprehensions against the appreciation of evidence by lay jurors

Dufraimont, however, is of the view that "apprehensions of jury incompetence were not uppermost in the minds of the seventeenth- and eighteenth-century judges whose concerns about hearsay hardened into an exclusionary rule. Instead, the historical origins of the hearsay rule lie in concerns about lack of oath and cross-examination, process values that are crucial to the proper functioning of the adversary system. (*ibid.*, citations omitted)

See also: Frederick W. J. Koch, *Wigmore and historical aspects of the hearsay rule*, unpublished dissertation (2004), available at http://search.proquest.com/docview/305111445?fromunauthdoc=true:

> In 1904 Dean Wigmore advanced a new theory regarding the raison d'être for the hearsay rule which continues to exert a significant influence on English and Canadian hearsay reform. Based on his historical work, Wigmore said that the common law judges of the late seventeenth century developed a single rule excluding hearsay evidence. According to Wigmore, these judges began to exclude hearsay because of a perception that the juries used in common law trials tended to overvalue such evidence in the absence of cross-examination. This overvaluation occurred because these untrained and inexperienced jurors failed to fully appreciate the potential sources of weakness in testimonial evidence when it was untested by cross-examination.

See also: John Henry Wigmore, *The History of the Hearsay Rule*, 17 Harv L Rev 437, 438 – 439 (1904).

[15] In *Richardson v. Perales* 402 U.S. 389 (1971), the United States Supreme Court allowed the use of uncorroborated hearsay evidence (i.e., written medical reports and evaluations submitted by physicians) to satisfy the substantial evidence requirement in an administrative proceedings. In so doing, it gave sufficient leeway to the administrative agencies to determine what constitutes 'substantial evidence,' and to accord due weight on the reliability and probative value of hearsay evidence. See the *Use of Hearsay Evidence and the "Substantial Evidence" Standard*, 1972 Duke Law Journal 174-182 (1972). Available at: http://scholarship.law.duke.edu/dlj/vol21/iss1/8.

See also John L. Gedid, *Hearsay Evidence in Administrative Proceedings – Pro and Con Views on the "Legal Residuum" Rule: the "Legal Residuum" Rule should be retained in Pennsylvania because of its Function to Insure Fundamental Fairness and Due Process*, 75 PA Bar Assn. Quarterly 7 (2004).

hearsay evidence when hearing ***officers are equipped with training and experience*** to gauge the reliability, value and relevance of the evidence presented before them. (Interestingly in many cases, the admission of hearsay evidence is made even if the administrative proceedings do not necessarily require cross-examination of witnesses.) As in the U.S., and for the same reasons, England likewise eventually allowed the admission of hearsay evidence in civil actions,[16] after it slowly departed from civil juries beginning in 1854.[17]

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[16] By statute, England made firsthand hearsay admissible in civil trials in 1968, abolished the rule entirely for civil cases in 1997, and in 2003 created a broad exception in criminal cases for firsthand hearsay from declarants unavailable to testify at trial. David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 Sup. Ct. Rev. 1,10 (2009).

See also the discussion on the modernization of civil evidence in England, in NEIL ANDREWS, THE THREE PATHS OF JUSTICE: COURT PROCEEDINGS, ARBITRATION, AND MEDIATION IN ENGLAND (IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE, VOL. 10) 105 – 106 (2011):

> 3.94 There has been much 'modernising' of civil evidence during the last few decades. The impetus for these reforms has been the civil jury's virtual disappearance in modern English practice. And so various 'exclusionary rules', designed to protect the civil jury against 'potentially unreliable' material, have been removed or modified.
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> 3.95 These developments are consistent with a perceived global trend towards 'free evaluation; of evidence. American Law Institute / UNIDROIT's *Principles of Transantional Civil Procedure* has recognised this concept. These English evidential changes will now be listed. The English 'hearsay rule' used to provide a barrier to admitting relevant evidence. This rule concerned second-hand or remoter reports of oral statements (for example, if the defendant withsed to adduce evidence, through one of his witnesses, who proposed to state that the 'claimant told me that his wife had said, "let's concoct a claim against these people""), The hearsay rule also concerned documents composed out-of-court. But there has now been a fundamental change. Since 1995, statute has allowed a party to use out-of-court oral statements, and documents, as evidence: 'In civil proceedings evidence shall not be excluded on the ground that it is hearsay', that is, 'a statement made otherwise than by a person giving oral evidence.' Instead, the court must to assess the 'weight' to be attached to the hearsay evidence. The judge is here guided by various considerations. x x x (Citations omitted)

[17] Section 1 of the Chancery Amendment Act of 1854 provides:

> The Parties to any Cause may, by Consent in Writing, signed by them or their Attorneys, as the Case may be, leave the Decision of any Issue of Fact to the Court, provided that the Court, upon a Rule to shoe Cause, or a Judge on Summons, shall, in their or his Discretion, think fit to allow such Trial; or provided the Judges of the Superior Courts of Law at Westminster shall, in pursuance of the Power herein-after given to them, make any General Rule of Order dispensing with such Allowance, either in all Cases or in any particular Class or Classes of Cases to be defined in such Rule or Order; and such Issue of Fact may thereupon be tried and determined, and Damages assessed where necessary, in open Court, either in Term or Vacation, by any Judge who might otherwise have presided at the Trial thereof by jury, either with or without the Assistance of any other Judge or Judges of the same Court, or included in the same Commission at the Assizes; and the Verdict of such Judge or Judges shall be of the same Effect as the Verdict of a Jury, save that it shall not be questioned upon the Ground of being against the Weight of Evidence; and the Proceedings upon and after such Trial, as to the Power of the Court of Judge, the Evidence, and otherwise, shall be the same as in the Case of Trial by Jury.

See also Sally Lloyd-Bostock and Cheryl Thomas's discussion on the English jury in civil cases, *viz*:

> The frequency of civil jury trials steadily declined in England and Wales from the middle of the nineteenth century, when judges were given the right to refuse trial by jury. Today, less than one percent of civil trials are jury trials. The Supreme Court Act

In the Philippines, we never had the jury system so that the actual and practical reason for the exclusion of hearsay testimony was, for the most part, lost to us. Our heads, however, need not forever be buried in the sands of inherited rules as our system of justice has come of age and has gathered enough experience for a re-examination of the rules that work or do not work for us.

To be sure, I do not recommend an outright abandonment of our rule on hearsay, but I submit that it is high time that ***we re-examine its strict application in administrative proceedings, particularly in disciplinary proceedings of judges and justices where bribery charges are involved***.

Three reasons compel me to make this proposal:

First, disciplinary proceedings of judges, as earlier discussed, involve an administrative proceeding before an investigating judge or justice who determines, after an investigation, whether the accusations made against the respondent judge are true, and thereafter recommends the appropriate remedy or penalty.

In this light, due respect should be given the investigating judge or justice's evaluations of the credibility of the witnesses, and the reliability of the pieces of information that they attest to. Unlike lay jurors, the investigating judge or justice has had years of experience in hearing and evaluating the testimony of witnesses and their demeanor in delivering their testimonies. The risk of overvaluing the import of hearsay evidence is thus minimized by the training and expertise of our investigating judges and justices.

Second, the strict application of the hearsay rule, in effect, has shielded erring judges and justices from facing the consequences of their corrupt acts. As I earlier noted, the nature of a bribery case necessarily involves secrecy between the corruptor and the corruptee; thus, bribery rarely, if at all, surfaces when the transaction goes as planned.

Would we have to wait for betrayal, or for ill-relations between the two parties, so that we can find a witness with personal knowledge of the bribery transaction?

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gives a qualified right to trial by jury in only four types of civil case: libel and slander, fraud, malicious prosecution, and false imprisonment. Even in these cases, the right can be denied where the court is of the opinion thay the trial requires "prolonged examination of documents or accounts, or any scientific or local investigation which cannot be conveniently made with a jury." Sally Lloyd-Bostock and Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 Law and Contemporary Problems 9, 13 (1999).

Should this Court simply suffer in silence while practitioners glibly claim that the judiciary is corrupt and at the same time hide behind the hearsay rule when they are held to account for their statements?

Third, the unnecessarily strict application of hearsay in administrative proceedings of judges has crippled this Court's capability to discipline its ranks. An examination of bribery cases involving judges show our extreme wariness in declaring that a judge had in fact been bribed, often using the hearsay rule to conclude that insufficiency of evidence prevents us from finding the judge liable for bribery. We would, however, still penalize these judges and dismiss them from office because of acts constituting gross misconduct.

I cannot help but think that we so acted because, at the back of our minds, we might have believed that the respondent judge had indeed been guilty of bribery, but our over-attachment to the hearsay rule compelled us to shy away from this reason to support our conclusion. Hence, we try to find other ways to penalize the erring judge or justice.[18]

While this indirect approach may ultimately arrive at the desired goal of penalizing erring judges and removing the corrupt from our roster, we should realize that ***this approach surrenders the strong signal that a finding of guilt for bribery makes***.

It must not be lost on us that we send out a message to the public, to the members of the judiciary, and to the members of the bar, every time we decide a case involving the discipline of judges: we broadcast, by our actions, that we do not tolerate the acts for which we found the erring judge guilty. This message is lost when we penalize judges and justices for gross misconduct other than bribery, when bribery was the real root cause for the disciplinary action.

I believe that the time has come for this Court to start calling a spade a spade, and make the conclusion that bribery had taken place if and when the circumstances sufficiently prove its occurrence. In making this conclusion, we should not be unduly hindered by technical rules of evidence, including hearsay, as we have the resources and experience to interpret and evaluate the evidence before us and the information it conveys.

We must not likewise get lost as we wander in our search for the proper degree of supporting evidence in administrative proceedings. This quantum of evidence should be substantial evidence because this standard provides the necessary balance and flexibility in determining the truth behind the accusations against a respondent judge, without sacrificing the

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[18] See for instance, *Gacad v. Judge Clapis* (A.M. No. RTJ-10-2257, July 17, 2012, 676 SCRA 534), *Verginesa-Suarez v. Judge Dilag* (A.M. No. RTJ-06-2014, March 04, 2009, 580 SCRA 491), and *Kaw v. Judge Osorio* (469 Phil. 896 [2004]).

necessary fairness that due process accords him and without sacrificing what is due to the institution we serve and the Filipino people.

2) The probative value of hearsay evidence in substantial evidence

The admission of hearsay evidence does not necessarily translate into belief in the information it provides, hook, line and sinker. To satisfy the substantial evidence requirement for administrative cases, hearsay evidence should necessarily be supplemented, and corroborated by other evidence that are not hearsay.

We are not completely without experience in admitting and giving due probative value to hearsay testimony. Note, in this regard, our experience in administrative proceedings on the ***writ of amparo***, as well as the evaluation of hearsay evidence we do in ***child abuse cases.***

In both, we give due regard to information otherwise inadmissible because of the hearsay rule, without giving up the fairness and rule of reason required by the due process clause. Note too, that in both instances, a compelling need exists to relax the exclusionary rule of hearsay evidence[19] – a necessity that is also present in disciplinary proceedings against judges.

In giving due credence to hearsay evidence, we said in the case of *Razon, et. al. v. Tagitis*:[20]

> The fair and proper rule, to our mind, is to ***consider all the pieces of evidence adduced in their totality, and to consider any evidence otherwise inadmissible under our usual rules to be admissible if it is consistent with the admissible evidence adduced***. In other words, we reduce our rules to the most basic test of reason – i.e., to the relevance of the evidence to the issue at hand and its consistency with all other pieces of adduced evidence. Thus, **even hearsay evidence can be admitted if it satisfies this basic minimum test.**[21] (Emphasis supplied)

If this approach were to be applied to the disciplinary proceedings of judges, I submit that all the evidence relating to or tending to support the underlying act of bribery – regardless of their hearsay nature - can and

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[19] The case of *Razon, et. al. v. Tagitis* (G.R. No. 182498, December 3, 2009, 606 SCRA 598) involves the enforced disappearance of Engineer Morced N. Tagitis, a consultant for the World Bank and the Senior Honorary Counselor for the Islamic Development Bank (IDB) Scholarship Programme. In *Tagitis*, we noted (citing a landmark case by the Inter-American Court of Human Rights) that the deliberate use of the State's power to destroy pertinent evidence is inherent to the practice of enforced disappearance. Thus, there is a strong need for flexibility under the unique circumstances that enforced disappearance cases pose to the courts; to have an effective remedy, the standard of evidence must be responsive to the evidentiary difficulties faced.

Accordingly, we allowed the admission of hearsay testimony, over the objections of the public officers concerned, and evaluated it along with its consistency with the totality of all the pieces of evidence adduced.

[20] Id.

[21] Id. at 692.

should be examined. If all the acts alleged are substantially proven to have been committed, and they collectively point to the commission of bribery although not to the level of proof beyond reasonable doubt, then the Court should be well within its rights to find the respondent liable for acts amounting to gross misconduct based on bribery.

In assessing hearsay evidence, I submit that we consider the following factors:

(1) The credibility of the witness, and possible motives or relationship with the interested parties that could taint the reliability of his testimony;

(2) The availability of the declarant to testify in person before the investigating judge or justice as well as his or her general character;

(3) The timing of the statement and the relationship between the declarant and the witness;

(4) Whether the information conveyed by the hearsay evidence had been substantially corroborated in its material points; and

(5) The circumstances surrounding the statement, particularly those pointing to the declarant's misrepresentation about the respondent's involvement.

III. The totality of evidence shows that Justice Ong committed bribery

Based on the above factors, I am convinced and hereby ask the Court to join me in the conclusion that the hearsay evidence provided by Luy – specifically, that Justice Ong was Napoles's contactman in the Sandiganbayan, and that the latter paid him a bribe – should be admitted and given its proper weight when considered alongside other pieces of evidence.

First, the investigating justice found Luy and Sula to be credible and reliable witnesses whose testimonies even withstood the intense public scrutiny of Senate committee hearings. No evidence has ever been shown that they fabricated their statements about Justice Ong, nor that they harbored ulterior or illegal motives in adducing evidence against Justice Ong.

Second, Napoles, the declarant of the damning statements about Ong, could not reasonably be made available to testify against Justice Ong, as she would be testifying against her own interest. As I earlier explained, testifying against Justice Ong would amount to the admission by Napoles

that she had committed the crime of corruption of a public officer, without any possibility of evading prison sentence by becoming a state witness.

Third, Napoles's statements regarding Justice Ong's assistance in the Kevlar Helmet case, her payment to Justice Ong, as well as her instructions to give checks to Justice Ong, were all made in the course of Luy's performance as her employee; they were made in confidence and in the course of instructing Luy on how to better undertake the tasks she had asked him to perform.

In particular, Napoles's statement that he paid Justice Ong a certain amount was made in reference to ***a ledger she kept of her expenses on the Kevlar Helmet case***, information that she told Luy in the course of the latter's employment.

Fourth, the information derived from the hearsay evidence – that Justice Ong aided Napoles in the Kevlar Helmet case and that Napoles paid him for this assistance – constitutes a reasonable explanation for Justice Ong's visits to Napoles's office during which he was given a financial accommodation by Napoles; Justice Ong's picture with Napoles during a social function; and the highly questionable grant of probation of Napoles' relatives by Justice Ong – ***pieces of evidence that are not based on hearsay***.

Further, these pieces of information are corroborated by the testimony of another Napoles employee, Sula, who received information from Napoles in the course of their employer-employee relationship. In her testimony, Sula categorically attested that Napoles identified Justice Ong as her "contactman" in the Sandiganbayan several times; Napoles did this before Sula and before other Napoles employees.

Fifth, Napoles had no reason to lie or misrepresent that Justice Ong assisted her in the Kevlar Helmet case at the time she made the disclosure to Luy. At that time, Napoles and Luy's personal and working relationships were close, as they did not only stand as employer and employee to one another; they were members of the same family as they were second cousins. Napoles also disclosed the information to Luy in the course of the latter's performance of his duties as her employee. There could possibly be no benefit to Napoles in fabricating the fact of Justice Ong's assistance in the Kevlar Helmet case where she had been acquitted.

Admitting Luy's hearsay statement regarding Justice Ong's assistance to Napoles in the Kevlar Helmet case and giving it its proper weight would – when considered with the rest of the evidence untainted with issues of admissibility – lead to the reasonable conclusion that Justice Ong had committed gross misconduct through acts amounting to bribery.

As I earlier emphasized, Justice Ong's assistance to Napoles, as well as his receipt of money from her, reasonably explain Justice Ong's action in the grant of probation to Napoles's relatives, the ledger of "Sandiganbayan expenses" that Luy encountered in the course of his employment, as well as Justice Ong's subsequent visits to Napoles's office where he was given an advantageous financial accommodation. It additionally explains why Napoles's employees believed that Justice Ong indeed was her contact man at the Sandiganbayan.

Taken together, these pieces of evidence provide a cohesive narrative revealing that Napoles gave Justice Ong money in exchange for his assistance in the Kevlar Helmet case, a case that the Fourth Division of the Sandiganbayan (whose Chairman is Justice Ong) decided.

The act which the public officer committed in exchange for the gift he received need not necessarily be a crime – it may consist of committing an unjust act, or refraining from doing something that is his official duty to do, so long as it is connected with the performance of his official duties. Assisting a litigant towards a successful avoidance of a criminal sentence or imprisonment involves such an unjust act.

Worthy of note too, that specifying the act which the repondent judge committed to doing in exchange for the gift he accepted is immaterial for purposes of determining whether he committed gross misconduct arising from acts amounting to bribery.

Bribery, as defined in the Revised Penal Code, has two forms: ***first***, ***direct bribery***, which may be committed by accepting a gift in exchange for the public official's *(1)* performance of a crime, *(2)* performance of an unjust act and / or *(3)* refraining from performing his duty.[22] These acts must be performed in the course of the public official's duties in government.

The ***second*** form involves ***indirect bribery*** – which involves accepting gifts given by virtue of the public official's position in government, often with the view of exchanging future favors.[23] Acts which are neither illegal nor unjust, but which are performed in the course of the public official's duties and in exchange of the gift or favor given to the public official, falls under indirect bribery.[24]

In these lights, the critical facts necessary to prove bribery, for purposes of determining gross misconduct, are *(1)* the respondent judge's act of the receiving a gift or favor, *(2)* his knowledge that this gift was given

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22 Article 210, REVISED PENAL CODE.

23 Article 211, REVISED PENAL CODE.

24 *People v. Pamplona*, CA, 51 OG 4116, as cited in LUIS B. REYES, THE REVISED PENAL CODE BOOK TWO, Seventeenth Ed. 393 – 394 (2008).

by virtue of his office, and *(3)* the connection between the bribe-giver's interest with the bribe-receiver's office.

In other words, what is crucial in gross misconduct where bribery is the underlying act is the acceptance of a gift or favor, knowing that the gift or favor is given because of one's position in the judiciary – *i.e.*, that it was given to persuade the respondent judge or justice to perform an act for the giver. This act may be criminal, unjust, or may even be in line with the respondent judge or justice's duties.

Notably, the New Code of Judicial Conduct asks members of the judiciary not only to establish judicial independence and integrity, but to maintain the appearance of these judicial attributes. Judges and justices are given sufficient leeway and discretion in the application of the law and evaluation of the pieces of evidence before him or her, and it is crucial that their exercise of discretion is never compromised. Particularly, their actions cannot be tainted with ulterior motives that our criminal laws cover, such as payment from one of the litigants, regardless of whether such litigant's cause was in line with the law or not.

In these lights, the acceptance of a gift or valuable favor from a litigant in one's court, especially when such litigant had just been acquitted and still had relatives with pending cases in the division one presides over or is a member, already constitutes the underlying act of bribery for purposes of a gross misconduct charge. It involves indirect bribery at the very least because the gift or favor was accepted knowing full well that it was given because of one's position in the judiciary, not because of any particular private relationship that would justify modest gifts. In such case, the gift would necessary be in exchange for or would be looking up to a favorable act in favor of the giver.

Applying these principles in these lights, I cannot accept Justice Ong's attempt to hide behind the Sandiganbayan division's collegial decision-making process to exonerate himself of the charges against him. That he is just one of five (5) justices in his division is no excuse when it is considered that he speaks for or against the merits of cases pending with his Division. That Justice Ong himself might not have actually drafted the decision in the Kevlar Helmet case does not automatically free him from liability for the acts imputed to and proven against him, as the critical point is his participation in the case.

Justice Ong acted, in his official capacity as presiding justice and member of the Sandiganbayan Fourth Division, on the decision and motion for reconsideration of the Kevlar Helmet cases. He was identified, by several people who had no cause to implicate him, as Napoles's contactman in the Sandiganbayan. He even went to Napoles's office twice before signing probation orders for Napoles's relatives. During one of those visits, Luy

prepared checks to be given to him as an accommodation given to him by Napoles. At that time, Napoles had just been acquitted before Justice Ong's Division, while the cases of Napoles' relatives still stood to be acted upon by the Division on the probation aspects. These acts, to my mind, more than reasonably establish his gross misconduct based on the underlying acts of bribery (indirect bribery, at the very least).

IV. Assuming arguendo that the hearsay evidence against Justice Ong could not be admitted as evidence, the totality of admissible evidence shows that Justice Ong committed gross misconduct by assisting, claiming to have assisted, or fostering the belief that he assisted Napoles in the Kevlar case.

A. Assessment of Luy and Sula's testimonies

Even with the use of our traditional approach of excluding hearsay evidence in administrative proceedings, I submit that the presented ***evidence that are not hearsay*** sufficiently prove that Justice Ong committed acts amounting to gross misconduct. His acts after the promulgation of the Kevlar Helmet decision show that he had assisted, claimed to have assisted, or at the very least fostered, the belief that he assisted Napoles in the Kevlar Helmet case.

A closer examination of Luy and Sula's testimonies show that they are not entirely without any probative value. A statement made by a witness may, at the same time, be both hearsay and non-hearsay, depending on what it intends to prove.

If the testimony is used to prove the veracity of a statement that the witness had no personal knowledge of, then the statement is undoubtedly hearsay with respect to the subject of the statement. But if the testimony is used to prove matters other than the veracity of the statement itself[25] and of which the witness has actual knowledge, then the statement is admissible and may be given probative value. This is the independently relevant type of evidence.

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[25] Moreover, the ban on hearsay evidence does not cover independently relevant statements. These are statements which are relevant independently of whether they are true or not. They belong to two (2) classes: (1) those statements which are the very facts in issue, and (2) those statements which are circumstantial evidence of the facts in issue. The second class includes the following:

> a. Statement of a person showing his state of mind, that is, his mental condition, knowledge, belief, intention, ill will and other emotions;
> b. Statements of a person which show his physical condition, as illness and the like;
> c. Statements of a person from which an inference may be made as to the state of mind of another, that is, the knowledge, belief, motive, good or bad faith, etc. of the latter;
> d. Statements which may identify the date, place and person in question; and
> e. Statements showing the lack of credibility of a witness. *Estrada v. Desierto*, 408 Phil 194, 227 (2001).

In these lights, evidence that may be hearsay in proving the fact directly in issue (bribery), may be used to prove the surrounding facts, related to the fact directly in issue, that a witness has personal knowledge of, such as the utterance of another person in front of witnesses, *albeit* the veracity of the uttered statement itself cannot be considered to be directly established.[26]

Further, it may also be used to show the other person's state of mind, physical and mental condition, knowledge, belief, intention, and other emotions.[27] The latter, notably, coincides with Rule 130, Section 48 of the Rules of Court, that allows a witness to present his opinion on the emotion, behavior, condition, or appearance of a person.

Admittedly, the purpose for which a piece of evidence is offered must be manifested to the court at the time the evidence is offered and presented.[28] This aspect, however, is where the leniency of administrative cases on the technical rules of evidence comes in. Thus, although no distinction had been made as to the purpose of the testimonies, probative value may be given to and separated from their hearsay aspects, particularly to the extent that a statement is independently relevant to the issue at hand.

Applied to the present case, we can - without refusing to apply the hearsay rule – give credence to Luy's statement insofar as it proves that *(1)* Napoles plainly stated that she had been talking to Justice Ong while the Kevlar Helmet case was pending in the Sandiganbayan and that she gave the latter money to assist her, *(2)* that her demeanor at the time she uttered this statement was calm and confident, and *(3)* that during the conversation when Napoles uttered these statements, she appeared confident that she would be acquitted in the Kevlar Helmet case.

In other words, while we do not use Luy and Sula's statements to establish that Napoles had been telling the truth regarding Justice Ong's involvement in acquitting her in the Kevlar Helmet case, we still can accept that she uttered these statements to Luy, a person closely related to her and whose work involved confidential matters entrusted only to a trusted associate or employee.

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[26] *Miro v. Mendoza*, G.R. Nos. 172532 172544-45, November 20, 2013.

[27] See *US v. Enriquez*, 1 Phil. 241, 243–244 (1902).

[28] In particular, Sections 34 and 35 of Rule 132 of the Rules of Court provide:

> Section 34. Offer of evidence. — The court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified. (35)
>
> Section 35. When to make offer. — As regards the testimony of a witness, the offer must be made at the time the witness is called to testify.
>
> Documentary and object evidence shall be offered after the presentation of a party's testimonial evidence. Such offer shall be done orally unless allowed by the court to be done in writing. (n)

To reiterate, Luy was not merely an employee of Napoles; he is also her second cousin, and has assisted her in her operations (now being questioned for its linkages in the illegal use of the Priority Development Assistance Fund) for a considerable length of time. We can also accept Luy's impressions of Napoles' state of mind and emotions at the time she uttered these statements – *i.e.*, a person confident that she would be acquitted. Significantly, she was in fact acquitted. From the time of this acquittal, the proven acts of meetings, socials and financial accommodation followed.

With respect to Luy's testimony on the financial accommodation that Napoles gave Justice Ong, we can derive from his statements the following non-hearsay aspects:

(1) Justice Ong visited Napoles' office twice;

(2) During one of those visits, Napoles received a check worth Php 25.5 million;

(3) That in exchange for the Php25.5 million check, Luy was asked to prepare 11 checks to be issued by Napoles with Justice Ong as the payee;

(4) That these checks contain an aggregate amount of Php25.5 million plus 13% interest; and

(5) That before Luy placed Justice Ong's name in the checks, Napoles went to the room where Justice Ong had been staying, and thereafter instructed Luy to make the checks payable to cash.

Luy's statements regarding these events are not hearsay, as he was involved in preparing these checks. His testimony regarding Justice Ong's presence in Napoles' office at the time he was preparing these checks also cannot also be considered as hearsay. That these checks, however, had been issued to facilitate Justice Ong's participation in the AFPSLAI (that then gave 13% interest to its depositors) cannot be taken as evidence because Luy had not been personally privy to the transaction facilitated by the checks he prepared.

With respect to Sula's testimony, we can give it credit to the extent that she heard Napoles say that Justice Ong would help her in the Kevlar Helmet case, not just in front of Sula, but in front as well of other Napoles employees.

Further, we can also accept Sula's testimony that Justice Ong had visited Napoles' office twice in 2012. We cannot, however, give credit to Sula's statements regarding Justice Ong's possible involvement in helping

Napoles with the cases filed against her in the pork barrel scam, as these are speculative and unproven at this point and are not covered by our present case.

B. The facts established by Luy and Sula's testimonies, when considered with the totality of the pieces of evidence, sufficiently establish that Justice Ong assisted or claimed to have assisted Napoles in the Kevlar Helmet case, or at the very least allowed Napoles to believe in such assistance.

After excluding the aspects of Luy and Sula's testimonies that are hearsay, I believe that the following facts can be considered sufficiently established:

(1) That Luy and Sula both heard Napoles claim that Justice Ong was assisting her in the Kevlar Helmet case;

(2) That Sula witnessed Napoles make the same claim before the latter's other employees;

(3) That Napoles's demeanor in making this claim was of someone who knew that she would be acquitted prior to the release of decision in the Kevlar Helmet case;

(4) That indeed Napoles was acquitted in the Kevlar Helmet case;

(5) That Justice Ong visited Napoles's office twice in 2012;

(6) That during one of those visits, Luy assisted Napoles in preparing 11 checks for Justice Ong, in exchange for the Php25.5 million check that Napoles allegedly received during Justice Ong's visit.

These factual conclusions from Luy's and Sula's testimonies, when taken together with other pieces of evidence and circumstances surrounding the case, sufficiently establish, by substantial evidence, that Justice Ong assisted, claimed to have assisted, or fostered the belief that he assisted Napoles in the Kevlar Helmet case. They also establish that Justice Ong afterwards received a favor from Napoles, as he exchanged his Php25.5 million check with 11 checks totaling to Php25.5 million with 13% interest.

Whether Justice Ong's check for Php25.5 million was funded, or had been encashed by Napoles, unfortunately, are unanswered questions from the evidence of the present case. ***If that check had not been funded***, then Napoles effectively gave Justice Ong Php25.5 million, plus 13% of this sum, under the guise of the transaction they entered. On the other hand, ***if that check had indeed been funded***, then a very interesting document to see would be Justice Ong's Statement of Assets and Liabilities, his ***SALN***.

What, if I may ask, was worth this much to Napoles at that time?

The totality of the pieces of evidence presented before the Court yield the following factual conclusions:

The two witnesses, both of whom were found credible by the investigating justice, testified that Napoles had been confident of her acquittal in the Kevlar Helmet case through Justice Ong's assistance. This confidence, according to Luy, was exhibited by Napoles even prior to the Sandiganbayan's decision on the Kevlar Helmet case.

Napoles had indeed been acquitted by the Fourth Division that Justice Ong then chaired (and still chairs). Meanwhile, her relatives, who had been her co-accused, were found guilty of falsification of public documents but never spent a minute in jail due to Justice Ong's direct action on this aspect of the Kevlar Helmet case.

We are aware though that the probation order came in the early part of 2013; *i.e.*, after Justice Ong's established interactions with Napoles in 2012. ***Napoles and Justice Ong were photographed together at a social event in 2012***. **During the same year, Justice Ong visited Napoles's office twice**.

Further, during one of those visits, Napoles allegedly received a check worth Php25.5 million, and initially intended to issue 11 checks reflecting Php25.5 million plus 13% interest with Justice Ong's name as payee. These checks, however, were ultimately made payable to cash.

A discordant note in all these is Justice Ong's claim that he visited Napoles to ask for her assistance in accessing the robe of the Black Nazarene in Quiapo. This claim, however, does not need to negate the credit of Luy's testimony that he prepared the checks as both can be accomplished in one visit. (Or, there might have been other visits.) Others also attested to Justice Ong's visits to Napoles in 2012 and, significantly, other than his lame reference to the deity and unabashed play for sympathy through religion, Justice Ong never presented any evidence to disprove these points.

I find it too much of a coincidence that the Sandiganbayan justice that Napoles had been boasting about as the one who would help her in the Kevlar Helmet case, is the same justice that she socially mingled with (as shown by their photograph in a party), and the same justice that had twice personally visited her in her office in 2012. Justice Ong, too, is apparently one justice who could issue a check for Php25.5 million.

The more logical explanation for all these events, to my mind, is that Justice Ong and Napoles have been more than passing acquaintances long before 2012. Justice Ong had been visiting Napoles at her office, and had

been present in at least one party where he was photographed with Napoles and no less than a senator of the realm. These suggest relationships at both the official and social levels and should be read with the direct testimony of what Napoles told her employees about her acquittal and the actual fact of acquittal.

Additionally, Ong had transacted with Napoles to the tune of Php25.5 million, a fact also directly testified to by Luy.

I submit that the confluence of these facts and events cannot but lead a reasonable mind to believe that respondent Justice Ong, at the very least, assisted or, to be exact, extended favors to Napoles and her relatives in the Kevlar Helmet case.

Assisting or claiming to have assisted a litigant in a case pending or decided by the court he sits in, or allowing the belief that he assisted in the said case violate several canons in the New Code of Judicial Conduct pertaining to integrity and impartiality. **Canon 2, Section 1**, requires judges to "ensure that not only is their conduct above reproach, but that it is perceived to be so in the view of a reasonable observer."

Further, **Canon 3, Section 2** instructs judges to "ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the Judiciary."

Judges must not only perform their duties with impartiality and integrity, but must ensure that these duties appear to have been executed with impartiality and integrity. Acts of assisting or making litigants believe that they have been assisted by the judge hearing his or her case not only reflects on his partiality and questionable integrity, it also reflects badly for the reputation of the judiciary, as it gives the impression that justice can be bought. **That the Sandiganbayan, the country's anti-graft court, is involved in a corrupt practice should not be without significance to the Court**.

Worse, as the accused in the present case is a member of the judiciary, it sends out the additional message that the one who dispenses justice can also be the same justice who sells it. Considering the grave repercussions of Justice Ong's violations, I find it logically incomprehensible to characterize his acts as less than a serious charge, and I find it morally reprehensible to impose a penalty less than dismissal with prejudice. The Court should likewise forward its record of this case to the Ombudsman for whatever action she may deem proper under the circumstances.

In sum, given the nature of the disciplinary proceedings for judges and the circumstances proven in the present case, **I strongly believe that Justice**

Ong is no longer worthy of being identified as one of our colleagues in the judiciary. We should, at the soonest possible time, act on this already-delayed case with dispatch, dismiss him as recommended by Justice Villarama, and thereby give the strongest signal to the country of our intent to purify our ranks.

As **one final point**, I also invite the Court's attention to the underlying case that ultimately gave rise to the accusation against Justice Ong. It was a case involving **Kevlar Helmets**.

To the uninitiated, **these are the helmets that the members of our military use as they fight battles for us who continue to live in the relative safety and comfort of our homes.** Any irregularity in these purchases means that less than the ideal exchange had been secured by the purchasing government in the transaction. It is painful to realize that this irregularity – proven by no less than the conviction of several officers of the military as well as Napoles' relatives – had been at the possible expense of the members of the military who risk their lives for the rest of our society. **If only for this, the Court should be aware, sensitive, and critical, in viewing the present case. Even if only to this extent, let us signal to the military how we feel for and appreciate them.**

ARTURO D. BRION
Associate Justice