

The Applicability of *Upjohn Company v. United States*  
in the Philippine Setting and Establishing the  
Parameters of the Attorney-Client Privilege

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# ATTORNEY-CLIENT PRIVILEGE

## I. INTRODUCTION

### A. *Fundamental Precepts*

Of the many relationships that permeate the interaction among men in society, few are as fiduciary and as prone to impropriety as that between a lawyer and his client. Indeed, the Supreme Court has gone so far as to state that “there is no other human relation which involves so delicate, exacting, and confidential a nature and character as that of attorney and client, which necessity and public interest so require.”<sup>1</sup> By its very nature, the relationship is highly personal.<sup>2</sup>

One of the key aspects of such a fiduciary relationship is the attorney-client privilege. In essence, the privilege protects from disclosure, subject to certain exceptions, the communications which pass in confidence between an attorney and his client in the course of the professional relationship.<sup>3</sup> The modern rationale for the privilege lies in the fact that legal disputes are best handled by lawyers when they are fully advised of all facts pertinent to the cases of their clients. The latter, in turn, will only disclose the necessary information if they can be sure that what is communicated shall not be revealed without their consent.<sup>4</sup> Like the attorney-client relationship within which it operates, the privilege is itself strictly personal.

### B. *Structure of the Inquiry*

Operating within the paradigm established by the aforementioned principles, this discourse shall delve *in seriatim* in the following discussions: First, the treatment of the doctrine on the attorney-client privilege in the case of *Upjohn Company v. United States*<sup>5</sup> shall be discussed. Second, it will be determined whether or not the *Upjohn* doctrine has found express or implicit recognition in this jurisdiction by virtue of statutes, judicial decisions, and the various provisions of the Rules of Court. Third, an analysis will be made of the seeming incongruence between the doctrine laid down in *Upjohn* and the well-entrenched principle in Philippine jurisprudence that the attorney-client privilege is strictly personal in nature. Lastly, proposals will be made on how to harmonize these two conflicting doctrines.

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1. *Regala v. Sandiganbayan*, 262 SCRA 124 (1996).
  2. *In re Sycip*, 92 SCRA 1 (1979).
  3. SPENCER A. GARD, *JONES ON EVIDENCE* 762 (6th ed. 1972) [hereinafter JONES].
  4. JOHN W. STRONG, *MCCORMICK ON EVIDENCE* 205 (3d ed. 1992).
  5. 449 U.S. 282 (1981).

II. *UPJOHN COMPANY V. UNITED STATES*: DEBUNKING THE CONTROL GROUP TEST

*A. Facts of the Case*

The Upjohn Company was an American corporation engaged in the manufacture of pharmaceutical products, which it sold in both domestic and international markets. Upjohn carried out an internal investigation to look into its auditors' reports that some of its overseas subsidiaries had paid bribes to officials of foreign governments. In connection with this, the company's lawyers prepared a questionnaire for some of its employees accompanied by a letter discussing recent disclosures that several American companies had made possibly illegal payments to foreign government officials, and emphasized that Upjohn's management needed full information concerning any such payments made by the corporation or its subsidiaries. The letter also indicated that Upjohn's Chairman had asked the company's General Counsel to conduct an investigation for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government. The company's managers received instructions that the inquiry was to be treated as highly confidential, and as such must not be discussed with anyone other than Upjohn employees who might be in a position to provide the information required in the course of the investigation.<sup>6</sup>

The corporation, in compliance with pertinent disclosure requirements, voluntarily submitted a preliminary report to the Securities and Exchange Commission. A copy of the report was simultaneously submitted to the US Internal Revenue Service (IRS), which immediately began an investigation to determine the tax liability. Upjohn provided the IRS investigating agents with a list of its employees who had been interviewed by Upjohn counsel, as well as employees who had responded to the questionnaire. The IRS subsequently issued a summons, demanding production of files pursuant to the investigation conducted under the supervision of Upjohn's general counsel, written questionnaires sent to managers of Upjohn's foreign affiliates, and memoranda and other notes of the interviews, whether conducted in the US or abroad, with officers and employees of the corporation.<sup>7</sup>

Upjohn refused to present the aforementioned documents, citing among others the attorney-client privilege. The Government sought enforcement of the summons in the United States District Court for the Western District of Michigan. The District Court held that the summons should be enforced. Upjohn appealed the District Court's decision to the Court of Appeals for

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6. *Id.* at 584, 589.

7. *Id.* at 590.

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the Sixth Circuit. The Appellate Court ruled that the privilege did not apply to communications by officers and agents who were not responsible for directing the corporation's actions in response to legal advice, as these communications were not to the "clients."<sup>8</sup> The Court of Appeals remanded the case to the District Court in order to determine which of the employees interviewed were within the "control group."

### *B. Decision of the Court*

On certiorari, the US Supreme Court upheld Upjohn's position. The High Court abandoned the control group test applied by the Court of Appeals for the Sixth Circuit.<sup>9</sup> The control group test limits the coverage of the attorney-client privilege to communications between corporation counsel and those employees "responsible for directing the company's actions in response to legal advice,"<sup>10</sup> i.e. only the top management of the corporation. The rationale of this test is that if the employee making the communication is in a position to control or take a substantial part in a decision regarding any action which the corporation may take upon the advice of the attorney, that employee in effect personifies the corporation when he makes his disclosure to the lawyer.<sup>11</sup>

In Upjohn, however, the Court ruled that the privilege is not limited to disclosures by and to the members of the control group of the corporation, as the previous doctrine stated, but extends to communications between the lawyer of a corporation and the latter's middle and lower ranking employees.

### *C. Ratio*

The Supreme Court held that expanding the coverage of the privilege to communications to and from middle and lower ranking employees to counsel is more consistent with the concept of the attorney-client privilege, which is to encourage clients to disclose all pertinent information to their lawyers.<sup>12</sup> The High Court stressed that in the corporate context, employees who fall outside the control group frequently possess the information needed by the corporation's lawyers. It stated:

Middle-level indeed lower-level employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the

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8. *Id.* at 591.

9. *Id.* at 590.

10. *Id.*

11. *Id.*

12. *Id.* at 592

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relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.<sup>13</sup>

The Court then highlighted the attorney's dilemma in the absence of a more expansive rule than the control test:

The attorney...is thus faced with a 'Hobson's choice'. If he interviews employees not having the very highest authority, their communications to him will not be privileged. If on the other hand, he interviews *only* those employees with the very highest authority, he may find it extremely difficult, if not impossible, to determine what happened.<sup>14</sup>

The Court laid down three requisites for the privilege to apply to communications between a lawyer and the lower and middle ranking employees of his corporate client. First, the communications must pertain to the corporate duties of the employee(s) concerned. Second, the employees interviewed by counsel must be aware that the communications are made for the purpose of providing legal advice to the corporation. Third, the corporation itself must consider the communications and the subject matter thereof as confidential. In the case at bar, all three requisites were present. The communications concerned matters within the scope of the employee's corporate duties. The employees themselves were aware that they were being questioned in order that the corporation could obtain legal advice, as reflected in the letter issued by the Chairman to Upjohn employees requesting full disclosure of all information by the latter. Also, the questionnaires were accompanied by a policy statement clearly indicating the legal implications of the investigation. Finally, pursuant to explicit instructions from the Chairman of the Board (of Upjohn), the communications were considered highly confidential, and were continuously treated as such by the company.

### III. THE HISTORY AND DEVELOPMENT OF THE PRIVILEGE

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."<sup>15</sup> The privilege is founded upon necessity in the interest and administration of justice, and is premised on the fact that persons having knowledge of the law and skilled in its practice can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.<sup>16</sup> The privilege recognizes that sound legal advice or advocacy serves public ends and is wholly

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13. *Id.*

14. *Id.*

15. *Id.* at 389 (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)).

16. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).

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dependent upon the lawyer being fully informed by the client of the facts of the case.<sup>17</sup>

The origin of the attorney-client privilege can be traced back to 16th Century England, during the reign of Queen Elizabeth I, when the practice of testimonial compulsion was developed.<sup>18</sup> It was during this time when the conflict between the attorney's duty to the courts and his duty to his client first arose.<sup>19</sup> Such conflict forced lawyers to choose between protecting the secrecy and confidentiality of the information of his client on the one hand, and revealing such damaging information in the interest of justice on the other. However, such conflict was settled in the late 1700's when the search for truth balanced with the policy of encouraging litigant's to consult lawyers for the better administration of justice.<sup>20</sup>

In 1958, the American Bar Association urged the Judicial Conference of the United States to consider the codification of the rules on evidence. This led to promulgation of the Federal Rules of Evidence by the Supreme Court on 20 November 1972, which was later on transmitted to Congress in 1973. However, the proposed rules, which identified several distinct privileges, were criticized by Congress for being too inconsistent, incoherent and incomplete. Hence, Congress deleted the proposed article on privileges and substituted in its stead, a single and general rule<sup>21</sup> which states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person,, government, State, or political subdivision thereof shall be determined in accordance with State law.<sup>22</sup>

In the Philippines, the privilege traces its origin from Section 383 of Act No. 190, also known as the Code of Civil Procedure which was enacted by the Philippine Commission of 7 August 1901. The rule was later on adopted

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17. *Upjohn*, 449 U.S. at 389.

18. Jeff Anderson, et al., *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 765 (1983).

19. *Id.*

20. *Id.*

21. *Developments in the Law – Privileged Communications*, 98 HARVARD L. REV. 1450 (1985).

22. FEDERAL RULES ON EVIDENCE, RULE 501 (1973).

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in Section 26(e) of Rule 123 of the old Rules of Court, and even later in Section 21 (b) of Rule 13 of the 1964 Rules of Court.<sup>23</sup> The 1964 Rules of Court was amended in 1988 and is now known as the Revised Rules of Court.

Rule 130, Section 24 (b) of the Revised Rules of Court states:

The following persons cannot testify as to matters learned in confidence in the following cases:

x x x

(b) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given therein in the course of, or with a view to, professional employment, nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of the client and his employer, concerning any fact the knowledge of which has been acquired in such capacity.<sup>24</sup>

While Rule 138, Section 20 (e) of the same Rules provide as one of the duties of an attorney:

(e) To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client, and to accept no compensation in connection with his client's business except from him or with his knowledge and approval.<sup>25</sup>

The application of the privilege in the Philippines was also influenced by the legal system of the United States. In fact, the whole system of legal ethics of the United States was adopted by the Philippine Bar Association. It adopted Canons 1 to 32 of the Canons of Professional Ethics of the American Bar Association in 1917, and Canons 33 to 47 of the same in 1946. In 1980, the Integrated Bar of the Philippines proposed a Code of Professional Responsibility which it submitted to the Supreme Court for approval. On 21 June 1998, the Code of Professional Responsibility was promulgated by the Supreme Court.<sup>26</sup>

The Code of Professional Responsibility provides:

CANON 21 - A lawyer shall preserve confidence and secrets of his client even after the attorney-client relationship is terminated.

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23. Francis Ed. Lim, *Client Identity: Is it Protected Information Under The Attorney-Client Privilege?*, 39 ATENEO L.J. 35 (1995).

24. REVISED RULES ON EVIDENCE, RULE 130, § 24 (b).

25. REVISED RULES OF COURT, RULE 130, § 24 (b).

26. RUBEN E. AGPALO, *COMMENTS ON THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE CODE OF JUDICIAL CONDUCT* 2 (2001).

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Rule 21.02 – A lawyer shall not reveal the confidence or secrets of his client except:

- a.) When authorized by the client after acquainting him of the consequences of the disclosure;
- b.) When required by law;
- c.) When necessary to collect his fees or to defend himself, his employees or associates or by judicial action.

Rule 21.01 – A lawyer shall not, to the disadvantage of his client, use information acquired in the course of employment, nor shall he use the same to his advantage or that of a third person, unless the client with full knowledge of the circumstances consents thereto.

Rule 21.03 – A lawyer shall not, without the written consent of his client, give information from his files to an outside agency seeking information for auditing, statistical, bookkeeping, accounting, data processing, or any similar purpose.

Rule 21.04 – A lawyer may disclose the affairs of a client of the firm to partners or associates thereof unless prohibited by the client.

Rule 21.05 – A lawyer shall adopt such measures as may be required to prevent those whose services are utilized by him, from disclosing or using confidences or secrets of the client.

Rule 21.06 – A lawyer shall avoid indiscreet conversation about a client's affairs even with members of his family.

Rule 21.07 – A lawyer shall not reveal that he has been consulted about a particular case except to avoid possible conflict of interest.<sup>27</sup>

Moreover, criminal sanctions are also provided by the Revised Penal Code for lawyers who violate the attorney-client privilege.

Article 209 of the Revised Penal Code provides:

In addition to the proper administrative action, the penalty of *prison correccional* in its minimum period, or a fine ranging from 200 to 1,000 pesos, or both, shall be imposed upon any attorney-at-law or solicitor (*procurador judicial*) who, by any malicious breach of professional duty or of inexcusable negligence or ignorance, shall prejudice his client, or reveal any of the secrets of the latter learned by him in his professional capacity.<sup>28</sup>

### IV. THE PRIVILEGE IN THE CONTEMPORARY PHILIPPINE CONTEXT

#### A. Law and Jurisprudence

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27. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 21.

28. An Act Revising the Penal Code and Other Penal Laws, Act no. 3135, art. 209.

The attorney-client privilege has been recognized in Philippine law and jurisprudence. Indeed, a great premium is placed upon the attorney's "maintaining inviolate the confidence, and at every peril to himself, to preserve the secrets of his client."<sup>29</sup> This obligation continues even after the termination of the professional relationship.<sup>30</sup> The prohibition against unwarranted disclosures covers oral communications made by clients, as well as any written records of the same.<sup>31</sup> Furthermore, an attorney must temper mention of a client's affairs even in informal discussions among friends and relatives.<sup>32</sup> So sacred is the veil of absolute confidence which envelops the relationship that it is placed on a plane higher than the need to discover the truth; hence the legal sanction for an attorney's refusal to testify as to the communications between himself and his client.<sup>33</sup> The instances when such a duty is lifted from the lawyer's shoulders are few and strictly construed against any mode of undue or unnecessary revelation. In cases where the seal is removed from the attorney's lips, there is usually some higher public policy or interest that calls for disclosure.<sup>34</sup>

Through all these precepts runs a common and unyielding thread: the attorney-client privilege, just like the relationship that provides the legal milieu within which it exists, is strictly personal in nature.<sup>35</sup> Hence, only the client or his duly authorized representative may invoke or waive the privilege and only the client and no other may derive benefit from the privilege.<sup>36</sup>

*B. Case in Point: Regala v. Sandiganbayan*

Instructive of the current status of the attorney-client privilege in the Philippine context is the case of *Regala v. Sandiganbayan*.<sup>37</sup> This arose from the complaint instituted by the Presidential Commission on Good Government (PCGG) before the Sandiganbayan against Eduardo M. Cojuangco Jr., as one of the principal defendants, for the recovery of alleged ill-gotten wealth amassed during the regime of former President Ferdinand

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29. REVISED RULES OF COURT, Rule 138, § 20 (1988).

30. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 21.

31. *Id.* Canon 21, Rule 21.03.

32. *Id.* Canon 21, Rule 21.06.

33. REVISED RULES ON EVIDENCE, Rule 130, § 24 (b).

34. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 21, Rule 21.01

35. *Daroy v. Legaspi*, 65 SCRA 304 (1975); *In re Sycip*, 92 SCRA 1; *Regala v. SANDIGANBAYAN*, 123 SCRA 138.

36. *JONES*, *supra* note 3, at 766.

37. 262 SCRA 123 (1996).

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Marcos. The alleged ill-gotten wealth included shares of stock in various corporations.<sup>38</sup>

Several senior partners<sup>39</sup> of the Angara, Abello, Concepcion, Regala and Cruz Law Offices (ACCRA) were included as defendants. The basis for their inclusion as such was the establishment by lawyers of ACCRA of various corporations and business organizations in which they acted as incorporators, nominees, or stockholders allegedly for the purpose of storing ill-gotten wealth.<sup>40</sup>

In the course of the proceedings, Raul S. Roco, one of the partner-defendants, was excluded from the Complaint based on the understanding with the PCGG that he would reveal the identity of the principal/s for whom he acted as a nominee/stockholder in the corporations involved in the case.<sup>41</sup>

When the rest of the ACCRA partners sought similar treatment, i.e., exclusion from the complaint, the PCGG laid down the following requisites to be met before they could be excluded:

- a. The ACCRA partners must disclose the identity of their clients.
- b. The ACCRA partners must submit to the PCGG the documents substantiating the attorney-client privilege between them and their principal/s.
- c. The ACCRA partners must submit the deeds of assignment they executed in favor of their clients covering their respective shareholdings.<sup>42</sup>

The Sandiganbayan eventually refused to exclude the partners from the complaint, on the ground that they had failed to comply with the condition stipulated by PCGG that they identify the client/s for whom they had acted in establishing the corporations.<sup>43</sup>

The ACCRA partners then raised the issue to the Supreme Court on certiorari, citing, among others, the attorney-client privilege, which, according to them, included the identity of their client.

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38. *Id.* at 127.

39. These partners were: Teodoro Regala, Edgardo J. Angara, Avelino V. Cruz, Jose C. Concepcion, Rogelio A. Vinluan, Victor P. Lazatin, Eduardo U. Escueta, Paraja G. Hayudini, and Raul S. Roco.

40. *Regala*, 262 SCRA, at 129.

41. *Id.*

42. *Id.* at 131.

43. *Id.* at 132.

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In resolving the issue in favor of the ACCRA partners, the Court undertook an analysis of the nature and scope of the attorney-client privilege. Emphasis was placed on the lawyer's fiduciary duty to the client, which is "of a very delicate, exacting, and confidential character, requiring a very high degree of fidelity and good faith that is required by reason of necessity and public interest."<sup>44</sup>

The Court then addressed the seminal question of whether or not the lawyer's fiduciary duty operated as a legal justification for the ACCRA partners' refusal to disclose their client's identity. In answering in the affirmative, the Supreme Court first laid down the general rule that, as a matter of public policy, a client's identity must not remain unknown. Hence, the attorney-client privilege does not cover the identity of the lawyer's client. The reasons for this are:

- 1.) The court has a right to know that there is a client who actually exists;
- 2.) The privilege begins only after the establishment of the attorney-client relationship. Hence, there can be no privilege without a client;
- 3.) The privilege, as a general rule, pertains to the subject matter of the relationship; and
- 4.) As a matter of due process, the opposing party must know who his adversary is, and not be left to fight blindly against an unknown opponent.<sup>45</sup>

Nonetheless, just like any other general rule, the non-inclusion of a client's identity in the privilege admits of certain exceptions, namely:

- 1.) When there is a strong possibility that revelation of the client's name would implicate the client in the very activity for which legal advice was sought;
- 2.) When disclosure would open the client to civil liability; and
- 3.) When disclosure of the client's identity would furnish the government with the only link to form the chain of testimony required to convict the client of a crime.<sup>46</sup>

According to the Supreme Court, the case at bar fell within at least two of the named exceptions. First, revelation of the client's name would establish the connection of the ACCRA partners' client with the very fact in issue in the case. No less than the PCGG established the link between the alleged criminal offense and the legal advice or service sought by the client,

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44. *Id.* at 138

45. *Id.* at 142.

46. *Id.* at 142-146.

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as seen in the requisites the agency laid down before the lawyers could be excluded from the case, i.e., disclosure of the client's identity, documents substantiating the attorney-client privilege and the deeds of assignment for the corporations. The conditions alone show that the client whose identity was sought did consult the ACCRA partners for legal advice.<sup>47</sup>

Second, disclosure of the client's name would provide the link for the government to establish its case against the client of the ACCRA partners. After all, what the PCGG sought was not just the client's identity, but various documents substantiating the attorney-client privilege, as well as the documents pertaining to the legal services performed by the lawyers – the very services which lead to the ACCRA partner's inclusion in the case. Submission of these would result in “exacting (from the lawyers) a link that would inevitably form the chain of testimony necessary to convict the client of a crime.”<sup>48</sup>

The rationale for the case at bar did not go unchallenged. Of particular interest is the dissenting opinion of now Chief Justice Davide.<sup>49</sup> According to the latter, the ACCRA partners had yet to show that they fell within any of the exceptions to the rule that a client's identity must not be kept a secret, and that the most opportune moment for them to establish such would be at trial, where the broader perspectives of the case could be fully ventilated.<sup>50</sup>

Nonetheless, the value of *Regala* lies in the fact that it further strengthens the sanctity of the attorney-client privilege by expanding the latter to include even the identity of the client when so appropriate. *Regala* best illustrates the current jurisprudential status of the privilege in the Philippine setting – the privilege continues to be interpreted in a manner consistent with its rationale, which is to encourage full disclosure by a client by minimizing the possibility of unwarranted disclosures, even if such can be achieved only by tipping the scales in favor of shielding the client's identity when necessary.

### V. AN ANALYSIS OF THE APPLICABILITY OF *UPJOHN* TO THE PHILIPPINE SETTING

While *Upjohn* may constitute sound public policy in the United States, in view of the fact that it takes into consideration the realities of legal counseling in the corporate environment, the decision brings to fore several fundamental questions regarding its applicability to the Philippine setting, as

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47. *Id.* at 148

48. *Id.* at 149.

49. *Id.* at 160.

50. *Id.* at 165.

well as the seeming incongruence between the expansion of the privilege and the well-settled rule that the latter is strictly personal in nature.

First, what, if any, is the rule in this jurisdiction regarding the attorney-client privilege between a lawyer and his corporate client?

Second, is there statutory or jurisprudential recognition, whether express or implied, of the Upjohn doctrine?

Third, is it possible to reconcile the Upjohn doctrine with current Philippine laws and jurisprudence? Or would a comprehensive statutory and jurisprudential application be best achieved if the control test, rather than the Upjohn doctrine, were to be applied to the Philippines?

*A. Current Status of Upjohn in the Philippine Setting*

To date, there is no Philippine Supreme Court decision establishing a definitive rule on the scope of the attorney-client privilege in the corporate setting. Neither is there an express statutory provision on the subject, as even the current Rules of Court do not touch on the matter.

A lawyer may represent either an individual or corporation as his client, as any person, whether natural or juridical, may employ an attorney in his professional capacity provided such person has the legal capacity to enter into contracts.<sup>51</sup> Furthermore, corporations may sue or be sued in their respective corporate names.<sup>52</sup>

The Corporation Code vests the exercise of corporate powers and conduct of corporate business in the corporation's board of directors or trustees.<sup>53</sup> That the members of the board occupy positions of trust,<sup>54</sup> having control and guidance of corporate affairs,<sup>55</sup> is beyond dispute. Hence, the general rule is that only the members of the board possess the authority to employ an attorney to represent the corporation.<sup>56</sup> This stems from the fact that the power to enter into contracts, being a corporate power, is exercised by the board and no other entity.<sup>57</sup> The corporation is, in such matters,

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51. AGPALO, *supra* note 26, at 142.

52. The Corporation of the Philippines [CORPORATION CODE], Batas Pambansa Blg. 68, § 36 (1980).

53. CORPORATION CODE, § 23.

54. *Prime White Cement v. IAC*, 220 SCRA 103, 110 (1993).

55. *Gokongwei v. SEC*, 89 SCRA 336 (1979).

56. *Republic v. Phil. Resources Dev. Corp.*, 102 Phil. 960 (1958).

57. *People's Aircargo and Warehousing Co. Inc. v. Court of Appeals*, 297 SCRA 170, 182 (1998).

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represented by its directors in accordance with the provisions of Section 23 of the Corporation Code.<sup>58</sup>

Be that as it may, the imposition of this duty on the corporation's directors is not an exclusive one. The board is authorized to create an executive committee, which may act on "such specific matters within the competence of the board, as may be delegated to it."<sup>59</sup> Such delegation may also be made to officials or contracted managers,<sup>60</sup> which may include the power to employ an attorney for the corporation,<sup>61</sup> thereby constituting corporate officers as agents of the corporation.<sup>62</sup> The main limitation on such a delegation, however, is that it must be for a specific purpose.<sup>63</sup>

Hence, while the attorney represents the corporation, his services are brought into play by the board of directors, or whomever the latter may delegate the task to, of engaging the attorney's services, and the lawyer deals with the corporation, for all intents and purposes, through the board of directors, by virtue of the powers vested in the latter by the Corporation Code.<sup>64</sup> After all, the corporation, being invisible and existent only in contemplation of law, can only act and contract through the aid and by means of individuals – the board of directors.<sup>65</sup>

Hence, under Philippine law, the attorney who is engaged by the board or the duly appointed agent of the corporation, deals with the board or agent, and communicates with the directors or the agent regarding the case. Indeed, the board stands both as the agent of the corporation, and its very personification in the commercial and legal world, practically standing as the principal for the exercise of corporate powers and affairs.<sup>66</sup>

Hence, that communications between the board of directors or agent and the attorney of the corporation are privileged is beyond cavil. To apply the privilege to communications between the two entities is well within the doctrine of the attorney-client privilege being personal in nature, for utterances made and received by the board or its duly authorized agent are

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58. *Ramirez v. Orientalist Co.*, 38 Phil. 634 (1918).

59. CORPORATION CODE, § 35.

60. *People's Aircargo and Warehousing Co. Inc. v. Court of Appeals*, 297 SCRA 170, 182 (1998).

61. *Vicente v. Germaldez*, 52 SCRA 210 (1973).

62. *ABS-CBN Broadcasting Corp. v. Court of Appeals*, 301 SCRA 572 (1999).

63. *Id.*

64. CORPORATION CODE, § 23.

65. HECTOR S. DE LEON, *THE CORPORATION CODE OF THE PHILIPPINES ANNOTATED* 216 (2002) [hereinafter DE LEON].

66. CESAR L. VILLANUEVA, *PHILIPPINE CORPORATION LAW* 280 (2001).

deemed to have been made and received by the lawyer's client – the corporation.

*B. Deriving the Applicable Doctrine from Philippine Jurisprudence*

It is submitted that the application of the control group test is a sound doctrine. The members of the board have the responsibility of formulating the broad policy of the corporation and directing the conduct of its business operations. Actual management and carrying out of the various details of business operations and corporate policy are delegated to the officers elected by it and over whom it exercises supervision.<sup>67</sup> The only ones deemed officers of a corporation are those who are given that character either by the Corporation Code or the corporation's charter or by-laws. The rest are considered merely as employees or subordinate officials.<sup>68</sup> Hence, the board of directors, or agents of the corporation duly authorized by the former, fall within the definition of "officers," at least for the purpose of applying the control test to communication between them and the corporation's counsel, in that they stand, at least as far as communications with corporate counsel are concerned, as the principal for corporate powers and affairs. They fall squarely within the class of officers, identified by the control group test, as the "senior management, guiding and integrating the several operations...said to possess an identity analogous to the corporation as a whole."<sup>69</sup>

Nonetheless, as pointed out earlier, the United States Supreme Court has since abandoned the control group test. In its place, the shroud of confidentiality has been expanded to cover communications by middle and lower ranking employees.

This brings to fore the question of whether such an expanded coverage is applicable to the Philippine setting, in view of the jurisprudential tenets on the nature of the relationship between an attorney and his corporate client previously discussed. To date, pertinent Philippine laws and jurisprudence on the matter are still consistent with the control group test. Unswerving is the rule that only members of the top echelon of management, or their agents duly authorized for the purpose, to the exclusion of all other members and employees of the corporation, are authorized to enter into contracts with third parties,<sup>70</sup> and this includes contracts for the rendition by an attorney of

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67. DE LEON, *supra* note 65, at 252.

68. *Id.*

69. *Upjohn*, 449 U.S. at 383.

70. *People's Aircargo*, 297 SCRA, at 182.

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legal services to the corporation.<sup>71</sup> It is precisely these corporate officers encompassed by the control group test.

In light of the fact that the corporate officers composing the “control group” are the only individuals within the corporation authorized to contract with third parties (including corporate counsel), they must, as a consequence, personify the corporation<sup>72</sup> in such transactions with third parties. Hence, the privilege undeniably covers the communications between corporate counsel and upper echelon management by virtue of the latter’s personification of the corporation in such transactions.

But what of the *Upjohn* doctrine? The answer to this requires a brief exposition on the status of a corporate employee in the Philippine legal setting. Well settled is the rule that the only officers of a corporation are those who are given that character either by the Corporation Code or the corporation’s charter or by laws;<sup>73</sup> the rest are considered merely as employees or subordinate officials.<sup>74</sup> It has been held:

One distinction between officers and...employees of a corporation lies in the manner of their creation. An Office is created usually by the charter or by-laws of the corporation, while an employment is created usually by the officers. A further distinction may thus be drawn between an officer and an employee of a private corporation in that the latter is subordinate to the officers and under their control and direction... It is clear that the two terms...are by no means interchangeable. <sup>75</sup>

Since non-officers of the corporation, i.e. those whose positions are not created by law, or the articles of incorporation or by-laws of the corporation, are subordinate – always in contemplation of law and usually in practice – to officers, it then follows that such non-officers, regardless of the nomenclature given their position or title, may perform corporate functions only under the control and supervision of the corporation’s officers. Hence, non-officers may not enter into contracts with third parties on behalf of the corporation, including engaging the services of counsel, except under the direction of corporate officers where specific tasks are actually delegated to them.<sup>76</sup> Such delegation, however, transforms the employee into an agent of the corporation.<sup>77</sup> In such a case, the non-officer sheds his role as an outsider to the control group, and becomes, at least for purposes of the attorney-client

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71. Republic v. Phil. Resources Dev. Corp., 102 Phil. 960 (1958).

72. VILLANUEVA, *supra* note 66, at 280.

73. Gurrea v. Lezama, 103 Phil. 553 (1958).

74. DE LEON, *supra* note 65, at 252.

75. PSBA v. Leano, 127 SCRA 778, 781 (1984).

76. *People’s Aircargo*, 297 SCRA, at 182.

77. See *ABS-CBN*, 301 SCRA 572.

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privilege, an agent through whom corporate officers perform the essential function of communicating with counsel. Thus, in no case may non-officers act as the “personification of the corporation in the commercial and legal world,”<sup>78</sup> for this is a role reserved by law exclusively for corporate officers.

There being no personification of the corporation by its non-officers who communicate with the corporation’s lawyer in their capacity as non-officers, there is consequently no rationale for the attorney-client privilege to apply to communications between non-officers, i.e. those members of the corporation who fall outside the control group, and corporation counsel.

It may be argued that regardless of the rank or nature of work of employees who communicate with counsel, as the corporation possesses a separate juridical personality,<sup>79</sup> the privilege attaches only to the corporation, and not to its officers or employees, regardless of their rank. Nonetheless, as previously stated, a corporation acts only through individuals, namely its officers.<sup>80</sup> Hence, the privilege must necessarily attach to them when communicating with corporate counsel on behalf of the corporation because in contemplation of law, it is the corporation itself who is communicating with counsel. Corporate officers can be considered as those members of the corporation, as described by the control group test, as those in a position to act on the legal advice given.<sup>81</sup> In other words, only corporate officers, i.e. those within the control group, and no other, may personify the corporation. Hence, the attorney-client privilege attaches to them and to no one else. This shows that the control group test is still very much applicable to the Philippines, while the doctrine in *Upjohn* is of doubtful applicability, given the aforementioned status of pertinent laws and jurisprudence.

### VI. CONCLUSION

Now which of the two doctrines, the control group or *Upjohn*, must be applied to the Philippine setting? True, the *Upjohn* test is more in consonance with the public policy of encouraging full disclosure by an attorney to his lawyer. The inadequacy of the control group test is highlighted by the fact that it is not in consonance with the realities of corporate legal counseling, wherein more often than not, information essential for a lawyer to make his case is in the exclusive possession of middle and lower ranking employees.

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78. VILLANUEVA, *supra* note 66, at 280.

79. *Id.* at 74.

80. CORPORATION CODE, § 23.

81. *Upjohn*, 449 U.S. at 383.

Nonetheless, the reality at the moment is that jurisprudence on the matter, as previously discussed, strongly favors the control group test. How then is the tension resolved?

Harmonization of the Upjohn doctrine with current Philippine jurisprudence calls for a re-examination of the doctrine that limits the role of “personification of the corporation” to corporate officers. While a complete abdication of the rule is uncalled for, and may even prove deleterious to a corporation, it is worthwhile to consider the proposition that, for the limited purpose of expanding the attorney-client privilege, even middle and lower ranking employees, i.e. non-officers of a corporation, be considered agents or personifications of the corporation for the purpose of communicating with corporate counsel. Such a doctrine strikes the ideal balance between preserving the essential role of corporate officers as personifications of the corporation for the acts and contracts of the latter, and the need for a doctrine that recognizes the current realities and complexities of advising a corporate client.