Revisiting *Hilado v. David*

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I. INTRODUCTION

Sometime in June, 1945, Blandina Gamboa Hilado approached Atty. Vicente J. Francisco and asked him to handle the trial of a complaint she had caused to be filed in court for the annulment of a sale of real property made by her late husband in favor of Syrian national Jacob Assad.[1] Atty. Francisco

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immediately declined to handle the case because of his opinion that the sale was valid. Some days later, Mrs. Hilado left the *expediente* of the case in the office of Atty. Francisco for him to study. Atty. Francisco gave the *expediente* to his assistant, Atty. Federico Agrava, with instructions to return the same to Mrs. Hilado because of his previously expressed opinion. Atty. Agrava drafted a letter returning the records to Mrs. Hilado and explaining why they could not accept the case, and Atty. Francisco signed the same.[2]

Several months afterwards, the Syrian concerned saw Atty. Francisco and asked him to handle the same case in his behalf. Atty. Francisco agreed and entered his appearance.[3] This was objected to by counsel for Mrs. Hilado,[4] but the objection was denied by the trial judge, Hon. Jose Gutierrez David, who ruled that there was no attorney-client relationship established between Atty. Francisco and Mrs. Hilado.[5]

This ruling was elevated to the Supreme Court. Finding for the petitioner, the Supreme Court on 21 September 1949, in the landmark case of *Hilado v. David*,[6] allowed the motion for disqualification[7] and rendered a decision which has often been referred to until the present time.

This article is a reexamination of the doctrines embodied in *Hilado v. David* and essentially seeks to test its tenacity in light of more recent jurisprudence, particularly in the case of *Mercado v. Vitriolo*.[8] This article is divided into seven parts with the introduction serving as a brief narration of the facts of the case. The second part is a general overview of the doctrines in *Hilado* and is aptly complemented in the third, fourth and fifth parts through a more thorough discussion of the attorney-client relationship, the non-necessity of communication of the confidential information, and lastly, the requisite that confidentiality must be alleged. The sixth part pits the *Hilado* and *Mercado* rulings against each other by comparing the facts of each case and highlighting the situations that would necessitate either a stricter or

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1. Hilado v. David, 84 Phil. 569 (1949).
2. *Id.*
3. *Id.* at 575.
4. *Id.* at 572. Hilado's counsel, Atty. Dizon urged Atty. Francisco to discontinue representing Assad on the ground that Hilado had previously consulted with him about her case and had allegedly turned over papers to him. He even claimed that Atty. Francisco had written and sent Hilado a legal opinion. Since he received no response to this suggestion, Atty. Dizon filed a formal motion to disqualify Atty. Francisco.
5. *Id.* at 575.
6. *Id.* at 569.
7. *Id.* at 581.
8. Mercado v. Vitriolo, 459 SCRA 1 (2005).

a more relaxed application of the confidentiality rule. The seventh and final part of this article concludes with a reiteration of *Hilado*'s inherent soundness and applicability despite its slight modification in *Mercado*.

II. THE DOCTRINES IN *HILADO V. DAVID*

There are three main doctrines established in *Hilado v. David*. These are: (a) that mere consultation with a lawyer in his professional capacity is sufficient to establish attorney-client relationship, (b) that the mere fact of existence of previous attorney-client relationship is enough to prohibit the subsequent retainer, and (c) that confidentiality exists during and after the termination of attorney-client relationship.

A. Mere Consultation with a Lawyer in his Professional Capacity Sufficient to Establish Attorney-Client Relationship

The first lays the basic foundation for the attorney-client relationship, encompassing both the lawyer's duty of confidentiality and the doctrine of privileged communication. It was held that before the attorney-client relationship is said to exist, the attorney must be employed to give legal advice to, or prepare legal forms for, a prospective client.[9] Elaborating, the Supreme Court held that it was not necessary that the attorney was actually retained or that any fee was paid for such service.[10] In the mind of the Court, "the mere consultation of a lawyer in his professional capacity, with a view to obtaining professional advice, with the attorney voluntarily acquiescing in such consultation" was sufficient to establish the relationship.[11] And if the relationship was thus established, the prohibition regarding divulging privileged information and maintaining inviolate the client's confidence consequently applied.

B. Mere Fact of Existence of Previous Attorney-Client Relationship Enough to Prohibit the Subsequent Retainer

Second, if an attorney attempts to represent a new client with an interest adverse to one by whom he was formerly retained, the mere fact of the existence of the previous attorney-client relationship was enough to prohibit the subsequent retainer. Effectively, this meant that the prohibition applied *regardless* of whether or not confidential information gained from the first client was transmitted to the second or used to promote the second client's cause. Why? According to the Court, the complexity of communications between lawyer and client prevented, upon inquiry, a simple disclosure of

9. *Hilado*, 84 Phil. at 575.

10. *Id.* at 576.

11. *Id.*

only confidential matters.[12] Were confidential information made a condition precedent to applying the prohibition, making it necessary to determine what information was passed on, then the end result would be the revelation even of information not privileged, but still important or prejudicial to the client.[13] This, in turn, would make litigants wary of divulging information to attorneys and of seeking legal advice, "an evil which is fatal to the administration of justice."[14]

C. *Confidentiality Exists During and After Termination of Attorney-Client Relationship*

Finally, as to the duration of such confidence and the effectivity of the resultant prohibition, the Court held that both existed even after the attorney-client relationship has ended.[15]

D. *Important Public Policy Concerns Account for Persistence of Hilado Doctrine*

In essence, the doctrine lain down in *Hilado* is thus: If an attorney-client relationship exists, or was shown to exist, the lawyer is prevented from representing another client with opposing interests regarding the same subject matter with which the lawyer previously dealt at any time, and regardless if confidential information was divulged.

A survey of jurisprudence from the time of *Hilado* in 1949 until the present reveals that rarely, if ever, does the Court depart from such established doctrine. Perhaps the underlying policy considerations are too compelling to turn away from. For apart from ensuring the proper administration of justice, what was probably more important to the Court was that the prohibition also upheld the honor and integrity of the bench and bar, being founded on the principles of public policy and good taste.[16] Preventing a lawyer from representing a person with interests opposite to an existing client cemented the impression that the client's confidence would be kept inviolate and that said attorney would not engage in double-dealing.[17] Or perhaps, and as a corollary, there has been no other public policy compelling enough to initiate a strong reconsideration of the doctrine. Indeed, the mantra of keeping a client's confidence inviolate is repeated, oftentimes *verbatim*, by subsequent Courts in deciding against an attorney charged with violating such confidence.

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12. *Id.* at 578.

13. *Id.*

14. JOHN H. WIGMORE, EVIDENCE §§ 2285, 2290, & 2291 (1923).

15. *Hilado*, 84 Phil. at 577.

16. *Id.* at 578.

17. *Id.* at 579.

Whatever the cause, the fact remains that, instead of establishing a brand new doctrine to tie lawyers and clients within the bond of confidential relations, later Courts have decided instead to merely expand the doctrine -- whether by exceptions or amplifications -- but never, except in one instance, by abrogation, this in the case of *Mercado v. Vitriolo.*[18]

III. THE ATTORNEY-CLIENT RELATIONSHIP

The requirement that there first exist an attorney-client relationship before the duty of confidence and the subsequent prohibition against privileged communication both arise is, perhaps, the most important of the doctrines espoused in *Hilado.*[19] It is the condition *sine qua non* of the rule, as it were, without which, any questions regarding breach of confidence are not merely moot but, in fact, non-existent.

Thus, in *Hilado* -- as in the subsequent cases of the same tenor discussed below -- it behooved the Court to first make a finding that the relationship did exist. In this instance, the relationship was manifested by the simple act of sending a letter giving an opinion on the legal predicament of the client. By such communication, the attorney was barred from representing another person with respect to the same subject matter of the inquiry.

Undoubtedly, it is easy to question such a determination, appearing, as it does, to rest on dubious grounds. However, the Court was quick to defend itself. The advice here was given regarding the merits of a prospective client's case, resulting from an inquiry made by the client with the purpose of securing the lawyer's services. The relation, said the Court, is constituted once "the attorney is employed to give advice on a legal point, to prosecute or defend an action in court, or to prepare and draft, in legal form, such papers such as deeds, bills, contracts, and the like."[20] In other words, the basic test for establishing the relationship was the consultation with the lawyer in his professional capacity, with a view to obtaining professional advice, and the lawyer acquiescing to the consultation.[21]

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18. Mercado v. Vitriolo, 459 SCRA 1 (2005).

19. *Hilado*, 84 Phil. at 578. The Court said that to make the passing of confidential communication a condition precedent would not enhance the freedom of litigants to consult with lawyers on what they believe are their rights in litigation. Litigants would in consequence be wary in going to an attorney, lest by an unfortunate turn of the proceeding, the court should accept the attorney's inaccurate version of the facts that came to him. Hence the necessity of setting down the existence of the bare relationship of attorney and client as the yardstick for testing incompatibility of interests.

20. *Id.* at 575.

21. *Id.* at 576.

The Court then proceeded to extend the scope of facts establishing the relationship to consultations that did not result in actual employment (because either party desisted from further dealings), to instances wherein no consideration was paid, to cases wherein there was no previous professional relationship, and even to a relationship created by mere implication and devoid of any solemnities formalizing the contract between lawyer and client.[22] Considering the facts relied upon by the Court to hold the lawyer liable in *Hilado*, the relation therein was adequately encompassed by such an expanded scope.

Indeed, the broad scope laid down in *Hilado* has hardly needed any modification at all. If anything, jurisprudence has shown that even the most limited of contacts can create an attorney-client relationship.

Take, for instance, *Tiania v. Ocampo*,[23] where there was a breach of confidence when a lawyer prepared deeds of sale for one party which turned out to be mortgages in favor of another whom he represented. It was also held to be a breach of confidence for him to give advice during pre-trial to the opposing party, which led to a compromise agreement.[24] In both these instances, the lawyer created attorney-client relationships with parties having opposing interests to his client through mere minimal contact. By later appearing for his client in suits brought against such parties, he violated their confidence.

Similarly, in *Suntay v. Suntay*,[25] the relation was found to exist when a lawyer acted as administrator of his former client's property, subsequently prohibiting him from prosecuting an action based on information gained from such administration.[26] Though there was no explicit showing that the acts of administration were performed in his capacity as a lawyer, the Supreme Court seemed to imply that through the existing close relation between the lawyer and client – the latter even considering him as his *confidante* – the administration of the client's property necessarily assumed the character of having been undertaken pursuant to some legal matter.[27]

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22. *Id.*

23. Tiania v. Ocampo, 200 SCRA 472 (1991).

24. *Id.* at 479.

25. Suntay v. Suntay, 386 SCRA 449 (2002).

26. *Id.* at 456.

27. According to the Report of the Office of the Solicitor General, while there may be validity to respondent's contention that it is not improper for a lawyer to file a case against a former client, especially when the professional relationship had ended several years before, under the over-all circumstances of the case at bar, it cannot be said that respondent acted ethically. Complainant was not a mere client of respondent. He is an uncle and a political benefactor. The parties for whom respondent filed cases against complainant were former friends or

Yet, there are instances wherein even *Hilado's* extended criteria fail to provide the necessary link between the advice given and an ensuing attorney-client relation, preventing the application of the rule on privileged communication.

In 1969, twenty years after *Hilado*, the Court found factual basis to deny the existence of the relation in *Velasquez v. Barrera.*[28] In that case, Atty. Barrera previously appeared as counsel for the brother of Velasquez in an ejectment suit. Before appeal, he withdrew as counsel, but aided in preparing and filing the notice of appeal, the appeal bond, and a supersedeas bond for the same client. The bonding company required a counter-bond, which was guaranteed by a certain Ymson, who, in turn, asked for an Indemnity Agreement, secured by the property of Velasquez -- which agreement was also prepared by Barrera. The brother of Velasquez eventually lost the case but was unable to pay the judgment creditors. The creditors thus sued on the bonds, causing the bonding company to sue on the counter-bond, leading the guarantor to sue on the indemnity agreement. The guarantor was represented by Barrera. It was this final suit, against Velasquez and over his property, that led him to file a disbarment case against Barrera for representing conflicting interests.

In finding for Barrera, the Court held that there existed no attorney-client relationship between the former and Velasquez as to find a breach in the lawyer's duty to maintain inviolate his client's confidence. It was established that Barrera had never acted as Velasquez's lawyer and was not acting as the counsel of record of Velasquez's brother on appeal, when the controversy over the bonds arose.[29] More importantly, the mere fact that he intervened in the preparation of the Indemnity Agreement between the guarantor and Velasquez was not, in the mind of the Court, enough to create the relation.[30]

Implicit in the *ratio* of the case, making it fall outside the bounds set by *Hilado*, was that the lawyer here prepared a legal document *not solely* for Velasquez, but also for the guarantors. In essence, it was a situation wherein the lawyer's aid was requested by two parties *simultaneously*. Thus, in terms of simple chronology, there could be no violation of a previous relationship

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associates of complainant whom respondent met when he was serving as the lawyer and general adviser of complainant. The cases filed by respondent were about properties which respondent had something to do with as counsel and administrator of complainant.

28. Velasquez v. Barrera, 29 SCRA 312 (1969).

29. *Id.* at 323.

30. *Id.*

because both relationships were midwifed at the same point in time -- if, of course, such relationship was found to exist in the first place.[31]

Second, he was utilized by the parties because of his connection to the subject matter by reason of a previous employment. In other words, the motivating factor for his drafting of the agreement was mere convenience to the parties, and not, for either of them, a desire to obtain his professional services.

Similarly, the existence of the relation was later on found lacking in the case of *Pfleider v. Palanca.*[32] Here, Pfleider and his lawyer, Atty. Palanca entered into a contract of lease with the former as the lessor. Pfleider subsequently filed a case for rescission of the lease due to non-payment. Apparently, in the course of the case, Palanca disclosed a list of Pfleider's creditors, given pursuant to the lease contract. Pfleider subsequently sued Palanca in an administrative case, claiming that the lease was confidential information that the latter had no right to reveal. In finding against Pfleider, the Court held that such information was not given in the course of professional employment but in accordance with the lease. It was, therefore, not in the nature of confidential information and merely partook of a private and civil wrong, not a breach of the duty of fidelity to a client. In other words an attorney-client relationship did not exist with respect to the subject matter in dispute; it being a mere personal transaction. And, as such, there was no cause to invoke the privilege regarding confidential information.

In the more recent case of *Uy v. Gonzales*,[33] when a lawyer sued an individual to enforce his right of redemption, the Court found that the relation of attorney-client was not sufficiently established,[34] reiterating as its *ratio*, that found in *Pfleider*. Here, Uy claimed that Atty. Gonzales, in pursuit of the case of estafa through falsification of public documents filed against him, utilized confidential information previously obtained because the latter had, on a prior occasion, aided him in preparing a Transfer Certificate of Title over the land in dispute. It appeared that Gonzales merely sought to redeem land that Uy had bought from the Gonzales' deceased son. And, in order to facilitate this transaction, Gonzales aided Uy in preparing the Certificate of Title. The Supreme Court held that no attorney-client

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31. *But cf.*, Bautista v. Barrios, 9 SCRA 695 (1963). Here, the Court, albeit in an *obiter*, did mention that if an attorney acted for both parties to a contract, he could only represent one who sought to enforce such contract, and not one who alleged its invalidity. The ruling in *Velasquez* does not depart from this, as Barrera did in fact represent the party that sought to enforce his rights under the agreement.

32. Pfleider v. Palanca, 35 SCRA 75 (1970).

33. Uy v. Gonzales, 426 SCRA 422 (2004).

34. *Id.* at 430.

relationship existed between them and that, consequently, there could be no disclosure of confidential information, for the simple reason that the suit arose out of the lawyer's personal dealings with Uy.[35]

Still, these cases remain the exception, rather than the norm. They do not substantially depart from the *Hilado* doctrine. Rather, they are simply cases wherein the attorney-client relation was not found to exist. And when such is the case, it is either because the facts clearly show that legal advice was not in any way connected with the transaction or, as in the case of *Velasquez*, judicial acrobatics are necessary to hurdle the gaping hole of the *Hilado* doctrine.

IV. CONFIDENTIAL INFORMATION AND SIMILAR SUBJECT MATTER

Hilado next opined that the disclosure of confidential information was not essential to bar a lawyer from appearing for a person that had interests opposed to that of his own client.[36] Essentially, therefore, what this signifies is that all information passed between a lawyer and client is *a priori* presumed privileged. Indeed, and as if to cement such a conception, Hilado, on grounds of public policy as mentioned above, even foreclosed the possibility of an inquiry into whether the matters used in connection with the subsequent case were truly confidential as to the previous client.

The necessary ingredient, however, was that the subject matter of both relationships were connected, however slightly. Thus, *Hilado* held that:

> This rule has been so strictly enforced that it has been held that an attorney, on terminating his employment, cannot thereafter act as counsel against his client *in the same general matter*, even though, while acting for his former client, he acquired no knowledge which could operate to his client's disadvantage in the subsequent adverse employment.[37]

If the subject matter in both relationships is not connected, then obviously, the wholesale presumption of confidentiality will not apply. Take, for instance, the *Pfleider* case discussed above where, despite the existence of an attorney-client relationship, the subject of disbarment was a personal transaction of the lawyer, removing any information he revealed pursuant to the transaction from the ambit of the confidential information rule.

Numerous instances abound wherein such a doctrine has been applied wholeheartedly by the Supreme Court.

Thus, a lawyer is prohibited from appearing for the ex-wife of his former client in a case involving the same land subject of prior litigation

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35. *Id.*

36. Hilado v. David, 84 SCRA 569, 578 (1949).

37. *Id.* at 577 (emphasis supplied).

between them, wherein the lawyer represented the husband.[38] He is also prohibited from preparing an affidavit or pleading for his client that seeks to refute an affidavit or pleading he prepared for a former client,[39] or for appearing for the second client and taking a position diametrically opposed to that of his former client.[40] Nor may a former in-house counsel of a bank litigate cases against such bank in matters that he handled while still an employee.[41] Finally, a government lawyer who took part in the investigation of a government official for graft and corruption, by administering oaths and collecting evidence, may not subsequently appear for such official at pre-trial.[42]

Interestingly enough, the doctrine also applies even if one case is a civil suit and the other is a criminal prosecution. In *Nombrado v. Hernandez*,[43] Atty. Hernandez represented the victim in the criminal case for physical injuries. Later, he represented the father of the accused in a civil case for ejectment against his former client. Though the cases were of a different nature, the subject matter in both were essentially the same -- the motive behind the crime being the dispute over the land litigated in the ejectment case.[44]

In all of the abovementioned cases, the subject matter of both litigations were, in some way, connected. Furthermore, in each case, the Court refrained from making an inquiry into whether or not confidential matter was indeed divulged to the second client, reasoning as it did in *Hilado*, that the mere existence of the previous attorney-client relationship was enough to bar the subsequent retainer from taking effect.[45]

Recent jurisprudence, however, far from merely applying the doctrine, has instead made it even more stringent. In two cases decided only in the past year, the implication in *Nombrado* – that mere slight convergence in

38. Abaqueta v. Florido, 395 SCRA 569 (2003).

39. Ngayan v. Tugade, 193 SCRA 779 (1991). *See also* Artezuela v. Maderazo, 381 SCRA 419 (2002).

40. Natan v. Capule, 91 Phil. 640 (1952). In this instance, Capule's first client was in possession of the land in dispute, while his second client alleged that he had a right to possession. In this respect, the Court held that it was the duty of the lawyer to protect his former client's possession. By representing a party with a stand contrary to that of his former client, he breached such client's confidence and trust.

41. Philippine National Bank (PNB) v. Cedo, 243 SCRA 1 (1995).

42. Pasay Law and Conscience Union, Inc. v. Paz, 95 SCRA 284 (1980).

43. Nombrado v. Hernandez, 26 SCRA 13 (1968).

44. *Id.* at 16.

45. Often, as in the cases of *PNB* and *Pasay Law and Conscience*, the ruling in *Hilado* espousing such doctrine is quoted verbatim.

subject matter is enough to disqualify – was not merely made explicit, but rather, expanded in favor of a more liberal approach to protecting the client's confidence.

Pormento v. Pontevedra[46] is similar to *Nombrado* in that it involved both a civil and a criminal case. Here, the Supreme Court specifically delineated the *Hilado* doctrine regarding subject matter and confidential information. The Court herein held that if the subject matter of both controversies were related, directly or indirectly, a lawyer cannot represent a subsequent client.[47] In such a case, the lawyer might be compelled to use information gained from his previous relationship. Indeed, the Court was quite explicit in stating that "the proscription... finds application where the conflicting interests arise with respect to the same general subject matter and is applicable however slight such adverse interest may be."[48]

In and of itself, *Pormento* already makes the *Nombrado* doctrine more stringent. Such doctrine was held to apply to a lawyer acting for one party in a criminal case and thereafter representing another party in a civil case involving the same land. Though here, unlike in *Nombrado*, the crime was in no way related to the dispute over the land and neither were the parties the same. The civil case was an ejectment suit between complainant and his nephew, whereas the criminal case was filed by the complainant against other persons for allegedly stealing trees from the land. Verily, the relation, if any, is limited to the place where the central acts occurred. The acts themselves, on the other hand, are irreconcilably unrelated.

A few months later, the Court decided *Quiambao v. Bamba*,[49] which involved a former director of a corporation filing a case for disbarment against the in-house counsel of such corporation. The case, however, took the *Pormento* pronouncements one step further. Here, the director, Quiambao, alleged that Atty. Bamba violated the Code of Professional Responsibility when, while still appearing as her counsel in an ejectment case, represented her former employer in a replevin suit filed against her.[50] The Supreme Court, in finding for Quiambao, held:

> It is of no moment that the lawyer would not be called upon to contend for one client that which the lawyer has to oppose for the other client, or that there would be no occasion to use the confidential information acquired from one to the disadvantage of the other as the two actions are wholly unrelated. It is enough that the opposing parties in one case, one of whom would lose the suit, are present clients, and the nature or conditions

46. Pormento, Sr. v. Pontevedra, 464 SCRA 167 (2005).

47. *Id.* at 177.

48. *Id.* at 178.

49. Quiambao v. Bamba, 468 SCRA 1 (2005).

50. *Id.* at 6.

> of the lawyer's respective retainers with each of them would affect the performance of the duty of undivided fidelity... We do not sustain respondent's theory that since the ejectment case and the replevin case are unrelated cases fraught with different issues, parties, and subject matters, the prohibition is inapplicable. His representation of opposing clients in both cases, *though unrelated*, obviously constitutes conflict of interest or, at the least, invites *suspicion* of double-dealing.[51]

The fact that the Court found it necessary to explain that mere suspicion gives rise to the prohibition further tightens the noose first applied in *Hilado*. As it were, not only is the actual disclosure of confidential information a non-factor, but additionally, the mere suspicion of double-dealing can also prevent the subsequent retainer from becoming effective, regardless of the relation in subject matter.[52] And as a consequence, the former nexus for establishing the prohibition – relation of the subject matter in both controversies – instead of being expanded to encompass a mere slight or incidental relation, is completely abolished and a new link is ushered in: suspicion of double-dealing.[53]

V. NECESSITY OF ALLEGING THE CONFIDENTIAL INFORMATION

In two recent cases, merely three years apart, the Supreme Court pronounced two very distinct doctrines regarding the necessity of alleging the confidential information that is under threat of disclosure.

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51. *Id.* at 11 (emphasis supplied).

52. The Court said that the proscription against representation of conflicting interests arises with respect to the same general matter however slight the adverse interest may be. It applies even if the conflict pertains to the lawyer's private activity or in the performance of a function in a nonprofessional capacity. In the process of determining whether there is a conflict of interest, an important criterion is probability, not certainty, of conflict.

53. It must be noted that *Quiambao* is a conflict of interests case -- a fact which may give rise to doubts as to its relevance to the present discussion. Still, it is submitted that the pronouncements should still be considered for the following reasons. First, to evidence a trend in the process of being established, especially in light of the pronouncements in *Pormento*. Second, *Hilado* itself dealt mainly with conflicts of interest, yet its doctrines have attained approval in both privileged communication *ratios* and those involving conflict of interest. And finally, both the issue of conflicts of interest and that of privileged communication are built upon the same foundation -- that of maintaining inviolate the confidence of the client. Indeed, a conflict of interest case is inextricably linked to privileged communication by reason of the fact that if, indeed, a conflict exists, there is a very real chance that privileged communication is being, or can be, divulged.

In *Suntay v. Suntay*,[54] the lawyer under attack for a possible conflict of interest claimed, as one of his defenses, that Rule 21.02 of the Code of Professional Responsibility[55] did not apply to him considering that the complainant failed to specify the alleged confidential information used. The Court brushed aside this argument by reiterating *Hilado* -- that it is "the bare relationship of attorney and client that is the yardstick for testing incompatibility of interests."[56]

Nonetheless, later in *Mercado v. Vitriolio*,[57] the Court retreated from such a stance and made the following pronouncement:

> We note that complainant did not even specify the alleged communication in confidence disclosed by respondent. All her claims were couched in general terms and lacked specificity. She contends that respondent violated the rule on privileged communication when he instituted a criminal action against her for falsification of public documents because the criminal complaint disclosed facts relating to the civil case for annulment then handled by respondent. She did not, however, spell out these facts which will determine the merit of her complaint. The Court cannot be involved in a guessing game as to the existence of facts which the complainant must prove.
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> Indeed, complainant failed to attend the hearings at the IBP. Without any testimony from the complainant as to the specific confidential information allegedly divulged by respondent without her consent, it is difficult, if not impossible, to determine if there was any violation of the rule on privileged communication. Such confidential information is a crucial link in establishing a breach of the rule on privileged communication between attorney and client. It is not enough to merely assert the attorney-client privilege. The burden of proving that the privilege applies is placed upon the party asserting the privilege.[58]

What then is to be made of the conflicting decisions? Should one follow blindly the contemporary precedent set by *Mercado*? Or, do *Suntay* and, by extension, *Hilado* still have relevance?

On a purely factual analysis, *Mercado* and *Suntay* do, indeed, differ. In the former, the relationship between the two cases at issue was not apparent on

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54. Suntay v. Suntay, 386 SCRA 449 (2002).

55. Rule 21.02 of the Code of Professional Responsibility provides:

> 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 own advantage or that of a third person, unless the client with full knowledge of the circumstances consents thereto.

56. *Suntay*, 386 SCRA at 458 (citing Hilado v. David, 84 Phil. 569 (1949)).

57. Mercado v. Vitriolo, 459 SCRA 1 (2005).

58. *Id.* at 12.

its face. The specific subject matters of both controversies -- marriage,[59] as contrasted with birth certificates[60] -- were not even indirectly related. Even if one were to consider the charge in the criminal case -- that the client lied about the person to whom she was married as evidencing a relationship between subject matters, such a consideration must be weighed with the realization that it is a mere charge, yet to be proven, and in a criminal case nonetheless. On the other hand, *Suntay* clearly involved the same subject matter – a fact which was free from question or dispute.

Thus, the Court may have found it necessary to establish the link between the two controversies in some other manner; hence the invocation of the necessity to allege. Stated otherwise, if the relation between the two controversies is not apparent and unquestioned on the face of the pleadings, then it is necessary to prove, and allege it, in some other manner -- something which the complainant, in this instance, failed to do.[61] Hence the disparate rulings.

The same rule, of course, applies even if *Quiambao* is used as a basis. Despite the lax standards for finding a correlation, still the allegation in *Mercado* fail to fit the bill. The mere essence of the two cases, criminal against civil, necessitate against a suspicion of double-dealing. One is prosecuted for the public good by the State; the other, for some advancement of a private right, or redress of a private wrong. Second, it is difficult to see how the lawyer in *Mercado*, by filing a criminal case, would gain some advantage against his former client - yet another reason for refraining from bestowing upon his actions a dubious motive.

It is, of course, entirely possible that *Mercado* does not fall within the ambit of *Quiambao* or *Pormento*. It must be remembered that the second case in *Mercado* was filed by the lawyer himself.[62] He thus represented his own interests in the filing, not that of another client, to whom he could divulge confidential information. This would, of course, be in line with the ruling in *Pfleider* that it is absurd to prohibit a lawyer from protecting his own personal

59. Complainant Rosa Mercado's husband filed a complaint for annulment of their marriage with the Regional Trial Court of Pasig City. This annulment case was dismissed by the trial court which eventually became final and executory on July 15, 1992.

60. On April 13, 1999, Atty. Vitriolo filed a criminal action against Mercado for violation of arts. 172 and 172 of the Revised Penal Code (falsification of public document). Vitriolo alleged that Mercado made false entries in the Certificate of Live Birth of her children. She also allegedly indicated in said certificates that she is married to a certain Ferdinand Fernandez when in truth she was married to Ruben Mercado.

61. *Mercado*, 459 SCRA at 12.

62. *Id.* at 5.

interests.[63] However, on the other side of the equation, there is the doctrine in *Natan v. Capule* that a lawyer may not use against his former client information acquired by virtue of the previous relationship.[64]

And perhaps therein lies another key to unlocking the mystery of *Mercado*. Because the lawyer was, in effect, protecting his own interests – albeit with the possibility of using confidential information against his former client – it is distinctly possible that that is the reason why the Court found occasion to interpret established doctrine rather loosely. If we are to juxtapose the freedom given to lawyers to litigate matters of personal interest with the same lawyer's duty to keep inviolate his client's confidence at almost all cost, then we are presented with a unique amalgam of the cases discussed above.[65] There is, on one hand, complete freedom to seek redress in court, and on the other, a curtailed ability to do the same. Necessarily therefore, what would have been the most natural reaction of the Court? The answer is simple. The Court found a compromise.

Indeed, in this case, the specific allegations were all that were needed to establish the breach of the privilege. Hypothetically, if such allegations were made, and found sufficient, then the doctrines examined throughout this argument would all come into play.[66] The special circumstances therefore called for a special requirement to meet the exigencies of the case, so to speak.

VI. THE COMMUNICATION MUST BE MADE IN CONFIDENCE

Perhaps the clearest derogation made by *Mercado* from the *Hilado* doctrine is the holding that the communication must be made to the attorney in confidence.[67] This is, as will be remembered, in stark contrast to the pronouncement in *Hilado* that the confidentiality of the information need not be inquired into, as the mere fact of relationship was the test for prohibition.[68]

Indeed, in *Hilado*, the question of confidential communications took the role of a more collateral issue than anything else. The Court held that

63. Pfleider v. Palanca, 35 SCRA 79 (1970).

64. Natan v. Capule, 91 Phil 640, 648 (1952).

65. Most of these cases dealt with a lawyer's representing a party, not himself, with interests adverse to that of his client.

66. Of slight importance, but interesting to note nonetheless, is that the complainant in *Mercado* voluntarily desisted from pursuing her complaint. As difficult as it is to impute non-legal rationalization to the Supreme Court, one cannot help but wonder if such a circumstance played a part in influencing the Court's decision.

67. *Mercado*, 459 SCRA at 11.

68. Hilado v. David, 84 Phil. 569, 578 (1949).

confidentiality could not be the basis for applying the prohibition – information passed between attorney and client as convoluted and confusing as it already was[69] – but rather, the reason being the mere fact of the existence of the professional relationship.[70]

However, what the Court did imply was that confidentiality was an expected incident of *all* information divulged from attorney to client within the relationship. By refusing to make confidentiality a condition precedent to applying the prohibition and by claiming that an inquiry into the nature of the information would violate the very purpose the client held in initially seeking the relationship, thus curtailing the administration of justice, the Court provided protection on a wholesale basis to anything that passed between attorney and client.

In that sense then, can we differentiate *Hilado* from *Mercado*. In the latter case, this nature of absolute confidentiality was considerably weakened; not without basis, of course. The Court in *Mercado* provided three requisites for the confidentiality of communication to exist: (1) the existence of the attorney-client relationship;[71] (2) that the client made the communication in confidence;[72] and (3) that the advice was sought from the attorney in his professional capacity.[73]

Of interest is the second requirement, which, as the Court explained, was possessed of its own requirements. Hence, the client must have intended the communication to be confident. He must have voluntarily disclosed it, and the disclosure must have been done by means which the client knew would not involve disclosure to a third party – at least more than is necessary to facilitate the transmission or the accomplishment of the purpose.[74] Following this reasoning, a compromise agreement to be delivered to the opposing party,[75] offers of settlement and documents not delivered to the attorney in his professional capacity are not within the privilege.[76] The wholesale characterization of confidentiality that *Hilado* bestowed on all communications between attorney and client was therefore reduced to piecemeal by the Court in *Mercado*. As it stands today, if the communications do not meet the specific requirements laid down for confidentiality, then they are not privileged.

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69. *Id.*

70. *Id.*

71. *Mercado*, 459 SCRA at 10.

72. *Id.* at 11.

73. *Id.*

74. *Id.*

75. Uy Chico v. Union Life Assurance Society, 29 Phil. 165 (1915).

76. Pfleider v. Palanca, 35 SCRA75 (1970).

Why the divergence then? As adverted to above, strong public policy considerations must be shown to exist in order to outweigh the already forceful ones that serve as the bedrock for *Hilado*. And, in light of recent jurisprudential announcements, the additional requirement seems rather reasonable.

For example, the policy that crimes must be prevented seemed sufficient to the Court in deciding *People v. Sandiganbayan*,[77] wherein the character of confidentiality was withheld from communications made regarding contemplated crimes.[78] Similarly, the confidentiality of a client's name received extensive discussion in *Regala v. Sandiganbayan*,[79] which announced, among other things, that a client's identity was not privileged by reason of due process (for the opposing party).[80]

Mercado itself falls succinctly in line with the abovementioned exceptions, not because it reveals another public policy consideration that should prevail over *Hilado*, but rather because it implements the exceptions provided for in both the Sandiganbayan cases. Indeed, according to Justice Puno's dissent in *Regala*, an assertion of the privilege carries with it the corollary duty to prove the underlying facts showing the existence of the privilege.[81] *Mercado* does nothing but recognize this by providing that the communication must be shown to be actually confidential before the privilege exists. And, as for the fear expressed in *Hilado* that such an inquiry would lead to disclosure of non-confidential yet damaging information, Justice Puno again has the answer – *in camera* or *ex-parte* proceedings.[82]

As regards the duty of confidentiality itself, *Mercado* does not depart very far from *Hilado*. The general concepts – that it is by virtue of this confidence that the attorney-client relation exists at all, that it continues even after the relation terminates, that it is necessary for the proper administration of justice, that it exists the moment legal advice is sought – are agreed upon by both cases. If anything, this is a mere affirmation of long-standing principles extant not only in this jurisdiction but in countless others as well.

However, where *Hilado* utilized the duty of confidentiality to prevent an attorney from appearing as counsel for his client's opponent,[83] *Mercado* would have utilized it to prevent the attorney from using it as a foundation

77. People v. Sandiganbayan, 275 SCRA 505 (1997).

78. *Id*. at 519; *see also* Genato v. Silapan, 406 SCRA 75 (2003).

79. Regala v. Sandiganbayan, 262 SCRA 122 (1996).

80. *Id*. at 142.

81. *Id* at 184.

82. *Id*.at 185.

83. Hilado v. David, 84 Phil. 569, 572 (1949).

for his own action against his client.[84] Were it not for the failure of such client to properly plead specific facts or to testify to them at the hearing, a reading of the *Mercado* decision seems to imply that had the client proven her case, her theory as to a breach of confidentiality would have been sustained.[85]

How then would such a decision have expounded on the foundation laid by *Hilado*? Clearly, the mere fact of prosecuting one's case against a former client was not *per se* prohibited. *Mercado* would have merely prevented the attorney from using confidential information in the prosecution of his cause, not from prosecuting his cause altogether. *Hilado*, on the other hand, implicitly considered that the confidential information and the duty of confidentiality would be betrayed by the fact of a former counsel appearing for an opposing party. Otherwise stated, the Court, in *Hilado*, would prevent the attorney from prosecuting an interest opposite to the client's, for the same matter in which he appeared -- quite a similar situation for which disbarment proceedings were instituted in *Mercado*.

Should thus the statement in *Natan v. Capule* that "an attorney is forbidden to do anything that will injuriously affect his former client in any matter wherein he formerly represented him,"[86] be applied, following *Hilado's* lead, to *Mercado* as well? Probably not in the instance abovementioned, for the simple reason that the similarity of subject matter in the two *Mercado* proceedings had not been sufficiently proven. Yet, were the allegations of the complainant in *Mercado* proven, then the successful action against the attorney would have rested as much on a violation of the duty of confidentiality as it would have on the principle of privileged communication; the former for taking a stand contrary to the client in a matter in which he appeared. The same, of course, can be said for *Hilado*, considering that the privileged/confidential information was so inextricably linked to the duty of confidence that the court felt it only needed to focus on the latter to satisfy its decision.

VII. CONCLUSION

To reiterate, the *Hilado* doctrine is as follows: if an attorney-client relationship exists, or has shown to exist, the lawyer is prevented from

84. Mercado v. Vitriolo, 459 SCRA 1, 6 (2005).

85. *Id.* at 12. Mercado contends that Vitriolo violated the rule on privileged communication when he instituted a criminal action against her for falsification of public documents because the criminal complaint disclosed facts relating to the civil case for annulment then handled by respondent Vitriolo. According to the Court, she did not, however, spell out these facts which will determine the merit of her complaint. The Court cannot be involved in a guessing game as to the existence of facts which the complainant must prove.

86. Natan v. Capule, 91 Phil. 640, 648 (1952).

representing another client with opposing interests regarding the same subject matter with which the lawyer previously dealt, at any time and regardless if confidential information was divulged.

As shown above, the durability of *Hilado* rests on its inherent soundness and consistent applicability to contemporary matters. The need to facilitate the administration of justice by giving potential litigants free and open avenues to seeking enforcement of their rights and by ensuring them that their interests are fully protected via complete confidence in their attorneys[87] is a consideration that will, undoubtedly, continue to remain applicable in a country where the judiciary remains one of the staunchest defenders of citizens' rights. Hand in hand with such a consideration is the indispensability of maintaining the integrity of both the bench and the bar, in ensuring that a high level of professional standard is observed.[88]

In light thereof, the one significant departure made from the doctrine itself – that all communication is not *per se* confidential, and that a showing of such confidentiality must first be proven – is based on strong considerations of public policy. It is difficult to argue that the desire of the State to prevent crimes[89] or to uphold the fundamental right of every person to due process[90] are policies not worthwhile enough to overturn *Hilado*. Indeed, such difficulty, and perhaps even impossibility, forced the Court to slowly erode one aspect of the doctrine until it finally made its definite pronouncement in *Mercado* that *Hilado* was truly modified. Nevertheless, in such an instance, some salutary purpose was still upheld.

As for the other aspects of the *Hilado* doctrine, they remain firmly entrenched in judicial decision-making. That the attorney-client relationship must exist[91] will always be the fundamental basis for considering the application of the privilege and the duty to preserve a client's confidence inviolate. Without it, one cannot even begin to consider applying the rudiments of linkage or similarity of subject matter. Moreover, the requirement that a necessary link be first established, whether it be under the hubris of the subject matter or that of mere suspicion, though somewhat departing from *Hilado*, nevertheless continues to enforce its rationale. Verily, by expanding the scope of the link to even the most insignificant factual minutiae, the possibility of a breach of confidence going unpunished or of confidential information being divulged unnecessarily or even of a potential client shirking away from the turning of the wheels of justice is substantially diminished.

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87. *Hilado*, 84 Phil. at 578 (1949).

88. *Id.* at 579.

89. People v. Sandiganbayan, 275 SCRA 505, 519 (1997).

90. Regala v. Sandiganbayan, 262 SCRA 122, 142 (1996).

91. *Hilado*, 84 Phil. at 578.

It is entirely possible that *Hilado* will undergo further modifications in the future. Nonetheless, so long as the undercurrent of any changes remains true to the policy bedrock upholding *Hilado*, or is strong enough to unearth it, then whatever adjustments are put in place will be nothing more than mere improvements on the original.