LAWYERS' BEHAVIOR AND JUDICIAL DECISION-MAKING*

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(Public opinion data indicates) that lawyers are especially disliked because they manipulate the legal system in the interests of their particular clients, without regard to the common, universal values of right and wrong. (Such data also reflect) that lawyers are praised because their first priority is to the private perspective of their clients. Lawyers, in other words, bestride the following cultural contradictions: we both want and in some respects have a universal, common culture, and we want that culture to be malleable and responsive to the particular and often incompatible interests of individual groups and citizens. We expect lawyers to fulfill both desires, and so they are a constant, irritating reminder that we are neither a peaceable kingdom of harmony and order, nor a land of undiluted individual autonomy, but somewhere disorientingly in between. Lawyers, in the very exercise of their profession, are the necessary bearers of that bleak winter's tale, and we hate them for it. [1]

INTRODUCTION

This paper is a collection of ideas that had been simmering in my mind for years. Until I got exposed to the discipline popularly called in American law schools as law and economics, I could not effectively construct a framework of analysis which could best express

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[1] Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987).

the forces that were shaping lawyers' behavior and the nuances, Philippine-style, of the legal processes themselves.

Let me explain. The Code of Professional Responsibility and the Code of Judicial Conduct for example, recognize non-monetary factors as the principal parameters for acceptable, lawyerly and judge-like behavior. Grudgingly, the Code of Professional Responsibility recognizes money as a measure of compensation for services of lawyers, although it places more than enough qualification on this right to receive compensation, that one will be induced to believe that lawyering is a profession for the inherently noble-hearted or for those who are wealthy to begin with. Although I have no argument with a construct that vizualizes a noble place in the sun for lawyers, I have problems of seeing it happen in the real world. What I mean is that I share the general impression of the public that idealism and the public interests, are motives quite insignificant in the scale of values of most lawyers. Which is not to say that lawyers are generally a bad lot, for the species of students we get in first-year law classes are as varied as any other college or professional school can get. Not do I see a tendency in our school, at least, to bring about a dilution of that sense of idealism among the students, and I have no inclination to believe that the case were otherwise in any other law school. What I suspect on the other hand, is that the forces in the market for legal services are doing more than their fair share in altering or modifying the decision-parameters which they were taught to use in law schools. In other words, my impression is that law schools have been laboring partly in vain, to shape the values configuration of market players, who will more probably find such values configuration inadequate at best or even useless.

THE ENTRANTS TO AND PARTICIPANTS IN THE MARKET

In an earlier paper,[2] I identified several factors which are going to shape the decision of students to enter law school, what the students identify as the costs of their entry to law schools, the entry fee to law practice, which includes the bar examinations, the

[2] Lourdes Sereno, The Market for Legal Services in the Philippines (unpublished).

categorization of the class of lawyers into the superstars, the Class B lawyers, and the Class C lawyers, and how each class of lawyers is in turn predicted to construct a fee-arrangement which is very much in keeping with their expectations in life.[3] It is the theory in that paper that law students made the decision to enter law school and take the bar subsequently, with an initial Expected Present Value. In other words, the decision involved a function which principally relies on an expectation of future income versus opportunity cost for present income foregone plus interest rate.[4] Let us indulge in a little digression into some matters touched upon in that study.

It was proposed in that study that the principal price-determinants of legal services are:

> (i) the stakes involved (gain if case is successful/loss if unsuccessful;
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> (ii) the nature of the prior or ongoing relationship between the lawyer/law firm and the client;

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[3] The most comprehensive survey on the socio-economic background of lawyers is the pioneering work of Dr. Manuel Flores Bonifacio and Prof. Merlin M. Magallona publisLed by the U.P. Law Center entitled "A Survey of the Legal Profession in the Philippines" (1982).

[4] Using S. Rosen's formula in *The Market for Lawyers*, 35 J. L. & ECON. 215-247. According to him, to attract students to incur the total costs of obtaining a law degree, the expected present value should exceed total costs and is "approximately the average annual career earnings divided by interest" or

$$EPV = \frac{\text{Average Annual Career Earnings}}{\text{Rate of Interest}}$$

Another version of an EPV model for entering law school, which is an inherent factor (though often an unquantified one) in choosing law as a career is also presented in Ehrenberg, where:

PV = N (S - A) - L (T + C + A), where
N = years law student expects to practice
L = years it takes to complete law school
S = earnings expected upon graduation from law school
T = tuition, and
C = other law school costs

in Ehrenberg, *An Economic Analysis of the Market for Law School Students*, 39 J. LEG. EDUC. 627 (1989).

(iii) training and educational investments, whether direct or indirect;

(iv) reputational premium of the lawyer;

(v) the financial and political reputation of the client;

(vi) the financial and political reputation of the defendant;

(vii) the income expectations of the lawyer.

Among the more important factors affecting both the reputation of the lawyer and the real outcome of the case, I cited two: access to legal information and access to a power network.

Access to legal information in the Philippines is characterized by two features: (1) the existence of a monopoly or oligopoly which drives up legal fees in favor of the very few large law firms who have veritable "war chests" in terms of substantial library collections;[5] and (2) an information-asymmetry whereby only the most sophisticated clients or those retaining in-house counsel have sufficient information in legal matters to be at a position where they can either have enough bargaining leverage because of their possession of legal information or at a position where they can exit with ease from an unsatisfactory lawyer-client relationship. Both of these features are based on the theory that legal information is "capital stock," and although the prevalent thinking among educators is that it should be a "public good" available to all, at least in the area of law, it is not. It is rather more reflective of the theory that "knowledge can be owned, exchanged and monopolized the way 'real' resources can."[6]

The existence of powerful networks which works to drive up the reputational premium in favor of the "superstar lawyers" is not based on any empirical study on the matter. There is no reason to

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[5] *See* Myrna S. Feliciano, *Access to Law: Library and Information Needs of Researchers in Law*, in The Library in the Information Revolution, Proceedings of the Sixth Congress of Southeast Asian Libraries, Singapore, 30 May - 3 June 1983.

[6] Gary D. Byrd, *The Economic Value of Information*, 81 LAW LIBR. J. 191, 195 (1989), attributing the phrase TO HARLAN CLAVELAND, THE KNOWLEDGE EXECUTIVE 29-33 (1985).

believe that any empirical study on this matter is forthcoming in the foreseeable future. The most serious data that can be collected at the moment are impressions, which are reflected in various surveys on the public impressions of the judiciary and the legal profession.[7]

On the other hand, it is worth noting that Rule 20 prescribes the following factors as determinants for lawyers fees, after Canon 20's stern warning that "a lawyer shall charge only fair and reasonable fees:"

> (a) The time spent and the extent of the services rendered or required;
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> (b) The novelty and difficulty of the question involved;
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> (c) The importance of the subject matter;
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> (d) The skill demanded;
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> (e) The probability of losing other employment as a result of acceptance of the proffered case;
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> (f) The customary charges for similar services and the schedule of fees of the IBP chapter to which he belongs;

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[7] In fact, even judges themselves admit the existence of what to this author appears as a significant level of corruption. In Social Weather Station's Survey of Judges' Opinions on the Judiciary and the Legal Profession, the judge-respondents were asked: "How do you assess the number of corrupt judicial professionals and personal?" specifically the tabulation for the response specifically for perceived levels of corruption among judges was received from the 452 respondents: Very Many, 2%, Many, 4 %, Some 24 %, A few, 37 %, Very few/ None, 16%, Don't know, 9%, No answer, 8% (1995).

In 1985, a survey on the public perception of the judiciary and the legal profession was sponsored by the Philippine Bar Association in coordination with the Bishops-Businessmen's Conference on Human Development. The survey was directed by Dr. Mahar Mangahas. In 1993, the Social Weather Stations conducted another national survey with the support of the Asia Foundation. Both surveys ran the statement: "Rich or poor, people who have cases in court are treated equally." In 1985, 49 % agreed with this statement and 26 % disagreed. In 1993, 43 % agreed while 39 % disagreed."

(g) The amount involved in the controversy the benefits resulting to the client or the service;

(h) The contingency or certainty of compensation;

(i) The character of the employment whether occasional or established;

(j) The professional standing of the lawyer.

It is interesting how an economist will try to balance Rule 20, the concept of public interest and Rule 2.04 which states: "A lawyer shall not charge rates lower than those customarily prescribed unless the circumstances so warrant."

Let me proceed to focus on a more advanced area of activity-lawyers' behavior and the process of decision-making in courts. By decision-making are meant not only final adjudicatory orders but all issuances, whether interlocutory or not, whether in execution or in incidental processes that goes into the creation of a judicial case. By this exercise, I hope to encourage a discussion among people who are interested in identifying possible solutions to some of the problems of justice in the Philippines.

THE CHOICE OF WHETHER TO LITIGATE OR TO SETTLE

When a client approaches a lawyer for legal assistance, a lawyer makes estimates of the outcome of the case. From such an estimation, he comes to a conclusion on whether it is better to settle or litigate. Of course, it has been suggested that lawyers who are paid on a per-appearance or an hourly basis, unless there are forces sufficiently strong to regulate their behavior, would naturally opt for a long process of resolving a controversy, i.e., they would opt for trial rather than settlement. We could deal with this problem later. What I would propose to evaluate at this point is the preconditions that Judge Richard Posner theorizes as dictating the likelihood of litigating:

$$PpJ - C + S > PdJ + C - S \qquad (1)$$

which may be expressed also as:

$$(Pp - Pd)\ J > 2\ (C - S) \qquad (2)$$

His explanation for his model:

> The expected gain (loss) from litigation depends on three factors: the judgment if the plaintiff wins, the probability of his winning, and the costs of litigation. The plaintiff's net expected gain, ... is the judgment if he wins discounted by his estimate of the probability that he will win, minus his litigation costs.[8] The defendant's expected loss is the judgment if he loses discounted by his estimate of the probability of losing (or, states otherwise, of the plaintiff's winning), plus his litigation costs.
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> The condition for litigation may be expressed symbolically, as in inequality (1), where J is the size of the judgment if the plaintiff wins, Pp is the probability of plaintiff's winning as estimated by the plaintiff and Pd is the defendant's estimate of that probability, and C and S are the costs of litigation and of settlement, respectively of each party. This is a very simple model because it assumes that both parties are neutral and the stakes in the case, the costs of litigation, and the costs of settlement are the same for both parties;[9] ...
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> If the parties agree on the probability that the plaintiff will win in the event of litigation, the left-hand side of (2) goes to zero and the case will be settled if one party is more pessimistic than the other, so that Pp - Pd is negative. In general, then, litigation will occur only if both parties are optimistic about the outcome of the litigation. This formalizes our earlier point that uncertainty is a major factor in the litigation rate ...
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> Inequality (2) brings out the important point that, other things being equal, the higher the stakes in a case the more likely it is to be litigated. The intuitive explanation for this result is that when the stakes are small the potential gains from

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[8] This presupposes the ordinary case where costs and attorney's fees are not shifted to the losing party. Posner's analysis varies in the case where indemnity for legal costs is statutorily provided.

[9] According to Posner, it also assumes a dichotomous outcome for litigating (either J or nothing) and that the costs of litigating and of settling are exogenous (*i.e.*, unaffected by other terms in the formula.

> litigating as perceived by the parties are also small and tend to be dominated by the higher costs of litigation relative to settlement...
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> Suppose the stakes are not the same for both parties, perhaps because the parties have different rates at which they discount a future to a present value, which will cause their J's to diverge. The critical question is how they diverge: inequality (1) implies that if the plaintiff's J is smaller than the defendant's, litigation is less likely than if they are of the same size; it is more likely if the defendant's J is smaller than the plaintiff's.
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> Or suppose the parties are not risk neutral. If both parties are risk averse, the likelihood of litigation will be less; if the parties differ in their risk preferences, the analysis is similar to that of a difference in the stakes."[10]

Posner's model is but a simple mathematical illustration or validation of what we as laymen have always believed to be true, although how to prove it to be true has always remained a problem to us. We have always known that the decision on whether to settle or not is dictated by the size of the stakes in the eyes of the parties, the costs of litigation and the probability which each side gives to his winning or losing. But until now, we have only been intuitively dealing with a formula for arriving at an estimation of the "settlement range" or its existence in any given controversy. Simply, the settlement range is that range of prices in which both parties would be willing to settle because it would increase their welfare. Settlement negotiations will fail, and litigation will ensue, if the minimum price that plaintiff is willing to accept in compromise of his claim is greater than the maximum price that the defendant is willing to pay in satisfaction of that claim.

Curiously, the results of the Social Weather Stations survey of 452 judges' opinion, revealed a poor opinion of lawyers.[11] In response to the statement: "Lawyers usually insist on a trial even if the case can be resolved without going to court," 69% agreed, while only 26%

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[10]RICHARD POSNER, AN ECONOMIC ANALYSIS OF LAW, 435-437 (1977).

[11]Survey of Judges' Opinions of the Judiciary and the Legal Profession, conducted in the first quarter of 1995; mailed-in responses came from 452 Regional Trial Courts.

disagreed, 3% could not decide, and 3% had no answer. For the 69% of the judge-respondents who agreed with the previous statement, they were asked to identify the reasons for this lawyer insistence on trial and were made to check the reasons they found applicable. The statement began: Lawyers usually insist on a trial because: The clients expect them to go to court (58%); They would forego appearance fees (42%), They were not trained enough on pre-trial settlements (42%), The prosecution office discourages fiscals from settling out of court (27%), None of the above (3%), and Can't decide (0%).

FACTORS AFFECTING PROBABILITY ESTIMATION

Posner's model assumes that each party makes an estimate of the probability that his claim will win (or lose, in defendant's case). This estimate runs from "0" to "1.0." However, he does not identify for us the factors that go into making this estimation, except by way of reference to "precedents" as capital stock. Picking up from his clues, I would enlarge the range of probability factors, considering the Philippine environment, and would include the same factors I had earlier identified as factors affecting the fee-charging structure. These factors are:

> (a) The class to which the lawyer belongs - Superstars, Class B or Class C;
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> (b) In addition, or despite factor (a), whether the lawyer is perceived to have a special relation to the judge hearing the case, or a network comparable to the same;
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> (c) Access to the "capital stock" of legal information;[12]

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[12] Posner considers the body of precedents as a capital stock. i.e., a stock of capital goods. *"Capital goods yield productive services over a period of time. A computer is an example of physical capital, education of human capital. A body of precedents is a stock of knowledge that yields services to potential disputants in the form of information about legal obligations."* In POSNER, *supra.* note 10, at 419. Whoever has greater access or even control (in the sense that the price of such goods make use of such goods prohibitive) to its capital stock of legal information, can profit from the stock of legal knowledge in the same way that owners of lands may be able to create a monopoly because of its scarcity.

(d) The perceived "unpredictability" of decision-making in the Philippines.

All of the above factors, we must remember, are in the area of perceptions, and the "imaging" of a lawyer and the worth of his services is due to the fact that the above factors are generally accepted to be true, but empirically unverifiable.

If we are going to create a function explaining the phenomenon of estimation of probability of outcome, we will have:

(f) P = Class of Lawyer, Special Relationship or Network, Access to Legal Information, Unpredictability of Decision-Making,

where, Unpredictability of Decision-Making tends to be positive where the first three factors are positive, and negative where the first three factors are negative.

Earlier, we adverted to Posner's conclusion that "litigation will occur only if both parties are optimistic about the outcome of the litigation." On the other hand, settlement is more likely to occur if one party is more pessimistic about the outcome of litigation. If the probability estimate function in (3) above tends to be strongly positive in favor of one party relative to the other, then the other party will tend to settle while the other will not be inclined to settle.

This poses a practical problem we have to address: Whether the probability estimate function, will affect the inequality for precondition for litigation posited by Posner to such an extent that a party who, under our law, is entitled to judicial relief, will effectively be denied such by the operation of such precondition. If it does, what results is a phenomenon most people believe: the effective denial of access to justice to a larger majority of society. What the equation simply does for us is to breakdown the factors affecting such precondition in the hope that, in isolating these factors, we may be able to study them in greater detail and influence them to achieve an identified social end.

What is interesting to note, is the opinion of judges which is contrary ot this popular perception of effective denial of justice to the majority of the population. In a survey of judges' opinions conducted by the Social Weather Station from January to March of 1995,[13] the 452 mailed-in judge-respondents from Regional Trial Courts, were asked to agree or disagree with this statement: "Poor people can get adequate justice under our judicial system." 64% agreed, while 32% disagreed.

The same respondents were also asked: "Would you say that court decisions are predictable, or are they unpredictable?" To which 55% responded that they are predictable, 36% responded that they are unpredictable, 5% can't decide, and 4% had no answer. Curiously, the same question was propounded to a test set of Metro Manila lawyers, and 65% found court decisions unpredictable. The latter figure is not to be quoted and is not to be used as the basis for any conclusion, but it points to a possibly significant dichotomy between how judges perceive the degree of reliability of precedents and judicial tradition, as against how lawyers perceive them. Is it possible then, that lawyers, in making estimates of the outcome of a case, provide for a wide margin of error for their prediction. If judicial decisions are unpredictable, then what are the strongest factors in an estimate of the outcome. Could we be hitting upon the most critical factor if we are talking about the oligopoly of the superstars and the well-connected? These are questions we must pay attention to.

EFFECT OF PROCEDURAL RULES DESIGNED TO FACILITATE TRIAL

Plenty of literature exists in the field of law and economics on the costs of litigation in the United States. The writings began from the widely-held perception that the costs of litigation are rising, and that these costs were beginning to have a "chilling" effect on the judicial process, and that this turn, is a public interest issue.

From these writings questions were propounded on whether alternative methods of dispute settlement yielded greater results in terms of social benefits than litigation. The most important conducted

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[13] Survey of Judges' Opinions on the Judiciary and the Legal Profession.

which involved a random sampling of 1,600 cases over five states in the United States yielded data on the frequency of litigation, measurement of stakes involved, the impact of lawyer time and quality of activities on fee and outcome and total monetary costs.[14] The analysis of the data proceeded from the basic assumption that litigation is an investment process. Overall, the study concluded that litigation "pays" but only in the sense that plaintiffs recover more than they invest in litigation. But the study also reveals positive net returns for many defendants as well. The study did not resolve the problem of social cost or the effectiveness of litigation vis-a-vis other methods of dispute resolution. The researchers concluded that another study will have to be awaited for the empirical data to support the lay and legal scholars' perception that settlement is a more effective and efficient method of dispute resolution.

Until now, measures of the cost-effectiveness of procedural rules designed to facilitate trial or settlement per se, are still in the realm of speculations and theories. Succinctly, the theory is stated in this manner:

> We begin with pretrial discovery. A full exchange of the information in the possession of the parties is likely to facilitate settlement by enabling each party to form a more accurate, and generally therefore a more convergent, estimate of the likely outcome of the case; and pretrial discovery enables each party to compel his opponent to disclose relevant information in his possession. One may wonder why compulsion is necessary, since the exchange of information is a normal incident of bargaining. But such an exchange is less likely in a settlement negotiation than in an ordinary commercial transaction. If a commercial negotiation fails, the parties go their separate ways; if a settlement negotiation fails, the parties proceed to trial, at which surprise has strategic value. Each party has an incentive to withhold information at the settlement negotiation, knowing that if the negotiation fails, the information will be more valuable at trial if the opponent has not had an opportunity to prepare a rebuttal to it.
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> Although pretrial discovery in general is likely to increase the settlement rate, the effect of particular discovery provisions

[14] David M. Trubak, et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 70 (1983).

> is less certain. Consider Rule 35 of the Federal Rules of Civil Procedure, which authorizes a party to compel his opponent to be examined by a physician designated by the party, if the opponent's health or fitness is in issue...Suppose the plaintiff is less seriously injured in fact that defendant would have believed had he, not been able to compel an examination by his physician. Then the defendant will be unwilling to make so large a settlement offer as he would have been willing to make before the examination, when he exaggerated the extent of the plaintiff's injuries; but the plaintiff's minimum settlement offer is unaffected since the examination discloses no new information to him concerning the extent of his injuries. Thus the likelihood of a settlement is reduced. But in cases where the Rule 35 examination convinces the defendant that plaintiff's injuries were more serious than he (the defendant) had believed, Rule 35 increases the likelihood of a settlement (why?). The net effect of Rule 35 on the settlement rate is thus unclear. It does not follow, however, that Rule 35 has no net effect on the efficiency of the procedural system; it probably increases it (why?).[15]

Regardless of the information yield of a pretrial discovery procedure, in all likelihood the increased utilization of pretrial discovery will lead to a convergence of the probability estimate, increasing the likelihood, in Posner's model of a "settlement range." It is important, therefore, to promote the full use of pretrial discovery, if only for the reason of increasing the chances of settlement, on the assumption, of course, still unverified by empirical data, that an increase in settlement rate brings about an increase in social benefits.

In the SWS survey earlier, adverted to, several statements were propounded to the respondents, and it yielded the following results: 45% agreed that the judicial system does not give enough emphasis to the pre-trial phase while 52% disagreed; 26% agreed that the system should give a full year for the pre-trial pleadings and allot only a few weeks for the trial while 71% disagreed; 69% agreed that lawyers usually insist on a trial even if the case can be resolved without going to court while only 26% disagreed, 63% think that law students do not get enough training on handling our-of-court settlements while 20% think they get just the right amount of training. These figures indicate that in the judges' mind, there is a

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[15] POSNER, *supra* note 10, at 437-8.

serious need to address the issue of under-utilization of the pre-trial and settlement avenues.

WHAT THE JUDGE MAXIMIZES

In understanding judicial behavior, we have to assume, that judges, like all economic actors maximize a utility function. This function in all probability includes material as well as non-material factors. In American literature, they have come up with several theories on what judges maximize.

The first is that the American judicial system have rules designed to minimize the possibilities of a judge maximizing his financial interest by receiving a bribe from a litigant or from acceding to a politically powerful interest group by making the rules work in such a manner as to create disincentives for the judge ruling in such a manner.

The second, proceeding from the first is that the judge maximizes the interest of the group to which he belongs. If he belongs to the landowning class, he will generally favor landowners, and if he walks to work, he will generally favor pedestrians.

The third is that the judge maximizes the prospects of his promotion to a higher office by slanting his decisions in favor of powerful interest groups.

The last is that judges maximize their influence on society by imposing their values, tastes and preferences thereon.

Depending on one's impressions and experiences (since there is no empirical data on which a more scientific conclusion can be reached on which of the above four theories are correct), we can see the relation of this utility-maximizing behavior on both our probability estimate function and Posner's precondition inequality for litigation. Although more research is required in this area, if we believe Posner's function to be true, and common sense point out it is more likely to be true than not, then we have, if we believe the third theory about maximization of prospects for promotion, a self-reinforcing and self-perpetuating cycle:

The wealthier or more powerful the client is, the more likely he is to get a well-connected or Class A lawyer; the more well-connected and higher-class the lawyer retained is, the more he will make a favorable prediction of the outcome, and the more optimistic the client will be about his prospect, the more optimistic the client will be about his prospect, the less likely he will settle and the more likely he will litigate; the more likely the client will litigate, the more favorably that a judge who has a utility-maximizing function that seeks his promotion in office, will just ever so slightly or more so tilt a decision in favor of this particular litigant.

All is not lost, however. Lets I be accused of engendering a rebellion over the state of our judicial processes, let me point to one every hopeful item in the 1995 Social Weather Stations survey. The statement was given: "Corruption is a fact of life which judges have to live with." An overwhelming majority, or 84% of the judge-respondents disagree, while only 7% agree. The rest were either undecided or gave no answer. I tend to believe that indeed, the most predominant motive of judges in decision-making is their desire to influence, more than anything, the shape and hue of society.

CONCLUSION

There are several items we can perhaps focus on in the area of reform. The beauty of economic models is that, at least conceptually, it is possible to isolate phenomena for purposes of making plans for social engineering. A law and economic model is only as good as its ability to increase chances of success in influencing behavior.

The first is the phenomenon of oligopoly of information. If we are able to undertake a wider dispersal of materials containing legal information, then perhaps this will lead to reduced legal fees and reduced reputational premium in favor of the superstar class. Information technology offers much promise in this respect, but as of this moment, even computer-aided research in the form of the Philjuris and Lex Libris CD-Rom's still require major investment. Hopefully, the liberalization of the telecommunications industry will bring about the availability of accessing documents through Internet and communication through E-mail.

The second is that we must devise ways to increase the chances that a settlement range will exist. In the works cited, we have seen that the likelihood of settlement exists where there is not over-optimism on the side of one or both parties, or where there is not too much divergence between the probability estimates. We can increase convergence of probability estimates by undertaking intensive training of judges in the hope that it can increase certainty and predictability in the outcome of judicial decisions,. We can also increase convergence of estimates by integrating in our law curriculum, and in the training module for judges, a social science course which will expose them to the wider societal impact that each of their decisions create. The most popular tool used thus far, and one which is widely used in American cases on environment is the concept of "social costs" or "externalities."[16] Briefly, the actual cost incurred in undertaking an activity are not only the direct costs incurred by the firm but the damage incurred or negative externality incurred by third parties. For example, the cost of producing a certain product are not only the monetary outlay incurred by the owner of the manufacturing enterprise but also by residents who may be exposed to the effluents caused by the process of production. If we as much as create a consciousness among future lawyers and among our judges that the social cost of a wrongful decision can result in higher insurance premium. e.g. in automobile accidents, or higher costs of fighting crime which in turn leads to higher taxes, in criminal cases, then judges and lawyers will bring into their utility function this social element.

Another area we can focus on is teaching our lawyers and judges how to negotiate. The model on litigation talks about costs of settlement, and it has attempted to show the relationship between costs of settlement and likelihood of settlement by showing that its positive increase diminishes the window of settlement. If it can be demonstrated that settlement is efficient, because it can be conducted in a more professional manner, then this mode of resolving disputes will be resorted to more often.

Another area to be promoted, and running on the same arguments as settlement, *i.e.*, settlement increases social benefits, is

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[16] Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

the increased use of pretrial discovery rules. We have seen from the Social Weather Stations survey that judges do not believe that lawyers try hard enough to make full use of the pre-trial phase and that they insist on going to court even though the dispute could be resolved without going to trial.

There are too many problems of justice for any reform to be undertaken on a generalized basis. Perhaps, the more efficient process is the identification of the "soft issues," as a manner of speaking, which will yield the least resistance to altering behavior which will hopefully result in satisfying in greater degrees a society's unquantifiable quest for justice.

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