

# The Bersamin Dicta in *Disini v. Sandiganbayan*, Attorney-Client Privilege, and the In- House Counsel

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*The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable. And it is in the public interest that the lawyer should regard himself as more than a predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political[,] and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.<sup>1</sup>*

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1. United States v. United Shoe Machinery Corporation, 89 F.Supp. 357, 359 (D. Mass. 1950) (U.S.).

## I. INTRODUCTION

With the diversification of businesses, the establishment of local branches and subsidiaries by multinational corporations, and the desire to cut costs on often expensive external counsel legal fees, the demand for legal knowledge within the corporate setting in the Philippines has created a market for highly-skilled legal professionals working full time as in-house counsel or in other corporate capacities.<sup>2</sup> The result is a gradual paradigm shift in the way lawyers view career options. Indeed, from a time where “true” law practice was perceived as circumscribed within the confines of law firm employment or government and judicial service, today, more and more lawyers are shedding the pejorative notion that “going corporate” diminishes their standing in the legal community. As a result, many are readily choosing as a viable, if not lucrative, career option full-fledged corporate employment. No less than the Supreme Court has recognized this form of legal practice in *Hydro Resources Contractors Corp. v. Pagalilauan*, where it was held that:<sup>3</sup>

A lawyer, like any other professional, may very well be an employee of a private corporation or even of the government. It is not unusual for a big corporation to hire a staff of lawyers as its in-house counsel, pay them regular salaries, rank them in its table of organization, and otherwise treat them like its other officers and employees. At the same time, it may also contract with a law firm to act as outside counsel on a retainer basis. The two classes of lawyers often work closely together but one group is made up of employees while the other is not. A similar arrangement may exist as to doctors, nurses, dentists, public relations practitioners, and other professionals.<sup>4</sup>

Notwithstanding this gradual paradigm shift in the perception of in-house corporate practice, the rules governing the conduct of corporate practitioners have not been well-defined or sufficiently outlined in this jurisdiction. At least insofar as the Code of Professional Responsibility<sup>5</sup> is concerned, the framework adopted in prescribing the ethical obligations of lawyers continues to involve traditional attorney-client obligations which,

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2. See generally Asialaw, *The Changing Fortunes of In-house Counsel*, available at <http://www.asialaw.com/Article/1971484/Search/Results/The-Changing-Fortunes-of-In-houseCounsel.html?Ksupreywords=BHP> (last accessed Nov. 15, 2011).

3. *Hydro Resources Contractors Corp. v. Pagalilauan*, 172 SCRA 399 (1989).

4. *Id.* at 402-03. See also *Equitable Banking Corporation v. NLRC*, First Division, 273 SCRA 372, 375-76 (1997).

5. CODE OF PROFESSIONAL RESPONSIBILITY. See also RUBEN E. AGPALO, *THE CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS* 369 (1991).

while still applicable to the in-house counsel, do not sufficiently cover the entire gamut of ethical situations that this form of legal practice involves.<sup>6</sup>

A related, if not vital, issue that deserves more than a passing consideration is the question of attorney–client privilege with respect to internal corporate dealings with their respective in-house counsel.<sup>7</sup> In the United States (U.S.), this issue was brought to sharp focus following several high-profile corporate fraud cases involving the misconduct of corporate officers who had presumably sought advice and counsel from their respective in-house counsel.<sup>8</sup> The problem, most observe, is that corporations will attempt to “immunize internal communications from disclosure by placing [in-house] legal counsel in strategic positions to filter documents through the legal department.”<sup>9</sup>

While the issue is not as pronounced in the U.S. as in the Philippines, the growing size of the in-house counsel community begs the need to define in specific strokes the scope of the attorney–client privilege (privilege) in terms of the corporate in-house counsel set-up. This is especially true, considering that the Philippine rule on privilege,<sup>10</sup> similar to that of the

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6. See Maria Carmen L. Jardeleza, *Shotgun versus Top Gun: Confidentiality and the Filipino In-House Counsel*, 83 PHIL. L.J. 94 (2008) for an excellent discussion on the ethical issues facing Filipino lawyers in the corporate setting, and the inability of the existing CODE OF PROFESSIONAL RESPONSIBILITY to provide guidance for such situations.
  7. See generally Michael A. Lampert, *In-house Counsel and the Attorney Client Privilege*, available at <http://library.findlaw.com/2000/Oct/1/128767.html> (last accessed Nov. 15, 2011).
  8. See generally Time, *Behind the Enron Scandal*, available at <http://www.time.com/time/specials/packages/0,28757,2021097,00.html> (last accessed Nov. 15, 2011); WorldCom Scandal: A Look Back at One of the Biggest Corporate Scandals in U.S. History, available at [http://www.associatedcontent.com/article/162656/worldcom\\_scandal\\_a\\_look\\_back\\_at\\_one.html](http://www.associatedcontent.com/article/162656/worldcom_scandal_a_look_back_at_one.html) (last accessed Nov. 15, 2011). Among such high profile corporate fraud cases involved Enron Corporation, an American energy company which, in 2001, was discovered to have manufactured a robust financial condition through accounting fraud and market manipulation. Another notable corporate fraud case involved WorldCom, a telecommunications company, which similarly resorted to shady accounting practices to falsely report corporate growth and prop up declining stock prices.
  9. Roman Silberfeld, *Attorney-Client Privilege and the In-House Counsel*, available at <http://www.rkmc.com/Attorney-Client-Privilege-and-the-In-House-Counsel.htm> (last accessed Nov. 15, 2011).
  10. LEGAL ETHICS, rule 138, § 20 (e). This Section provides that it is the duty of the lawyer “[t]o maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client, and to accept no compensation in

Code of Professional Responsibility,<sup>11</sup> appears to be tailored more particularly to the traditional attorney-client relationship applicable to the corporation's external counsel. Unfortunately, recent dicta in a dissenting opinion by Justice Lucas P. Bersamin in *Disini v. Sandiganbayan*<sup>12</sup> have prescribed stringent qualifications on the application of the rule which, if not refined or qualified, may result in undermining the very public policy purpose upon which the privilege is actually founded.

This Comment therefore attempts to explore the application of the rule on privilege with respect to the in-house counsel within the Philippine corporate and judicial setting. Considering the unique role of an in-house counsel as legal manager and legal counsel within the modern corporation, the Comment aims to provide a descriptive discussion of the limits and application of the privilege, drawing, in particular, from U.S. experience, and highlighting the difficulties implied by the recent dicta found in *Disini*. The Comment also proposes possible approaches to balancing the interests of the Court in properly discovering the truth, while preserving the value of free communication between lawyer and client, even within the corporate setting.

## II. THE ROLE OF THE IN-HOUSE COUNSEL

### A. *The In-House Counsel as Legal Manager*

If statistics in the U.S. are indicative, recent years have shown a significant increase in the number of lawyers choosing in-house corporate practice. Between the 1970s and 1980s, for example, "there was a [40%] increase in the number of legal practitioners working in-house."<sup>13</sup> This was followed by an additional 30% increase in the decade that followed.<sup>14</sup> The reason for this increase was primarily economic: the corporate community desired to shift legal work in-house, thereby saving costs otherwise spent on expensive external counsel fees.<sup>15</sup> In-house counsel compensation became more

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connection with his client's business except from him or with his knowledge and approval." *Id.*

11. CODE OF PROFESSIONAL RESPONSIBILITY, canon 2I. This Canon provides that "[a] lawyer shall preserve the confidence and secrets of his client even after the attorney-client relation is terminated." *Id.*

12. *Disini v. Sandiganbayan*, 621 SCRA 415 (2010).

13. Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering For A Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1059 (1997).

14. *Id.*

15. See Scott Gibson, Recruiting in-house lawyers — a guide for General Counsel/Legal Directors, available at <http://www.edwardsgibson.com/article/view/25> (last accessed Nov. 15, 2011). It provides that:

competitive,<sup>16</sup> and the regularity of work hours was particularly appealing to lawyers who were tired of turning-in 18-hour days in traditional law firms.<sup>17</sup>

Yet, in spite of this dramatic rise in in-house corporate employment, many commentators have noted that the practice, as a whole, has been generally under-examined.<sup>18</sup> This is due largely to the complexity and ambiguity of the role of the in-house counsel in the modern corporate organization.<sup>19</sup> Whimsically described as “the ‘Swiss army knife’ of the legal profession,”<sup>20</sup> in-house counsels are the strategists “for the company’s management in navigating the business free of legal hurdles.”<sup>21</sup> They are, in a word, the corporation’s *legal managers*.

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[t]raditionally the role of the in-house lawyer was primarily to save costs and the equation most Financial Directors would undertake was simply to compare the cost of necessary external legal spend[ing] (on law firms) with the projected compensation of an in-house lawyer — if the former was greater than the latter then there was a *prima facie* case for hiring.

*Id.*

16. Lawyer’s Weekly, *Stacking-up: Salaries on the rise for in-house lawyers*, available at [http://www.lawyersweekly.com.au/blogs/special\\_reports/archive/2011/05/05/stacking-up-salaries-on-the-rise-for-in-house-lawyers.aspx](http://www.lawyersweekly.com.au/blogs/special_reports/archive/2011/05/05/stacking-up-salaries-on-the-rise-for-in-house-lawyers.aspx) (last accessed Nov. 15, 2011).
17. See Lawcrossing.com, *In-house counsel: Life in the corporate wing*, available at <http://www.lawcrossing.com/article/1171/In-House-Counsel-Life-in-the-Corporate-Wing> (last accessed Nov. 15, 2011). The Article states that corporate legal departments have long been a haven for law-firm refugees—established lawyers who are willing to take a pay cut in return for more reasonable hours. *Id.* See also Lawdepartmentmanagementblog.com, *What nine advantages do in-house lawyers see in their jobs and four remarks*, available at [http://www.lawdepartmentmanagementblog.com/law\\_department\\_management/2010/05/what-nine-advantages-do-in-house-lawyers-see-in-their-jobs-and-four-remarks.html](http://www.lawdepartmentmanagementblog.com/law_department_management/2010/05/what-nine-advantages-do-in-house-lawyers-see-in-their-jobs-and-four-remarks.html) (last accessed Nov. 15, 2011). According to a survey conducted by InsideCounsel magazine, it appears that 32.5% of 348 survey respondents referred to “work-life balance” as a key advantage. *Id.*
18. Omari Scott Simmons, *The Under-Examination of In-House Counsel*, 11 TENN. J. BUS. L. 145, 145-46 (2009).
19. *Id.* at 146-47.
20. *Id.* at 147 (citing Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS U. L.J. 989, 1003-20 (2007)).
21. Asialaw, *In-house Counsel: The Balancing Act*, available at <http://www.asialaw.com/Article/1971450/Search/Results/In-house-Counsel-The-Balancing-Act.html?Keywords=Legislation&PageMove=15&OrdezType=2> (last accessed Nov. 15, 2011).

Aside from this functional complexity, in-house counsels are also organized in often overlapping structural arrangements, especially in large multinational corporations spanning various jurisdictions. While local law departments are generally flat organizations with junior lawyers reporting to a senior lawyer responsible for the local affiliate, both are required to deal not only with local managers and directors, but also with foreign subject matter specialists and superiors on the regional and global levels.<sup>22</sup> This arrangement creates multiple approval and evaluation points — an arrangement almost alien from the direct reporting lines usually found in the traditional law office.<sup>23</sup>

A cursory survey of Philippine corporate practice suggests the same level of emerging structural and functional complexity as in the U.S. The organization of internal law departments in Philippine corporations, for example, often mirrors specific corporate needs such as regulatory compliance, litigation management, and general corporate housekeeping. This seemingly straightforward structure does not necessarily translate to a clear delineation of roles, functions, and obligations. Indeed, it can be reasonably assumed that even in Philippine corporations, decisions taken from the lowest ranks of day-to-day business to the highest level of management policy-setting would include advice from employed in-house lawyers. The role of the in-house counsel in these situations would, therefore, involve providing guidance on the legal risk associated with a

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22. See, e.g., Ben W. Heineman, Jr., *The General Counsel as Lawyer–Statesman* (A Blue Paper submitted to the Harvard Law School Program on the Legal Profession) 8, available at [http://www.law.harvard.edu/programs/plp/pdf/General\\_Counsel\\_as\\_Lawyer–Statesman.pdf](http://www.law.harvard.edu/programs/plp/pdf/General_Counsel_as_Lawyer–Statesman.pdf) (last accessed Nov. 15, 2011). Illustrating an example of the role a chief in-house counsel of a corporation plays, the Paper states:

[t]he General Counsel should be at the table with the CEO on the broad array of performance issues: key operational initiatives, economic risk assessment and mitigation, major transactions, new strategic directions (new products, new markets, new geographies), important template contracts, resolution of major disputes (through mediation or arbitration if possible), and major accounting decisions that have a forensic dimension (as many do today). The fundamental task is to establish critical facts, define applicable legal principles, identify areas of risk and generate options for accomplishing performance goals while minimizing legal, ethical or reputation risk.

*Id.*

23. *Id.* at 5. The Paper further explains that the idea of the modern general counsel is a lawyer–statesman who is an acute lawyer, a wise counselor and company leader, and who has a major role assisting the corporation achieve that fundamental fusion which should, indeed, be the foundation of global capitalism. *Id.*

particular business decision, which often includes decisions that are commercial or strictly non-legal in nature. The complexity is further pronounced when lawyers are placed in positions outside of traditional legal roles; it is not unheard of, and it is sometimes even preferred, for lawyers to head corporate communication departments, human resource departments, and other sensitive areas and functions.

It is clear, in any event, that in-house counsels, because of their intimate contact across all levels of corporate business and decision-making, serve as more than just lawyers in the traditional sense. While applying legal knowledge to various issues of corporate significance, in-house counsel would necessarily also require an intimate understanding of the nuances of the business few external counsels are ever able to achieve. An observation by the Association of Corporate Counsel of the United States is instructive:

Despite this general title, however, in-house counsel is more than just a legal adviser to a corporation or entity; in-house attorneys affect the full range of that body's decisions. While counsel will typically have a greater investment in the legalities of the decision-making process than with the substantive implications of the companies' business strategy, knowledge of the latter is essential for counsel to effectively protect the company's legal interests.<sup>24</sup>

Another way of viewing the role of in-house counsels as legal managers is to compare them to the role of external counsels who are also routinely engaged by the corporation to provide legal advice. A decisive comparison has been provided by Professor John Dzienkowski, in his paper *Evolving Issues for Corporate Lawyers and In-House Counsel*, as follows:

First, in-house lawyers have only one client (and in some cases affiliates of that one client) and thus their livelihood depends upon the continued representation of the client in a manner acceptable to the individuals who control and manage the entity. Outside lawyers and law firms have many clients and typically make efforts to ensure that their practices are diversified. The economic pressure on an individual's ability to earn a living in a job clearly creates the potential to influence behavior.

Second, the in-house lawyer is an employee of the organization. This has several implications. In-house lawyers receive all their compensation from one client, and they are also organizationally monitored by non-lawyers. Also, the officers and managers of the organization may view the in-house lawyer differently from their outside lawyers. They often consider their in-house lawyers to be team players and not someone like outside counsel

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24. Association of Corporate Counsel, *Becoming In-House Counsel: A Guide for Law Students and Recent Graduates* (An Unpublished Material, Sponsored by the Association of Corporate Counsel) 1, available at <http://www.mortgagebankers.org/files/conferences/2007/2007lirc/becominginhousecounsel.pdf> (last accessed Nov. 15, 2011). See also Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 *FORDHAM L. REV.* 955, 965-74 (2005).

whose time and loyalties are shared by many other clients, some of whom might even be competitors. In-house lawyers are often expected to make business as well as legal decisions.

Third, interpersonal relationships often make a significant difference in how professionals interact with the client. When a lawyer works in the same office and sees the constituents of an organization every day and develop personal and social friendships with the managers of a business entity, those factors clearly influence legal representation. Outside lawyers presumably could have the identical situation. However, they often have larger circles of friends and certainly have the opportunity to be more detached from their client's constituents.

Fourth, in theory[,] in-house lawyers have much more information about the client than outside lawyers do. They have business and legal information, as well as informal sources of information about the individuals who run the organization. This knowledge presents a unique opportunity to influence the decision makers to avoid a risk of substantial injury to the client entity.<sup>25</sup>

What is implicit in these comparisons is that because of the unique circumstances and nature of the in-house counsels' engagement, they are often vulnerable to influences not otherwise exerted on external counsel. What is often sacrificed in the placement of in-house counsel in fundamental corporate decision-making, therefore, is their independence and objectivity which may, if unchecked, lead to lapses in judgment and a tendency to "cover-up" corporate indiscretions.<sup>26</sup> Indeed, since in-house counsels only have the corporation as their sole employer, they are more likely to succumb to the temptation of indulging corporate indiscretions committed by corporate officers in the belief that this will gain them favor from these corporate bosses. More explicitly,

[t]he Board of Directors and the corporate officers exercise a significant amount of control over the in-house counsel's livelihood and career as an employee of the corporation. This, in turn, will determine the extent to which an in-house counsel will stay true to his fiduciary oath when faced with ethical issues. If the in-house counsel does not have enough guidance in ethical rules, he or she will more likely be forced to act in favor of keeping his livelihood. In some instances, this will mean a transgression of his or her ethical duties as a lawyer.<sup>27</sup>

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25. John Dzienkowski, *Evolving Issues for Corporate Lawyers and In-House Counsel* (An Unpublished Paper for the University of Texas Continuing Legal Education eLibrary) 3-4, available at [http://www.utcle.org/eLibrary/preview.php?asset\\_file\\_id=1769](http://www.utcle.org/eLibrary/preview.php?asset_file_id=1769) (last accessed Nov. 15, 2011).

26. See JOHN C. COFFEE, JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 195 (2006).

27. Jardeleza, *supra* note 6, at 107-08.



Another dilemma unique to in-house corporate practice involves the nature of the client itself: the corporation, a juridical entity, but a fiction of law nonetheless, which acts through human agents.<sup>28</sup> As eloquently pointed out by Professor Ralph Jonas:

The client to which the lawyer owes undivided loyalty, fealty[,] and allegiance cannot speak to him except through voices that may have interests adverse to his client. He is hired and may be fired by people who may or may not have interests diametrically opposed to those of his client. And finally, his client is itself an illusion, a fictional 'person' that exists or expires at the whim of its shareholders, whom the lawyer does not represent.<sup>29</sup>

Thus, while corporate officers, particularly corporate directors, owe fiduciary duties of loyalty and care to the corporate entity,<sup>30</sup> in-house counsels may sometimes find themselves caught in a tug-of-war between the individual and sometimes adverse interests of erring corporate officers and the corporation itself as their true client, knowing that, in practical terms, their employment and livelihood do not depend on the corporation but upon its human agents who are the ones evaluating their performance.

#### *B. The In-House Counsel as Engaged in the Practice of Law*

For all their amorphous roles within the corporation, what is certain is that in-house counsels in the Philippines are held to a higher standard of conduct than mere corporate managers as they continue to be governed by the same Code of Professional Responsibility as any other member of the Philippine

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28. Mark C. Van Deusen, *The Attorney-Client Privilege for In-House Counsel When Negotiating Contracts: A Response to Georgia-Pacific Corp. v. GAF Roofing Manufacturing Corp.*, 39 WM. & MARY L. REV. 1397, 1402-03 (1998).

29. Jardeleza, *supra* note 6, at 102 (citing Ralph Jonas, *Who is the Client? The Corporate Lawyer's Dilemma*, 39 HASTINGS L.J. 617, 619 (1988)).

30. The Corporation Code of the Philippines [CORPORATION CODE], Batas Pambansa Blg. 68, § 34 (1980). This Section provides:

Sec. 34. *Disloyalty of a director.* — Where a director, by virtue of his office, acquires for himself a business opportunity which should belong to the corporation, thereby obtaining profits to the prejudice of such corporation, he must account to the latter for all such profits by refunding the same, unless his act has been ratified by a vote of the stockholders owning or representing at least two-thirds (2/3) of the outstanding capital stock. This provision shall be applicable, notwithstanding the fact that the director risked his own funds in the venture.

*Id.*

See also *Gokongwei, Jr. v. Securities and Exchange Commission*, 89 SCRA 336 (1979).

Bar. As professionals engaged in the practice of law, they are subject to the supervision not only of their corporate superiors, but of the Supreme Court itself<sup>31</sup> under the broad and also somewhat amorphous definition of law practice laid down in *Cayetano v. Monsod*:<sup>32</sup>

To engage in the practice of law is to perform those acts which are [characteristic] of the profession. Generally, to practice law is to give notice or render any kind of service, which device or service requires the use in any degree of legal knowledge or skill.<sup>33</sup>

For this reason, in-house counsels, who perform acts requiring the use of legal knowledge or skill following the definitions provided in *Cayetano*, are still required to have and maintain the same requirements for any other lawyer practicing law in the Philippines. This includes compliance with Mandatory Legal Education requirements.<sup>34</sup> Furthermore, because the Code of Professional Responsibility applies with equal force to in-house counsels, they are also expected to observe the same duties and obligations that a lawyer would otherwise owe to any other client, which, in this case, because of the unique nature of their engagement, is a single and unique one: the corporation itself. In-house counsels, therefore, are obliged to maintain all “fidelity to the cause of [such] client”<sup>35</sup> and to “represent [it] with zeal within the bounds of the law.”<sup>36</sup> In-house counsels are also not allowed to “represent conflicting interests except by written consent of all concerned,”<sup>37</sup> and — more pertinently to the subject of this inquiry — are also required to preserve “the confidences or secrets of [the company] even after the

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31. PHIL. CONST. art. VIII, § 5 (5).

32. *Cayetano v. Monsod*, 201 SCRA 210 (1991).

33. *Id.* at 214 (citing 111 A.L.R. 23). *See also* Aguirre v. Rana, Bar Matter No. 1036 [B.M. No. 1036] (June 10, 2003).

34. Supreme Court, Adopting the Rules on Mandatory Continuing Education for Members of the Integrated Bar of the Philippines, Bar Matter No. 850 [B.M. No. 850], rule 2, § 2 (Aug. 22, 2000). All lawyers licensed to practice law in the Philippines are required to “complete every three (3) years at least thirty-six (36) hours of continuing legal education activities approved by the MCLE Committee.” *Id.*

35. CODE OF PROFESSIONAL RESPONSIBILITY, canon 17. This Canon states that a lawyer “owes fidelity to the cause of his client and he shall be mindful of the trust and confidence reposed in him.” *Id.*

36. *Id.* canon 19. This Canon states that a lawyer “shall represent his client with zeal within the bounds of the law.” *Id.*

37. *Id.* rule 15.03. This Rule provides that a lawyer “shall not represent conflicting interests except by written consent of all concerned given after a full disclosure of the facts.” *Id.*

attorney-client relation is terminated.”<sup>38</sup> What can be said about lawyers in general, therefore, can be equally said of lawyers serving as in-house counsel: “[A]n attorney is more than a mere agent or servant, because he possesses special powers of trust and confidence reposed on him by his client.”<sup>39</sup>

What must be underscored, however, is that while in-house counsels are bound to maintain loyalty to their corporate client, they are also considered officers of the court, and consequently owe primary fealty to the rule of law and the administration of justice.<sup>40</sup> The pronouncement of the Supreme Court in *In Re: Wenceslao Laureta*<sup>41</sup> holds true for them as well: “[A lawyer’s] first duty is not to his client but to the administration of justice; to that end, his client’s success is wholly subordinate; and his conduct ought to and must always be scrupulously observant of law and ethics.”<sup>42</sup>

Considering, therefore, this tension between their obligations to the corporation, the influences exerted by corporate representatives, and their duty to uphold the rule of law, the ethical minefield navigated by the in-house counsel is not difficult to perceive, especially since financial dependence upon the corporation, the desire for professional advancement, and the corporate culture itself may easily blur for the in-house counsel the hierarchy of values expected from all members of the Bar. This is made more complicated by the absence — or, at the very least, apparent absence — of specific ethical rules applying to situations unique to in-house counsel which could otherwise serve as guides through this dangerous minefield, as they serve the dual roles of legal manager and legal counsel.

Indeed, while the obligation is recognized under the Code of Professional Responsibility and codified under the Revised Rules on Evidence,<sup>43</sup> it is not entirely clear what the actual scope of “confidential

38. CODE OF PROFESSIONAL RESPONSIBILITY, canon 21. This Canon states that a lawyer “shall preserve the secrets of his client even after the attorney-client relationship has been terminated.” *Id.*

39. *Regala v. Sandiganbayan*, 262 SCRA 122, 138 (1996).

40. See RUBEN E. AGPALO, LEGAL AND JUDICIAL ETHICS 142 (8th ed. 2009).

41. *In Re: Wenceslao Laureta*, 148 SCRA 382 (1987).

42. *Id.* at 422.

43. REVISED RULES OF EVIDENCE, rule 130, § 24 (b). This Section provides:

Sec. 24. Disqualification by reason of privileged communication. —  
The following persons cannot testify as to matters learned in confidence in the following cases:

...

- (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 thereon in the course of, or with a view to, professional employment, nor can an attorney's

communication” is for the in-house counsel. More importantly, to what extent may corporations themselves claim privilege in order to refuse compulsive court processes to require disclosure of communications made to in-house counsel?

### III. ATTORNEY-CLIENT PRIVILEGE AND THE IN-HOUSE COUNSEL

The attorney-client privilege found in Philippine procedural law draws its life from as ancient a source as the Roman Republic, where attorneys, considered servants of those whose affairs they managed, could not testify for or against their masters under a fiduciary duty of loyalty.<sup>44</sup> At the heart of this privilege is the public policy recognition that clients ought to enjoy “freedom of consultation” with counselors engaged to defend them.<sup>45</sup> Fundamentally, the privilege is meant to protect the client from possible breach of confidence resulting from the client’s consultation with counsel.<sup>46</sup> The U.S. Supreme Court, in *Upjohn Company v. United States*,<sup>47</sup> declared that:

[the] attorney-client privilege’s] purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.<sup>48</sup>

This public policy consideration has far outweighed the danger that such privilege will be abused to obstruct the finding of the truth. Still, because the danger of abuse exists, the privilege “ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.”<sup>49</sup> In fact,

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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[.]

*Id.*

44. Van Deusen, *supra* note 28, at 1400 (citing Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL L. REV. 487, 487-88 (1928)).

45. Van Deusen, *supra* note 28, at 1401.

46. *Hadjula v. Madianda*, 526 SCRA 241, 248 (2007).

47. *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (U.S.).

48. *Id.* at 389.

49. 8 JOHN HENRY WIGMORE, *TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2291, 554 (1961). “The policy of the privilege has been plainly grounded since the latter part of the 1700s on subjective considerations.” Prior to that, its theory was objective rather than subjective, “a consideration for *the oath and the honor* of the attorney rather than for the apprehensions of his client.” *Id.* (emphasis supplied).

courts in the U.S. have recognized that while the preservation of the privilege is valuable, corporate clients could similarly attempt to hide mountains of otherwise discoverable information behind a veil of secrecy by using in-house legal departments as conduits of otherwise non-privileged information.<sup>50</sup> It has been said that:

[t]he fact that the attorney is in-house counsel does not mean that the privilege is unavailable. ... However, [the] in-house counsel's law degree and office are not to be used to create a 'privileged sanctuary for corporate records.' As a result, many courts impose a higher burden on the in-house counsel to 'clearly demonstrate' that advice was given in a strictly legal capacity.<sup>51</sup>

#### A. General Application of the Attorney-Client Privilege

The rule on attorney-client privilege is found in a larger section of the Revised Rules of Evidence on Disqualification by Reason of Privileged Communication and borrows extensively from U.S. practice and procedure.<sup>52</sup> Section 24 of Rule 130 states that among the persons prohibited

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50. Michael L. Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 483 (1986). In the U.S., this is also called the creation of a "zone of silence" wherein a corporate client structures its procedures so as to extend the privilege to majority of its routine transactions through transmittal to the in-house counsel. Thus, as dealings with the in-house counsel become more frequent, the "zone of silence" grows larger. *Id.*

51. David M. Greenwald, *Protecting Confidential Legal Information: A Handbook for Analyzing Issues Under the Attorney-Client Privilege and the Work Product Doctrine* (A Handbook Made Available by Jenner & Block) 61, available at [http://www.jenner.com/files/tbl\\_s20Publications/RelatedDocumentsPDFs1252/3664/2011\\_jenner\\_block\\_protecting\\_confidential\\_legal\\_information.pdf](http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/3664/2011_jenner_block_protecting_confidential_legal_information.pdf) (last accessed Nov. 15, 2011) (citing *United States v. Davis*, 131 F.R.D. 391, 401 (S.D. N.Y. 1990) (U.S.)).

52. REVISED RULES OF EVIDENCE, rule 130, § 24 (b). *But see* American Bar Association's Asian Law Initiative, *Analysis of the Rules of Evidence and the Electronic Rules of Evidence for the Republic of the Philippines* (ABA-Asia Legal Assessment Series), available at [http://apps.americanbar.org/rol/publications/philippines\\_rules\\_of\\_evidence.pdf](http://apps.americanbar.org/rol/publications/philippines_rules_of_evidence.pdf) (last accessed Nov. 15, 2011) (citing *United States v. Zolin*, 491 U.S. 554 (1989) (U.S.)). The Article discusses:

[o]n its face PRE 130(24)(b), which creates an attorney-client privilege, has no exception for the situation in which the communications are made to the attorney for the purpose of furthering ongoing or future criminal or fraudulent activity, an exception that exists under US law. Such communications are most often made by those engaging in white collar crimes of the sort highlighted by the Philippine Supreme Court Committee. Efforts to use an attorney's advice to further ongoing or future criminal or fraudulent activity are

from testifying on matters learned in confidence is the lawyer engaged under an attorney-client relationship, when his client has not given him consent to testify:

SEC. 24. *Disqualification by reason of privileged communication.* — The following persons cannot testify as to matters learned in confidence in the following cases:

...

- (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 thereon 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>53</sup>

In *Mercado v. Vitriolo*,<sup>54</sup> the Supreme Court, distilling the elements of the rule from *Wigmore*, said that for the privilege to apply, the following must clearly be established:

- (a) There exists an attorney-client relationship, or a prospective attorney-client relationship; and it is by reason of this relationship that the client made the communication.

...

- (b) The client made the communication in confidence.

...

- (c) The legal advice must be sought from the attorney in his professional capacity.<sup>55</sup>

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inconsistent with the rationale[] for the privilege, and thus there is no sound reason to prevent such communications from being admitted into evidence.

*Id.*

53. REVISED RULES OF EVIDENCE, rule 130, § 24 (b).

54. *Mercado v. Vitriolo*, 459 SCRA 1 (2005).

55. *Id.* at 10-11. See also WIGMORE, *supra* note 49, at § 2292, 554.

The essential factors to establish the existence of the attorney-client privilege communication are: (a) Where legal advice of any kind is sought (b) from a professional legal adviser in his capacity as such, (c) the communications relating to that purpose, (d) made in confidence (e) by the client, (f) are at his instance permanently protected (g) from disclosure by himself or by the legal advisor, (h) except the protection be waived. Waiver of the privilege may be expressed or implied such as when a part of the declaration, conversation, or writing containing the privileged matter is introduced in evidence.

In *Mercado*, the Supreme Court dismissed an administrative case filed by the petitioner against the respondent for supposedly divulging confidential information she had made to him in the course of professional employment.<sup>56</sup> In ruling against the petitioner, the Court clarified that “communication from a (prospective) client to a lawyer for some purpose *other than* on account of the (prospective) attorney–client relation is not privileged.”<sup>57</sup> For the privilege to apply, therefore, communication must not be intended for “mere information,” but for the purpose of seeking legal advice as to specific rights or obligations. Thus, a client who seeks business or personal assistance and not legal advice does not thereby render the communication privileged.<sup>58</sup>

In supporting this conclusion, the Court cited the earlier case of *Pfleider v. Palanca*,<sup>59</sup> which involved a lease agreement between a client as the lessor and the lawyer as the lessee, where the parties agreed that any lease payments owing on the property would be paid by the lawyer as lessee directly to the client’s creditors.<sup>60</sup> Arguing that the list of creditors provided by the client to the lawyer was privileged, the client–lessor sought to have the lawyer disciplined for disclosing the document in breach of his professional obligation.<sup>61</sup> In ruling in favor of the lawyer, the Court said that the disclosure of the list was “not because of the professional relation then existing between them, but on account of the lease agreement.”<sup>62</sup> The Court concluded that any violation of the supposed confidence that accompanied the delivery of that list “would partake more of a private and civil wrong than of a breach of the fidelity owing from a lawyer to his client.”<sup>63</sup>

In *People v. Sandiganbayan*,<sup>64</sup> the Court was faced with the question on the extent of the client’s privilege with respect to the commission of criminal acts.<sup>65</sup> Noting in the first place, and citing U.S. jurisprudence, that the scope

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*Id.* See also *Orient Insurance Co. v. Revilla and Teal Motor Co.*, 54 Phil. 919, 927–28 (1930).

56. *Mercado*, 459 SCRA at 13.

57. *Id.* at 10 (emphasis supplied). Logically, the privilege refers *also* to communications from attorney to client relative to privileged matters. See also *Orient Insurance Co.*, 54 Phil. at 926.

58. *Mercado*, 459 SCRA at 12.

59. *Pfleider v. Palanca*, 35 SCRA 75 (1970).

60. *Id.* at 76.

61. *Id.* at 78.

62. *Id.* at 78–79.

63. *Id.* at 79.

64. *People v. Sandiganbayan*, 275 SCRA 505 (1997).

65. *Id.* at 516.

of the privilege is not confined to verbal or written communications but to any form of communication,<sup>66</sup> and even to communication relating to crimes already committed,<sup>67</sup> the Court refused to extend the privilege with respect to communication involving a crime yet to be perpetrated.<sup>68</sup>

Meanwhile, in the early case of *Barton v. Leyte Asphalt & Mineral Oil Co.*,<sup>69</sup> the Supreme Court denied the privilege to a document admitted into evidence already in the hands of a third party not the attorney: “The law protects the client from the effect of disclosures made by him to his attorney in the confidence of the legal relation, but when such a document, containing admissions of the client, comes to the hand of a third party, and reaches the adversary, it is admissible in evidence.”<sup>70</sup>

By far, however, the most celebrated case on attorney-client privilege involved the refusal by lawyers of the ACCRA Law Office<sup>71</sup> to divulge the identity of its client whose corporations — which the law firm assisted in incorporating and in which several lawyers sat as nominee directors — were supposedly used as conduits to amass ill-gotten wealth during the Marcos era. In resolving the lawyers’ claim of privilege, the Court, in *Regala v. Sandiganbayan, First Division*,<sup>72</sup> first said that as a matter of public policy, “a lawyer may not invoke privilege and refuse to divulge the name or identity of his client.”<sup>73</sup> The Court, however, again citing U.S. authorities, noted specific exceptions to the general public policy rule: first, “where a strong probability exists that revealing the client’s name would implicate that client in the very activity for which he sought the lawyer’s advice;”<sup>74</sup> second,

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66. *Id.* at 517-18 (citing *In re: Carter’s Will*, 122 Misc. 493, 204 N.Y.S. 393 (N.Y. Surr. Ct. 1924) (U.S.); *State v. Dawson*, 90 Mo. 149 1, S.W. 827 (Mo. 1886) (U.S.)).

67. *Id.* at 519. *See also Hadjula*, 526 SCRA at 247. In *Hadjula*, the Court held that documents and information revealed in the course of a legal consultation with the attorney and used as bases in the criminal and administrative complaints against the client were covered by the privilege. *Id.*

68. *Sandiganbayan*, 275 SCRA at 519 (citing 58 AM. JUR. *Witnesses* § 516, 288-89).

69. *Barton v. Leyte Asphalt & Mineral Oil Co.*, 46 Phil. 938 (1924).

70. *Id.* at 953.

71. *See* Angara Abello Concepcion Regala & Cruz Law Offices, available at <http://www.accrallaw.com/> (last accessed Nov. 15, 2011). Angara Abello Concepcion Regala & Cruz Law Offices (ACCRALAW) was established in 1972 and is one of the largest law firms in the Philippines specializing in litigation and general corporate practice. *Id.*

72. *Regala*, 262 SCRA at 122.

73. *Id.* at 141 (citing 58 AM. JUR. 2D *Witnesses* § 507, 285).

74. *Regala*, 262 SCRA at 142.



“[w]here disclosure would open the client to civil liability;”<sup>75</sup> and third, “[w]here the government’s lawyers have no case against an attorney’s client unless, by revealing the client’s name, the said name would furnish the only link that would form the chain of testimony necessary to convict an individual of a crime.”<sup>76</sup> Citing these exceptions, the Court upheld the lawyers’ claim of privilege and allowed the identity of their client to remain hidden:

The circumstances involving the engagement of lawyers in the case at bench, therefore, clearly reveal that the instant case falls under at least two exceptions to the general rule. First, disclosure of the alleged client’s name would lead to establish said client’s connection with the very fact in issue of the case, which is privileged information, because the privilege, as stated earlier, protects the subject matter or the substance (without which there would be no attorney-client relationship).

The link between the alleged criminal offense and the legal advice or legal service sought was duly established in the case at bar, by no less than the [Presidential Commission on Good Government (PCGG)] itself. The key lies in the three specific conditions laid down by the PCGG which constitutes petitioners’ ticket to non-prosecution should they accede thereto:

- (a) the disclosure of the identity of its clients;
- (b) the submission of documents substantiating the attorney-client relationship; and
- (c) the submission of the deeds of assignment petitioners executed in favor of their clients covering their respective shareholdings.

From these conditions, particularly the third, we can readily deduce that the clients indeed consulted the petitioners, in their capacity as lawyers, regarding the financial and corporate structure, framework[,] and set-up of the corporations in question. In turn, petitioners gave their professional advice in the form of, among others, the aforementioned deeds of assignment covering their client’s shareholdings.

There is no question that the preparation of the aforestated documents was part and parcel of petitioners’ legal service to their clients. More important, it constituted an integral part of their duties as lawyers. Petitioners, therefore, have a legitimate fear that identifying their clients would implicate them in the very activity for which legal advice had been sought, i.e., the alleged accumulation of ill-gotten wealth in the aforementioned corporations.<sup>77</sup>

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75. *Id.* at 144.

76. *Id.* at 146.

77. *Id.* at 148-49.

A common thread that runs through these cases involves the application of the privilege to lawyers in private legal practice, i.e., lawyers who offer their services to the public as counselors-at-law. In these cases, there were no ambiguities in the character of the lawyer and the client or their engagement under an attorney-client relationship. Neither was there a question on the parties' intention to keep the communication confidential. The only real difficulty left for resolution involved the *scope* of such privilege, and whether such communication was given in the lawyer's professional capacity.

While these cases, particularly the enumeration of the elements of the privilege found in *Mercado*, may be instructive for an in-house counsel, they can, at best, only serve as general guidelines because of the inherent ambiguities in an in-house counsel's unique dual role as both legal manager and legal adviser. Thus, while the broad elements of the privilege as laid down by the Revised Rules of Evidence remain the same for both in-house counsels and private practitioners, its application to corporate communications may not be so easy to ascertain: who, for example, is the in-house counsel's client? If a corporation can only act through its officers and employees, does this mean that all such officers and employees are clients of the in-house counsel? Furthermore, while communication intended to be confidential may indeed be passed on to the in-house counsel, does this automatically make such communication subject to the privilege? Finally, are all advice given by the in-house counsel in the performance of his varied functions covered by the benefit of the privilege?

In resolving these varying issues, the most appropriate point of departure would perhaps be the well-recognized rule that communication, to be privileged, must be sought from the lawyer in his professional capacity,<sup>78</sup> for the purpose of seeking legal advice. It should be noted, however, that issues presented to the in-house counsel do not precisely fit into the clearly defined category of "legal advice," since these are often intermingled with both legal and non-legal elements. Therefore, applying the *Mercado* standard, that business related communication is beyond the ambit of the privilege, would effectively render corporate decision makers perennially insecure about the type of information they pass on to their in-house counsel.

Unfortunately, recent dicta in *Disini* appear to support this insecurity by considering as beyond the purview of privileged communication "legal services [that] are so intertwined with the business activities that a clearer

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78. See *Burbe v. Magulta*, 383 SCRA 276, 283 (2002). According to the Court, professional employment is established at the moment a client "consults a lawyer with a view to obtaining professional advice or assistance, and the lawyer voluntarily permits or acquiesces with the consultation." Thus, whether the attorney consulted did not afterwards handle the case or the existence of a close personal relationship between the lawyer and the client is immaterial in constituting professional employment. *Id.*

distinction between the two is impossible to discern.”<sup>79</sup> This apparent pre-occupation between the legal and the commercial, if not clarified, may ultimately result in undermining the purpose of the privilege itself by creating a “chilling effect” on the communications coursed through the in-house counsel. The dicta would also create an undue advantage for adverse parties in corporate litigations, where claims of privilege will likely be refused because of the “intertwined” nature of the communication made. Apropos, therefore, would be the observation of Justice Jackson in his concurring opinion in *Hickman v. Taylor*:<sup>80</sup> “Discovery was hardly intended to enable a learned profession to perform its functions either without wits or wits borrowed from the adversary.”<sup>81</sup>

*B. Disini v. Sandiganbayan and the Bersamin Dicta*

*Disini* involved the propriety of the revocation by the Sandiganbayan of an Immunity Agreement earlier entered into between the petitioner, Jesus E. Disini (Jesus) and the PCGG on 16 February 1989.<sup>82</sup> Under this Immunity Agreement (Agreement), Jesus agreed to testify, on behalf of the Philippine Government (Government), in connection with its case against the Westinghouse Electric Corporation pending before the U.S. District Court of New Jersey and in the arbitration case that Westinghouse International Projects Company filed against the Government before the International Chamber of Commerce Court of Arbitration.<sup>83</sup> These cases involved the construction by Westinghouse Electric Corporation of the Bataan Nuclear Power Plant — a contract which was supposedly brokered by Herminio T. Disini, Jesus’s second cousin for whom he worked as an executive from 1971 to 1984.<sup>84</sup> In exchange for Jesus’s testimony, the Government agreed to waive its right to compel him to testify in any other domestic or foreign proceeding that may be brought by the Government against his cousin, Herminio.<sup>85</sup> Jesus thereafter testified in favor of the government according to the terms of the Immunity Agreement.<sup>86</sup>

Eighteen years later, however, the Government applied for a *subpoena duces tecum et ad testificandum* from the Sandiganbayan requiring him to testify in another case filed by the Government against Herminio.<sup>87</sup> The application

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79. *Disini*, 621 SCRA at 447 (J. Bersamin, dissenting opinion).

80. *Hickman v. Taylor*, 329 U.S. 495 (1947) (U.S.).

81. *Id.* at 516.

82. *Disini*, 621 SCRA at 422.

83. *Id.* at 421-22.

84. *Id.* at 422.

85. *Id.* at 423.

86. *Id.* at 424.

87. *Id.*

was granted over Jesus's objections, and in a Motion for Reconsideration filed by Jesus, the Court revoked the Immunity Agreement and affirmed the issuance of the *subpoena*.<sup>88</sup>

In arguing in favor of the issuance of the *subpoena*, the Government claimed that the PCGG's power to grant immunity was limited only to criminal and civil prosecution and could not exempt anyone from providing evidence in court if they are not defendants to a case.<sup>89</sup> In ruling against the Government, however, the Supreme Court pointed out that Executive Order (E.O.) No. 14, which granted the PCGG the power to extend immunity to witnesses, included the power to exempt them not only from prosecution, but also from enforced testimony.<sup>90</sup> Citing the previous case of *Tanchanco v. Sandiganbayan*,<sup>91</sup> the Court said that the "scope of immunity offered by the PCGG under the [E.O.] may vary,"<sup>92</sup> with the Commission having the discretion of granting "appropriate levels of criminal immunity depending on the situation of the witness and his relative importance to the prosecution of ill-gotten wealth cases."<sup>93</sup>

Thus, the Court ruled that by the language of E.O. No. 14, the PCGG extended Jesus not only criminal and civil immunity, "but also immunity against being compelled to testify in any domestic or foreign proceeding, other than the civil and arbitration cases identified in the Immunity Agreement."<sup>94</sup> In any event, Jesus' refusal to testify before the Sandiganbayan would result in liability for criminal contempt — a case which the Government itself concedes Jesus could not be prosecuted for, being a criminal action.<sup>95</sup> Mincing no words, the Court concluded that the Government should not be allowed "to 'double cross' petitioner Disini."<sup>96</sup> It also declared that:

[t]he Immunity Agreement was the result of a long drawn out process of negotiations with each party trying to get the best concessions out of it. The Republic did not have to enter that agreement. It was free not to. But when it did, it needs to fulfill its obligations honorably as Disini did. More than any one, the government should be fair.<sup>97</sup>

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88. *Disini*, 621 SCRA at 424.

89. *Id.* at 425.

90. *Id.* at 426.

91. *Tanchanco v. Sandiganbayan*, 476 SCRA 202 (2005).

92. *Disini*, 621 SCRA at 426 (citing *Tanchanco*, 476 SCRA at 229-30).

93. *Disini*, 621 SCRA at 426.

94. *Id.*

95. *Id.* at 427.

96. *Id.* at 430.

97. *Id.* at 431 (citing *Republic v. Sandiganbayan*, 226 SCRA 314, 327 & 330).

In dissenting from the majority opinion, Justice Bersamin delved into the separate arguments presented by Jesus to support the validity of the Immunity Agreement, principal of which involved the competence of the PCGG to exempt him from testifying — a competence which the majority sustained as found in E.O. No. 14.

In the mind of Justice Bersamin, the Immunity Agreement contravened the express mandate of the PCGG to recover ill-gotten wealth of former President Marcos.<sup>98</sup> Through the Agreement, Jesus was freed from divulging information material to the recovery of ill-gotten wealth amassed by President Marcos through Herminio.<sup>99</sup> This could not be allowed, especially considering the categorical language of Section 15, Article XI of the 1987 Constitution which expressly provides: “The right of the State to recover properties unlawfully acquired by public officials or employees from them or from their nominees, or transferees, shall not be barred by prescription, laches[,] or estoppel.”<sup>100</sup> While there may have been an Agreement between Jesus and the Government which, under the laws on Obligations and Contracts, must be complied with in good faith by both parties, the Agreement could not bind the government under both the foregoing provision of the Constitution, and because its object was contrary to public policy.<sup>101</sup>

Turning to Jesus’ claim that the privilege disqualified him from testifying against Herminio — an argument that the majority did not discuss as it may not have been necessary to sustain the validity of the Immunity Agreement — Justice Bersamin enumerated the elements required for the application of the attorney-client privilege, and found that the circumstances did not show a concurrence of these elements.<sup>102</sup> In particular, Justice Bersamin specifically addressed Jesus’ employment in Herminio’s companies where he served in various capacities, which he dissected, as follows:

That the petitioner was a lawyer did not automatically mean that the communications of Herminio to him (or vice versa) were covered by the attorney-client privilege. The petitioner was a mere employee of Herminio or of his companies, not their retained counsel. A communication is not privileged only because it is made by or to a person who happens to be a lawyer. There are many cases, indeed, in which attorneys are employed in transacting business, not properly professional, and where the business may be transacted by another agent. In such cases, the fact that the agent sustains the character of an attorney does not protect the communications attending

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98. *Disini*, 621 SCRA at 442 (J. Bersamin, dissenting opinion).

99. *Id.*

100. PHIL. CONST. art. XI, § 15.

101. *Disini*, 621 SCRA at 442 (J. Bersamin, dissenting opinion).

102. *Id.* at 445-48.

the transactions with the privilege; hence, the communications may be testified to by him as by any other agent.

And, *secondly*, assuming that he then acted as a lawyer of Herminio, the petitioner did not show that the communications between him and Herminio had been made in confidence by a client to a lawyer, or that the communications had been specifically made in the course of a professional relationship between them. *The lawyer-client privilege cannot be extended to communications made to a corporate secretary and general counsel where there is no evidence which hat he is wearing when he receives the communications. Moreover, the privilege does not apply where the legal services are so intertwined with the business activities that a clearer distinction between the two is impossible to discern.*<sup>103</sup>

Justice Bersamin concluded by appealing to the higher standard of truth, which trumps the public policy consideration of encouraging free communication between lawyer and client.<sup>104</sup> Indeed, it is an appeal that commentators wary of the expansion of the privilege have cited before,<sup>105</sup> and which Justice Bersamin repeats for good measure: “It is appropriate to recognize privilege only to a very limited extent, such that permitting a refusal to testify or excluding relevant evidence has the public good transcending normally the predominant principle of utilizing all rational means for ascertaining truth.”<sup>106</sup>

#### IV. ANALYSIS

While the purpose of Justice Bersamin’s dissent was to limit the privilege when applied to in-house counsel, it should not render it effectively unworkable especially in situations where both legal and commercial communication are intrinsically intertwined because of the nature of the in-house counsel’s engagement. Indeed, the practical effect of Justice Bersamin’s dissent would be to emasculate the role of in-house counsel by isolating them to responding to purely “legal” matters for fear that “business” decisions, which in any event would necessarily include both legal and commercial aspects, may be outside the protection of the privilege.

While the tendency to limit the privilege is understandable as it may interfere with the lofty and ideal “search for truth,” courts still cannot deny the practical value of preserving an effective attorney-client privilege, especially for corporate entities, who are most in need of legal guidance

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103. *Id.* at 446-47 (emphasis supplied).

104. *Id.* at 447.

105. *Id.*

106. *Id.* at 447-48 (citing *In Re: Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 (8th Cir. 1997) (U.S.)).

particularly to ensure compliance with law. Echoing the U.S. Supreme Court in the landmark case of *Upjohn Company*:

The narrow scope given the attorney-client privilege by the court below not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.<sup>107</sup>

A. *The Bersamin Dicta and Cayetano v. Monsod*

Reading the *Bersamin Dicta* closely, it is not difficult to discern that its *ratio* departs from the necessary requirement that any privileged communication must be sought from a lawyer in his professional capacity, for the purpose of seeking legal advice. The difficulty, however, both for the in-house counsel and the court in applying the privilege, is determining what communication is “legal” especially when it is “intertwined with business activities.”<sup>108</sup> Borrowing from the imagery in *Disini*, in-house counsels do not wear “different hats” when receiving corporate communication, because any decision made by the in-house counsel, whether involving legal or commercial issues, will necessarily be informed by his legal training and knowledge. Indeed, the reality is that the in-house counsel wears both hats simultaneously, and he can no more separate his role as legal manager from his role as legal counsel any more than he can shut down his mind to exclusive areas of law, on the one hand, and business, on the other.

The question is further complicated by the broad definition of legal practice laid down in *Cayetano*. In *Cayetano*, the Supreme Court, interpreting the Constitutional requirement of being a member of the Philippine Bar “engaged in the practice of law for at least ten years” as qualification for appointment to the Commission on Elections, said that the practice of law included “any activity, in or out of court, which requires the application of law, legal procedure, knowledge, training[,] and experience.”<sup>109</sup> This, according to *Cayetano*, would necessarily qualify as lawyering “in his professional capacity.”<sup>110</sup>

Applying this standard would actually result in the expansion of the scope of the privilege if measured against trends in the U.S. where courts have generally regarded the tasks of in-counsel with a suspicious eye. In *Georgia-Pacific Corporation v. GAF Roofing Manufacturing Corporation*,<sup>111</sup> for

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107. *Upjohn*, 449 U.S. at 392.

108. *Disini*, 621 SCRA at 447.

109. *Cayetano*, 201 SCRA at 213-14.

110. *Id.*

111. *Georgia-Pacific Corporation v. GAF Roofing Manufacturing Corporation*, 1996 WL 29392 (S.D.N.Y. 1996) (U.S.).

example, an in-house lawyer who negotiated a contract on behalf of the corporation was not considered to be “exercising a lawyer’s traditional function,”<sup>112</sup> but rather was “acting in a business capacity.”<sup>113</sup> His recommendations to corporate executives during contract negotiations, therefore, were not considered privileged. Similarly, in *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*,<sup>114</sup> the engagement by an in-house counsel of a collection company on behalf of the corporation was again considered a business function, not a traditional legal function,<sup>115</sup> thereby removing any related communication from the ambit of the privilege.<sup>116</sup>

The issue raised by the Bersamin Dicta, however, is more specific. True, the broad definition extended by *Cayetano* would undermine the *ratio* in *Georgia-Pacific Corporation* and *E.I. du Pont de Nemours & Co.* by characterizing the nature of the work of in-house counsel in this jurisdiction as necessarily legal, where it would be considered “non-legal” in certain jurisdictions of the U.S. Still, such broad definition would not necessarily foreclose a finding that the contents of *particular* communication between the in-house counsel and the corporation are not necessarily “legal” in nature, even when the in-house counsel would, according to *Cayetano*, be engaged in the practice of law. Any such advice, therefore, following the Bersamin Dicta, should still necessarily be filtered through the fine mesh of whether it is “legal services” or “business activities,” and, once sifted, exclude from the privilege the communications “so intertwined with business activities that a clearer distinction between the two is impossible to discern.”<sup>117</sup>

#### *B. The In-House Counsel and the Predominant Purpose Test*

Notwithstanding the reluctance by U.S. courts to extend the scope of the privilege to supposedly “non-traditional” functions of in-house counsel, these courts have also recognized that as to the content of communication for activities *properly legal*, the privilege may be extended when the advice sought is *predominantly legal* in purpose. Underlying this test, of course, is the same basic principle that only legal advice and communication may be considered privileged, but the “predominant purpose test” allows more flexibility in recognizing that the actual content of in-house counsel

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112. *Id.* at 4.

113. *Id.*

114. *E.I. du Pont de Nemours & Co. v. Forma-Pack, Inc.*, 351 Md. 396 (Md. Ct. App. 1998) (U.S.).

115. *Id.* at 414.

116. *Id.* at 422.

117. *Disini*, 621 SCRA at 447 (J. Bersamin, dissenting opinion (citing *Chicago Title Insurance Co. v. Superior Court*, 174 Cal.App.3d 1142, 1154 (1985))).



communication may include both legal and business elements sometimes indistinguishable from one another. Thus,

[t]he test for the application of the attorney-client privilege to communications with legal counsel in which a mixture of services are sought is whether counsel was participating in the communications primarily for the purpose of rendering legal advice or assistance. Therefore, merely because a legal issue can be identified that relates to on-going communications does not justify shielding them from discovery. The lawyer's role as a lawyer must be primary to her participation. As explained by the court in *Hercules Inc. v. Exxon Corp.*, ... [o]nly if the attorney is 'acting as a lawyer' — giving advice with respect to the legal implications of a proposed course of conduct — may the privilege be properly invoked. In addition, *if a communication is made primarily for the purpose of soliciting legal advice, an incidental request for business advice does not vitiate the attorney-client privilege.*<sup>118</sup>

Professor Gregory C. Sisk observes that on occasion, the application of this *predominant purpose test* has involved a mere evaluation of the actual *content* of the communication, i.e. “whether legal or non-legal topics take up more space in the subject communication.”<sup>119</sup> However, the proper application of the test, according to Professor Sisk, requires asking whether the purported purpose in seeking legal advice or assistance was a “sincere and meaningful element of the overall exchange.”<sup>120</sup> The measure is therefore more *qualitative* than *quantitative*, and takes into consideration not only the content but the *motivation* in communicating with the in-house counsel.<sup>121</sup> Thus, in *In re Ford Motor Co.*,<sup>122</sup> a federal court extended the privilege to corporate minutes since it was “infused with legal concerns.”<sup>123</sup> Although the ultimate decision may have been “driven ... principally by profit and loss, economics, marketing, public relations, or the like,” it was legal advice that was sought.<sup>124</sup>

Because of the “qualitative nature” of the application of the test, it is not at all surprising that courts have generally been unable to prescribe precise

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118. *In re Vioxx Products Liability Litigation*, 501 F.Supp.2d 789, 798-99 (E.D. La. 2007) (U.S.) (citing *Hercules Inc. v. Exxon Corp.* 434 F.Supp. 136, 147 (D. Del. 1977) (U.S.)) (emphasis supplied).

119. Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS 201, 223 (2010).

120. *Id.*

121. *Id.* at 224.

122. *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997) (U.S.).

123. *Id.* at 966. *See also* *Southeastern Pennsylvania Transportation Authority v. CaremarkPCS Health, L.P.*, 254 F.R.D. 253, 261-62 (E.D. Pa. 2009) (U.S.).

124. *In re Ford*, 110 F.3d at 966.

degrees of legal advice necessary to satisfy the test.<sup>125</sup> Still, what is important to remember is that while motivation and circumstance play a role in determining the application of the privilege, the legal aspect as opposed to the business aspect of the advice must nonetheless be of paramount consideration:

Lest a non-legal element should become the tail that wags the dog, a clear and significant nexus between attorney-client communications and legal advice or assistance is rightly expected. In classifying the character of the communication, the crucial inquiry is the intent of the client in deciding to approach the lawyer, whether the goal is to obtain legal counsel, even if other dimensions of a matter are addressed as well.<sup>126</sup>

Clearly, therefore, the application of the *predominant purpose test* does not do away with the “clear distinction” required by the Bersamin Dicta. Still, the test is valuable because it recognizes that even when legal service and commercial activities are intertwined in the course of in-house counsel communication, the privilege can nonetheless be claimed if it can be shown that the purpose and the content of the communication was *predominantly legal* in nature. This means that, in the language of Professor Sisk, the request for legal assistance was “genuine” and the legal dimension “material” and not merely incidental to the legal services sought.<sup>127</sup>

## V. CONCLUSION

The expanding scope of legal practice in the Philippines certainly requires a re-examination of existing professional and ethical rules which, when originally crafted, did not contemplate these special and unique roles which have thus far been undertaken by members of the Philippine Bar. Of particular note are the ethical and professional issues surrounding the conduct of in-house counsel, whose unique relationship and proximity to the corporation result in issues of independence, conflict-of-interest, and lawyer-client privilege.

Departing from the dicta laid down by Justice Lucas Bersamin in *Disini v. Sandiganbayan*, this Comment highlights the difficulty of drawing the line between privileged and non-privileged communication using, as a yardstick, the existing jurisprudential guidelines more properly applicable to the traditional lawyer-client relationship. In this respect, the established rule that only communication to lawyers “made in his professional capacity, for the purpose of seeking legal advice”<sup>128</sup> becomes muddled because of the often-

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125. Van Deusen, *supra* note 28, at 1417.

126. Sisk & Abbate, *supra* note 119, at 223.

127. *Id.* at 225.

128. See *Mercado*, 459 SCRA at 11 (citing *Olender v. U.S.*, 210 F.2d 795, 801 (1954)).

intertwined roles that the in-house counsel plays within the modern corporate structure. By serving as both legal manager and legal counsel, in-house lawyers receive communication which, following *Disini*, would likely be removed from the ambit of the privilege because of the absence of evidence as to which “hat” the in-house counsel was wearing when he received the communication from the corporation.

U.S. practice has shown, however, that merely intertwining business and legal roles will not, by itself, remove such communication from the purview of the privilege, if it can be shown that the “genuine” and “material” purpose of the communication was predominantly legal in nature. While this, of itself, does not provide any practical or objective guidance on the precise “qualitative” extent which would call for the application of the privilege, the rule would nonetheless provide some flexibility for the in-house counsel when providing legal advice which may necessarily include business or commercial matters. Recognition of this approach, either by subsequent judicial pronouncement or substantive amendment to the Code of Professional Responsibility, would therefore alleviate any lingering insecurity created by the sweeping statements of the *Bersamin Dicta*. This would, in turn, encourage increased interaction by corporate officials with their in-house counsels who are in a unique position to positively influence their actions and behaviors. As aptly put,

[i]n-house attorneys differ from outside corporate counsel in that they have better access to the facts, their personal and professional ties are to their client, and they are often asked to make decisions, rather than give advice. Therefore, in-house counsel has greater ability to alter her client’s behavior and thus a corresponding duty to use that ability to promote constructive behavior by the client.<sup>129</sup>

An uncertain privilege is a worthless privilege, as the U.S. Supreme Court noted in *Upjohn Company*.<sup>130</sup> Certainly, the issues that involve in-house counsel privilege extend far beyond the motives surrounding in-house communication or the actual content of the communication itself — covering, for example, to the issue of inadvertent waivers<sup>131</sup> and the safeguards to ensure that in-house privilege are not abused as a ruse to perpetrate fraud.<sup>132</sup> Thus, there is a pressing need for guidance and clarification. The continuing complexity of corporate transactions and the

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129. Van Deusen, *supra* note 28, at 1435 (citing Sara A. Corello, *In-House Counsel’s Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389, 402 (1992)).

130. *Upjohn*, 449 U.S. at 393.

131. See Greenwald, *supra* note 51, at 71. See, e.g., Greenwald, *supra* note 51, at 122 & 89. For example, sending otherwise privileged communication by email to third parties not employees of the company, or the alienation to third parties of a subsidiary holding confidential communications with the parent company. *Id.*

132. See Sisk & Abbate, *supra* note 119, at 234-41.

involvement of lawyers in this unique environment where more and more practitioners appear to be headed in the future, require nothing less.