DECISION ANALYSIS AND OTHER QUANTITATIVE METHODS AS LEGAL NEGOTIATION TOOLS IN THE CONTEXT OF THE PHILIPPINE JUDICIAL SYSTEM

Mark Dennis Y.C. Joven

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ABSTRACT

Decision analysis has been developed as a tool to analyze and evaluate alternative courses of action while taking uncertainty into consideration. Traditionally, it has been used in various fields of study such as mathematics, statistics, philosophy, management, psychology and politics as a means to develop rational choice given several alternatives. In recent years, applications have been made in the field of law.

In connection thereto, this paper attempts to examine, discuss and analyze decision analysis as applied in law and legal problems, and afterwards to fine-tune decision analysis to suit the Philippine Judicial system in light of characteristics largely unique and distinctive to the Philippine experience. This paper attempts to examine and understand the two major problems in judicial administration in the Philippines: court delays and judicial corruption. Thereafter, this paper applies decision analysis and other quantitative methods such as value of control, value of information and present value to understand better the nature and extent of these problems.

I. DECISION ANALYSIS AND LAW

A. INTRODUCTION AND HISTORY OF DECISION ANALYSIS

Decision Theory[1] is an interdisciplinary area of study concerned with how decision-makers make decisions, and how optimal decisions may be reached. It

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proposes a formal procedure for decision making calculated to reach the most rational decision, while taking into consideration uncertainty (risk) and different possible conditions or states of nature.

With these considerations in mind, decision analysis constructs a logical or mathematical model of the problem at hand. Through its use, the decision maker is able to estimate the possible implications of courses of action he is open to take.[2] These processes are aimed to make the decision maker better understand the relationship between his alternatives and his objectives.[3]

In short, decision analysis attempts to develop a unitary formula on how rational decisions are made.[4] Proponents have applied principles in fields of study such as mathematics, statistics, philosophy, management, psychology, politics[5] and most other fields of study involving a great deal of decision making.[6]

Decision analysis as an analytical tool probably originated from the study of probabilities during the mid 1600s to early 1700s. As a field of mathematics, the study of probability otherwise known as probability theory was said to have been developed through the correspondences made between Blaise Pascal, a mathematician and philosopher and Pierre de Farmat, a lawyer, in 1654 on a problem encountered by a friend on gambling.[7] They tried to devise an equitable way of dividing the stakes between two persons based on the chances that each have in winning from that point in time.[8] In 1657, through the encouragement of Pascal, Christiaan Huygens published a book on probability theory, the first formal study on the matter.[9]

Decision analysis was developed to its present state in 1738 by Daniel Bernoulli, who suggested that a person faced with a number of options, where each one of which could bring forth more than one possible outcome with different probabilities, would cosinder the rational procedure to be to identify all possible outcomes, determine their values (positive or negative) and the probabilities that they will result from each

[1] It is comprised of two broad categories: normative or prescriptive, and positive or descriptive. Normative or prescriptive decision theory is primarily concerned with the study of what decisions should be made given the probability of certain events, while positive or descriptive decision theory attempts to forecast what people would actually do.

As a major field of study in decision theory, normative/prescriptive decision theory or decision analysis presupposes that the subject decision-maker is fully informed, able to compute with perfect accuracy, and is fully rational. Positive or descriptive decision theory attempts to predict what a person will do, while relaxing the assumption of full rationality made in decision analysis.

[2] Tom Spradlin, *A Lexicon of Decision Making*, available at <http://faculty.fuqua.duke.edu/daweb/lexicon.htm>.

[3] *Id.*

[4] Sven Ove Hansson, *Decision Theory: A Brief History*, available at <http://www.infra.kth.se/~soh/decisiontheory.pdf>.

[5] Decision Theory, available at <http://en.wikipedia.org/wiki/Decision_theory>.

[6] Ronald Howard, *Decision Analysis and Law*, 22 Cardozo L. Rev. 1595 (2001).

[7] At present, gambling problems are still closely studied by probability theorists.

[8] Blaise Pascal, available at <http://en.wikipedia.org/wiki/Blaise_Pascal>.

[9] Christiaan Huygens, available at <http://en.wikipedia.org/wiki/Christiaan_Huygens>.

course of action, and multiply the two to give an expected value (EV).[10] The rational choice among these options would be that which produces the highest expected value. His failure to explain the concepts of "value" and "probability" in his equation may be considered minor shortcomings to a largely revolutionary quantitative tool.

Before the 20th century, adherence to decision analysis has largely been limited to mathematicians, scientists and gamblers. As the need for more formal approaches to decision making increased, decision analysis has been increasingly applied to other fields of study. Since the 1960s, major business corporations have relied more and more on decision analysis and other quantitative tools in both their day-to-day and long term decision making.[11]

With the increasing popularity of decision analysis in business, applications of decision analysis in legal problems were proposed through the efforts made by Prof. Howard Raiffa, a noted Harvard economics professor publicly regarded as the founder of decision analysis.[12] In his seminal book entitled *Decision Analysis: Introductory Lectures On Choice Under Uncertainty (1968)*, Prof. Raiffa suggests the legal application of decision analysis, thereby opening a whole new approach to litigation analysis.

B. AS A LEGAL TOOL[13]

Decision analysis as a quantitative tool is intimately related to decision making. More than a complex (or simple) mathematical formula, decision analysis may be seen and understood as a translation of a formula the mind uses when making decisions in a logical manner. It forces the mind to decide consciously, while taking into consideration one or more uncertainties and the probabilities of occurrence of these uncertainties. Its significance may be seen in the light of well-documented findings that the human brain faces great difficulty dealing with more than seven factors at any one time.[14]

Given more than seven factors to wrestle with, the human mind tends to misappreciate information and probabilities. Research shows that when estimating

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[10] John Grohol, *Decision Theory*, available at <http://psychcentral.com/psypsych/Decision_theory>.

[11] REX BROWN ET AL., DECISION ANALYSIS: AN OVERVIEW 5 (1974).

[12] David P. Hoffer, *Decision Analysis As A Mediator's Tool*, 1 HARV. NEGOT. L. REV. 113 (1996); Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy*, 40 BUS. LAWYER 617 (1985).

[13] Some experts suggest that the legal applications of decision analysis may be classified into four. Robert Copple, a seasoned litigator, explains the four classifications, *to wit*: "The first is the 'obvious one,' using risk analysis for objective evaluation of one's own case strategy. The second use is as an advocacy tool, with the analysis constructed with the mediator. Third, he said, 'if you really want to get risky,' the decision-tree analysis can be conducted, and presented to opponents to try to persuade them to settle. Fourth, mediators can use decision trees to help parties focus on the risks and the elements for a good settlement." *Arbitration Reform Explained A Conflict Resolution System Model, Decision Trees, Mass Torts and More*, 21 ALTERNATIVES TO HIGH COST LITIGATION 179, 183-184 (2003).We, however, classified the applications of decision analysis to law into two categories: as an analytical tool and as a tool for communication. These classifications are more generally worded than the commonly accepted classifications: decision analysis in litigation and decision analysis in mediation. The latter classification was used by David P. Hoffer's, *op. cit. supra* note 12.

[14] George Miller, *The Magical Number Seven, Plus or Minus two: Some Limits on Our Capacity for Processing Information*, 63 PSYCHOLOGICAL REVIEW 81-97 (1956).

without a formal decision making tool, human perception and evaluation tend to be overly optimistic.[15] By forcing the decision-maker to note events, variables and probabilities through the formal process of decision analysis, he does not become a victim of human forgetfulness or carelessness, especially in complex cases.

Note, however, that this does not mean that decision analysis requires the use of pen and paper (or computers). In some instances, decision analysis taking into consideration probabilities might be performed intuitively or even involuntarily.[16] This is a testament to the assertion that decision analysis is in actuality merely an operationalization of how the mind works.

Because of these characteristics of decision analysis, it may be applied to most fields of human endeavor, especially those involving a great deal of decision making.[17] It is no wonder why decision analysis has been easily modified to suit the needs of business, engineering, medicine and most recently, of law.

Legal applications of decision analysis are of relatively recent origin,[18] spanning a history of no more than three decades. However, notwithstanding its relatively recent beginnings, decision analysis and its relationship to law has developed a large following in developed countries. This may be seen from the fairly large body of legal articles and other publications on this topic. A study of existing publications on this topic shows that a more widespread legal application of decision analysis is being developed, a testament to its evolution from the simple "litigate vs. settle" question.

Historically, the use of decision analysis by lawyers and legal professionals was limited to litigation decision-making,[19] which at its core is concerned with answering the question "Should we settle or litigate?" Litigation decision-making may also answer corollary questions such as "How do we price a proposed settlement?" Decision analysis may also be used as a tool to communicate ideas between parties interested in a suit (e.g., between lawyers and clients, lawyers and his partners/associates, lawyers pertaining to opposing causes of action, etc.). Recently, applications to the field of Alternative Dispute Resolution (ADR), especially in the practice of mediation have been proposed by several authors.[20]

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[15] *Arbitration Reform Explained*, *op. cit. supra* note 13 at 183.

[16] Jeffrey Senger, *Decision Analysis in Negotiation*, 87 MARQ. L. REV. 723, 724 (2004).

[17] R. Howard, *op. cit. supra* note 6 at 1595.

[18] D. Hoffer, *op. cit. supra* note 12 at 113.

[19] Also known as Litigation Risk Management Analysis in Dr. Bruce Beron's articles. Bruce L. Beron, Ph.D., *Litigation Risk Management Analysis: A Comprehensive, Logical Approach to Litigation Decision-Making*, 550 PLI/LIT 27 (1996).

[20] Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1 (1995); James E. McGuire, *Practical Tips For Using Risk Analysis in Mediation*, 53-May DISP. RESOL. J. 15 (1998); D. Hoffer, *op. cit. supra* note at 12.

1. As an Analytical Tool

Decision analysis is first and foremost a prescriptive tool[21] used to determine the most rational choice given several options in the light of uncertainty. Because of this characteristic, it has been applied by lawyers, negotiators and litigants as analytical tools for litigation. As such, some experts use the term "Litigation Risk Management Analysis (LRMA)" to denote decision analysis applied as an analytical tool for litigation decision-making.[22]

As earlier discussed, decision analysis (as an analytical tool) is mainly devoted to answering the "litigate vs. settle" questions. These questions haunt both plaintiffs and defendants; the only difference lies in their objective. A plaintiff confronts the "litigate vs. settle question" in either of two scenarios: at the onset when deciding to commence an action, and when proposed a settlement by the defendant.

At the onset, even before a complaint is filed, a prospective plaintiff may use decision analysis to determine whether or not to file a case. In this regard, the prospective plaintiff needs to determine the strength of his cause of action and the possible outcome of litigation taking into consideration the relevant litigation-linked costs such as attorney's fees and court fees, among others. Litigation places great risk to the prospective plaintiff's hard earned money that it hardly seems logical to sue without at the very least consulting an expert as to his chances of winning.

Since litigation entails tying up of a large amount of time and money, it is but prudent to first determine whether a case has intrinsic merit or is merely frivolous. An accepted test to determine whether a suit is frivolous applying principles of decision analysis would be the Negative Expected Value (NeEV) test.[23] Using this test to reveal a frivolous suit, we multiply the initial assessment of the probability of victory in litigation by the prospective plaintiff to the estimated payoffs in damages and/or liability which may be obtained by the prospective plaintiff. To this product, we deduct the estimated cost of litigation. A negative result otherwise known as a NeEV would make the suit a frivolous one.[24] Such NeEV litigation appears to be irrational for plaintiffs to file and for defendants to settle.[25]

It may also be used by a plaintiff (whether actual or prospective) to evaluate a proposed offer of settlement. Using decision analysis, a plaintiff may be able to see whether an offer brought forward by the defendant, or litigation would be more beneficial given certain risk and outcome considerations.

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[21] See note 1, *supra.*

[22] B. Beron, *op. cit. supra* note 19.

[23] Peter P. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games,* 23 Rev. Litig. 47, 59 (2004).

[24] We will discuss this concept more in a latter part of this paper.

[25] P. Huang, *op. cit. supra* note 23 at 59.

For defendants, using decision analysis to answer "litigate vs. settle" questions may be helpful in evaluating whether it is wiser to face the suit head-on or to settle with the plaintiff, as well as in determining the proper pricing of the settlement after the settlement option is picked. Defendants may consider factors such as his expected value (EV) to determine his best (highest) offer to settle. This number may however be adjusted according to the defendant's risk preference and the discount rate.[26] This number in conjunction with EV of the plaintiff would form the zone of possible agreement, assuming the defendant's EV is higher than the plaintiff's EV.

Decision analysis being a relatively simple evaluative tool may be used by both counsel (internal and external) and clients.

2. As a Tool for Communication

The lack of fruitful and efficient communication has been a stumbling block of humanity. Conflicts and disagreements, from love quarrels to global wars, are products of the failure of humans to communicate with minimal ambiguity or vagueness. This problem is best expressed by Axl Rose in his monologue at the start of the song "Civil War"[27] by Guns and Roses:

> What we've got here is failure to communicate.
> Some men you just can't reach...
> So, you get what we had here last week,
> which is the way he wants it!
> Well, he gets it!
> N' I don't like it any more than you men.

People oftentimes fail to communicate because of the inherent limitation of words. Words are frequently inaccurate, ambiguous and/or value laden.[28] Complex facts and legal issues tend to worsen this situation. Thus, lawyers are in constant search for ways to better communicate legal matter with clients, peers, judges and litigation opponents.

In recent years, some legal scholars have promoted decision analysis as a tool for communication. This was a natural result of the increasing complexity of law as both a profession and as a field of study. Through the use of decision analysis, problems associated with verbal communication are minimized, if not completely resolved. The use of numbers in communications has an intrinsic unequivocalness and definiteness, thereby decreasing the chance of misunderstanding in the use of words.

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[26] HOWARD RAIFFA, NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING 27-28 (2002).
[27] Slash, Duff Mackagan & Axl Rose, *Civil War*, Guns and Roses: Use your Illusion 2, Geffen Records (1991).
[28] George Miller, Ambiguous Words available at
<http://www.kurzweilai.net/meme/frame.html?main=/articles/art0186.html?m%3D4>.

This is why men usually rate feminine beauty through the question: "How do you rate Miss X on a scale of 1 to 10?" The use of numbers prevents value statements such as "She is so beautiful" or "She looks good." Due to the ambiguity and/or vagueness of the following statements, follow-up questions such as "Is she more beautiful than Miss Y?" or "Who is more beautiful between Miss X and Miss Y?" Numbers are precise in the sense that it allows us to evaluate magnitude and relative strength.

On a more legal note, findings show that the use of words have a tendency to estimate victory.[29] People (especially lawyers) have a natural tendency of making statements like "We have a strong case" and "We will probably win." These statements tend to evoke questions in the receiver's mind as to the relative strength of the said case. Is our position in this case stronger than that case? What is the likelihood of victory? What do we mean by "probably"?

By using numbers, it is easier to see how confident the speaker is about a case or an issue. Little or no follow-up questions or explanations are needed. This is probably why decision analysis is gaining popularity. As a tool for communication, it may be used by a lawyer in conversing with his client, between and among lawyers in a firm or those engaged to do a certain job, internally with a client, and between lawyers and mediators.

Decision Analysis in Mediation

Decision analysis has increasingly been used as a tool for mediators. This is largely through the articles of Marjorie C. Aaron, the executive director of the Program on Negotiation at Harvard Law School. In her seminal article entitled "The Value of Decision Analysis in Mediation Practice,"[30] Dir. Aaron discusses the particular applicability of decision analysis in mediation. She gives the following reasons for the foregoing position: It makes the disputants more open to settlement;[31] it makes deal making through mediation a group decision;[32] it makes the parties emotionally distant from the problem.[33] Decision analysis is applied to mediation because it is an effective, unambiguous and efficient way of communication.

Mediators are tasked to facilitate communication and negotiations with the end of assisting the parties in reaching a voluntary agreement regarding legal disputes.[34] Oftentimes, in line with the objective, mediators face problems such as different predictions about trial outcomes, asymmetric information/different view of the facts, emotional issues, constituencies, agency problems, poor communication, linkages to

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[29] J. Senger, *op. cit. supra* note 16 at 732; R. Howard, *op. cit. supra* note 16 at 183.

[30] 11 NEGOT. J. 123 (1995).

[31] Marjorie Corman Aaron & David Hoffer, *Using Decision Trees As Tools for Settlement*, 14 ALTERNATIVES TO HIGH COST LITIG. 71, 73 (1996).

[32] *Ibid.*

[33] *Ibid.*

[34] Rep. Act No. 9285 (2004), sec. 3(q), The Law on Alternative Dispute Resolution of 2004.

other disputes, unfavorable combinations of risk and loss aversion, strategic behavior and posturing, and issues of principle.[35] With decision analysis, mediators may have a way of solving or at least lessening these problems. These matters will be discussed in seriatim.

Different Predictions of Trial Outcomes

As earlier discussed, lawyers' evaluation of legal problems are often –if not always– subjective in nature. As such, it is but natural that the assessments of lawyers from opposing camps are not the same. Contrasting predictions on the probability of winning a motion, a specific factual finding or a certain level of damage award will probably lead to different valuations of case, which could impede possible settlement.[36]

Using decision analysis, mediators can first translate the foregoing "differences in opinion" into expected values. This would then force the parties to see either the reasonableness or unreasonableness of their position. It would also translate to a narrowing of the focus of discussions to contested matters and issues.[37]

Asymmetric Information/Different View of the Facts

The difference in the opinions of opposing counsels is usually a product of a different appreciation of either the same facts or of completely different ones. Opposing counsels having different views of the facts will probably have different opinions as to the litigation or mediation outcome. In the case of asymmetric information, things may be a little bit worse. With asymmetric information, opposing counsels may have completely disparate facts. These things tend to make settlement difficult, since the valuation of the opposite camps will not even be close to each other.

By serving as a repository for the information about issues and uncertainty in the case, the use of decision trees can facilitate the sharing of information which would otherwise be private.[38] With decision trees, both camps are also made aware of the evaluation of facts and issues of the opposing party, since it is standard practice to ask each lawyer to explain the basis for probability his probability and value estimates.[39] With this, both parties will be able to consider and evaluate the controversy in light of the assumptions raised by the other party, thus making settlement more likely.

In cases where parties have different versions of the facts, sensitivity analysis may help the parties evaluate whether differences are indeed relevant to the case at hand. With this, the parties may be able to identify and focus on those factual disputes which have greater impact on the settlement value of the case.[40]

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[35] D. Hoffer, *op. cit. supra* note 12 at 123-128.
[36] *Id.* at 123.
[37] *Id.* at 123.
[38] *Id.* at 123.
[39] *Id.* at 123-124.
[40] *Id.* at 124.

Emotional Issues

Because of the investments made by both parties and counsels in the case, they oftentimes become emotionally involved. Emotional involvement may impair rational decision-making, thus making settlement difficult. With decision analysis, legal cases with emotional underpinnings are transformed into business problems requiring rational decision making.[41] With this, both parties move towards a rational resolution of the dispute. Decision analysis thus helps to "separate the people from the problem."[42]

Constituencies

Negotiations have been regarded as a "two-level game" where the lawyers (as agents) negotiate with each other and with their respective clients or constituencies.[43] In cases where the specific approval by the client/party litigant (as principal) is required for settlement, negotiations become more difficult, since the lawyers need to convince both his principal and the opposing counsel so as to arrive at a settlement.

With the use of decision analysis, both negotiators have something to bring back to their principal to explain their reasons for entering into an agreement.[44] After a tentative settlement has been made on "the first level," a negotiator can present the decision tree to his principal together with the reason for entering into an agreement. By rationally discussing the terms with the principal, his approval becomes easier to secure.

Agency Problems

Sometimes, lawyers have different interests from their clients. This is often the case in hourly fee arrangements and certain contingent fee arrangements. With these, lawyers are often torn between choosing between his interests and his client's. Taking their interest into account, lawyers would choose litigation over settlement, since the foregoing would mean more bacon for them, even when settlement is clearly the more rational choice.

Decision analysis diminishes the lawyer's ability to persuade the client to act contrary to his (the client's) interest.[45] In using it, a lawyer is forced to highlight the different options of his client and their advantages and disadvantages. It decreases the decision making power of the lawyer since it translates the legal "mumbo-jumbo" to concepts readily understandable by the client. With this, clients participate more actively in decision making.

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[41] *Id.* at 124.

[42] ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 17-40 (1981).

[43] D. Hoffer, *op. cit. supra* note 12 at 124.

[44] *Ibid.*

[45] *Ibid.*

Poor Communication

As discussed earlier, poor communication between parties and lawyers can prevent settlement. Since decision analysis is a tool for communication, it can lead to more effective and efficient communications by narrowing the issues, sharpening the arguments and improving understanding.[46] With decision analysis, parties gain a better sense of the issues on which they disagree.[47]

Reactive Devaluation

Reactive devaluation is the term used to define the psychological mechanism in which the recipient of an offer concludes that "it must not be good enough for us if they're willing to offer it."[48] The presence of reactive devaluation may lead to the failure to settle, since neither party trusts the opposite camp enough to make a serious consideration of their respective offers. With decision analysis, parties formulate an acceptable settlement through the use of a rational tool thereby minimizing the effect of reactive devaluation.

Linkages to Other Disputes

When the resolution of the controversy at hand requires that another conflict be disposed, settlement may be hindered unless both disputes are addressed in one package. With decision analysis, we can determine beforehand the settlement value of the case at bar by taking into consideration possible results of collateral disputes.[49]

Unfavorable Combinations of Risk and Loss Aversion

Risk aversion explains a person's unwillingness to forego a chance to win a large gain in order to be guaranteed a small one.[50] On the other hand, loss aversion explains a person's inclination to risk a large loss to avoid making a smaller certain payment.[51] A risk-averse plaintiff matched with a defendant who is not loss-averse would settle a case more easily, because both parties want to avoid the risk of being defeated.[52] In cases with a risk-averse plaintiff and a loss-averse defendant, settlement would probably not be as easy, since both parties will probably choose litigation over being required to pay.

During negotiations, the personalities of party litigants and their counsel are masked from the opposing camps. This is an effective strategy if positional bargaining is employed. However, it has a tendency to deter settlement. With decision analysis,

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[46] *Id.* at 125.
[47] *Id.* at 125-126.
[48] *Id.* at 126.
[49] *Id.* at 126.
[50] *Id.* at 126.
[51] *Id.* at 126-127.
[52] *Id.* at 127.

parties may see the opposite camp's risk profile. With this, settlement would markedly be easier.[53]

Strategic Behavior and Posturing

Lawyers often use uncooperative behavior as a strategic tool designed to "get better deals." This however, encourages litigation and makes settlement harder to come by. By encouraging both parties to work together towards a common goal (to find a fair and reasonable settlement price), cooperation becomes an easier objective. Cooperative crafting of decision trees (with the help of a mediator) leads to results which are amenable to both parities.

Issues of Principle

When an issue of law, precedent, public policy, or personal pride is at stake, parties will almost always resist settlement because the privacy of the process does not allow this interest to be vindicated in a public forum.[54] These issues are often hard to settle because of their non-pecuniary nature.

By forcing parties to quantify settlement figures acceptable to them, precious time is saved. When an offer does not meet the minimum acceptable settlement of the defendant, mediation or exploratory talks on settlements should be terminated.

C. ADVANTAGES AND DISADVANTAGES OF USING DECISION ANALYSIS FOR LEGAL PROBLEMS

Decision analysis is not a perfect tool.[55] The results determined via decision analysis do not magically give the perfect answer to the legal (or non-legal) questions at hand.[56] It only models how the mind should think (rationally) given certain inputs such as probabilities, outcomes and options. Thus, the result of decision analysis is only as good as the inputs entered into it.[57] In short, it is a "garbage in, garbage out" system.

Notwithstanding this, decision analysis is still a reliable decision tool in that it is still better than "hunches."[58] "Hunches" are usually made on a general or wholesale basis, taking the entire set of facts and issues to determine the likelihood of victory in litigation. Therein lies the weakness of "hunches" and the advantage of using decision analysis together with the former.

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[53] Please see the latter part of this article on risk preference.

[54] D. Hoffer, *op. cit. supra* note 12 at 127.

[55] J. Senger, *op. cit. supra* note 16, at 733.

[56] *Ibid*

[57] *Ibid*

[58] *Ibid* (Actually, decision analysis and "hunches" are not mutually exclusive. The use of decision analysis just fine tunes what "hunches" connote.)

With decision analysis, we can make separate "hunches" on a per-issue or per-part basis. This logically translates to a better and more fine-tuned estimate of the case at hand. By using decision trees, we can highlight our different options and the chances of success of each, thereby making it easier to amend or modify these parts according to changes happening at present. Prof. Raiffa states the foregoing in plain and clearly understandable language:

> The spirit of decision analysis is to divide and conquer: Decompose a complex problem into simpler problems, get one's thinking straight in these simpler problems, paste these analyses together with a logical glue, and come out with a program for action for the complex problem.[59]

The foregoing seems to be of great importance considering that the mind has difficulty in processing more than seven variables at any one time.[60] Deciding based on "hunches" means that the decision maker may probably neglect to take into consideration some aspects of the case. With decision analysis, even complex cases involving multiple issues may be evaluated without the need to worry that some variables were not considered.

Decision analysis also gives lawyers and other decision makers more realistic evaluations/assessments of cases. This is important in the light of statistics which show that people are usually more confident than they should realistically be.[61] With people being inherently optimistic, relying on decision making purely through "hunches" may lead to irrational or less than optimal decisions.

For example, given a Batas Pambansa No. 22 case which involves the issuance of bouncing checks, where the following needs to be proved: (1) the accused draws or issued the check to apply to an account or for value, (2) the accused knew at the time of issue that he did not have sufficient funds with the bank to satisfy the credit and (3) the check was subsequently dishonored by the bank for insufficiency of funds; where each stage has an 75% chance of success. By using hunches, we will tend to believe that the case is almost foolproof, since each element may be proven with relative ease. However, if we note the actual probability of proving the said elements of the crime, we would only have about a 42% chance of success.

Decision analysis makes party litigants aware of the costs associated with litigation.[62] Oftentimes, party litigants do not fully appreciate the costs associated with pursuing litigation. People sometimes think that litigation is free or inexpensive, but the sad truth is that litigation costs a great deal of time and money. In the Philippines, only the rich can pursue litigation with little or no impairment of their savings.

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[59] HOWARD RAIFFA, DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY 271 (1968).
[60] D. Hoffer, *op. cit. supra* note 15.
[61] D. Hoffer, *op. cit. supra* note 15 at 183; J. Senger, *op. cit. supra* note 16 at 733.
[62] J. Senger, *op. cit. supra* note 16 at 734; M. Aaron & D. Hoffer, *op. cit. supra* note 31 at 71.

These "costs" are amplified by the risky nature of litigation. Litigation is a "take it or leave it" proposition; it is either you win or lose. With this much risk, it's a wonder how people are becoming more and more litigious. Through the use of decision analysis, people can better appreciate the costs vs. the benefits of litigation. Its use also facilities the creation of options, which may increase the probability of success of the client in a cost-efficient manner.

Decision analysis prevents frivolous litigation. Frivolous litigation or NeEV cases are calculated to have negative returns.[63] By using decision analysis, we can determine beforehand if the proposed litigation is economically feasible through the NEV test.[64] Given an NEV suit, the proposed litigation should be shelved, since it will not bear any economic advantage.

The use of decision analysis allows the parties an emotional distance from the case.[65] By drafting decision trees, parties become less concerned with principle and more concerned with the economic underpinnings of a lawsuit. As such, the assessment of the case at bar becomes more objective and reasonable. This leads to an increased propensity to settle.

Decision Trees act as a map or a flowchart of the different issues and stages of a case. Through this blueprint, it becomes easier to prioritize the different issues and stages a case will undergo.[66] Priority may be given to issues which tend to have greater influence to the outcome of litigation.

D. TECHNIQUES

1. "Litigate vs. Settle" Decisions

As an analytical tool, which aids in litigation, decision analysis is invariably conjoined with a standard model of litigation behavior, the decision theory of risky choice as developed by Steven Shavell.[67] Shavell uses man's penchant (or the lack thereof) for rational choice in light of uncertainty as basis for his model of litigation behavior. This rational model of the "litigate vs. settle" question was based on the writings of lawyer-economists Richard Posner and William Landes.[68] In his seminal paper entitled "An Economic Approach to Legal Procedure and Judicial Administration,"[69] Prof. Posner uses economic theory to determine the propensity of party litigants to settle, taking into consideration rational criteria such as the

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[63] Please see pages 401-402

[64] P. Huang, *op. cit. supra note* 23 at 59.

[65] M. Aaron & D. Hoffer, *op. cit. supra* note 31 at 74.

[66] *Id.* at 71.

[67] Gregory Todd Jones & Douglas Yarn, *Evaluative Dispute Resolution under Uncertainty: An Empirical Look At Bayes' Theorem And The Expected Value Of Perfect Information,* 2003 J. DISP. RESOL. 427, 432 (2003).

[68] *Id.* at 432.

[69] 2 J. LEGAL STUD. 399 (1973).

minimization of costs and/or the maximization of gains. Economics Professor William Landes, in his article, "The Economics of Legal Conflicts"[70] analyzes the same question of risky choice in litigation by using indifference curves and Pareto optimality.

According to Posner, "the most important assumption of the model is that potential litigants form rational estimates of the likely decision."[71] Stated differently, "the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial, and the direct costs of litigation and settlement."[72]

Applying this standard model of litigation,[73] the plaintiff first decides whether or not to bring suit. If he decides to bring suit, he and the defendant either settle or proceed to trial.[74] At the onset, the (prospective) plaintiff determines whether to commence an action, taking into consideration his evaluation of the subjective probability of victory, (P_P) and the payoff or benefits he will probably derive via judgment of damages and/or liability in case of victory (J). He [the plaintiff] will bring suit if and only if his expected judgment $(P_P \times J)$ would exceed his trial cost (C_P)."[75] Thus, trial will only ensue when "the probability-discounted judgment amount exceeds the [his] estimated cost."[76]

The foregoing formulae may be quantitatively denoted as:

$$P_P J \ < \ C_P \ ; (1)$$

or

$$EV_P \ = \ P_P J \ - \ C_P \ ; (2)$$

Where:

EV_P is the net expected value (NEV) of the trial to the plaintiff;

P_P is the subjective probability of victory in litigation by the plaintiff;

J is the payoff through judgment of damages/liability awarded to the plaintiff in case of victory in litigation; and

C_P is the costs associated with pursuing the litigation option incurred by the plaintiff.

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[70] 14 J. L. & ECON. 61 (1971).
[71] G. Jones & D. Yam, op. cit. supra note 48 at 433.
[72] Ibid.
[73] Otherwise known as the Decision Theory of Risky Choice.
[74] S. Shavell, op. cit. supra note 20 at 10.
[75] Ibid.
[76] G. Jones & D. Yam, op. cit. supra note 48, at 433.

Suppose that we represent plaintiff P in an impending lawsuit with defendant D for a sum of money. In our best judgment, we see that there is a 50% chance of winning the case. If we win, we will probably have a judgment of P1,000,000 in our favor. We also estimate that the trial would cost our client approximately P200,000 in attorney's costs and other out-of-pocket expenses. Would we suggest that our client pursue the case in court? Graphically, the foregoing data may be plotted in a decision tree (See Figure 1).

Figure 1
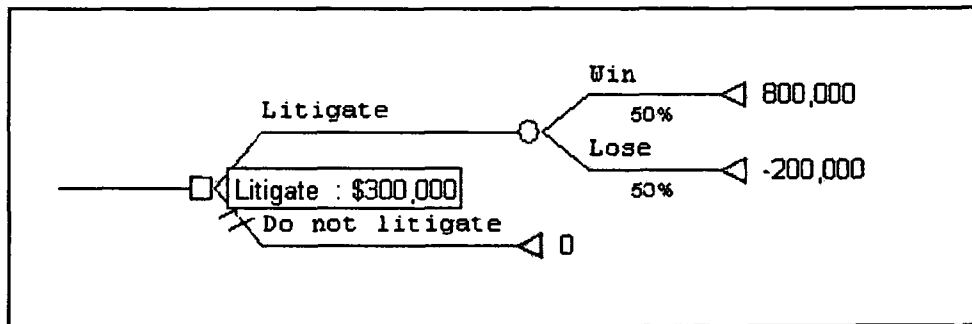
As seen from Figure 1, we should suggest that our client pursue the said case, since the same has a positive expected value (PEV) of P300,000.

On the other hand, if for example, there is only a 20% or less chance of winning the said case in litigation, we should suggest that our client desist from the pursuing the said case, since doing so would result in a NeEV. As such, pursuant to the NeEV test, the same is considered a frivolous suit. Being a frivolous suit, it will probably not translate to any net benefits for the prospective plaintiff.

However, according to this model, the total expected cost of the defendant for the trial will be as follows:

$$EV_D = (1 - P_D)J + C_D \; ; (3)$$

Where:

EV_D is the net expected cost (NEC) of the trial to the defendant;

P_D is the defendant's subjective probability of a ruling in his favor;

J is the payoff through judgment of damages/liability awarded to the plaintiff in case of victory in litigation; and

C_D is the costs associated with pursuing the litigation option incurred by the defendant.

In isolation, the net expected cost (NEC) of the defendant may be used to determine the maximum offer the defendant will rationally bid. Any agreement below the NEC will be more favorable to the defendant.

Settlement

Using the rational model of litigation behavior, settlement will only be had when both parties are offered a choice more favorable than their expected values; that is, "the plaintiff's minimum acceptable settlement is less than the maximum settlement the defendant is willing to offer."[77] Thus, the plaintiff will only agree to a settlement higher than his NEV (EV_P); and the defendant will only agree to present an offer lower than his NEC (EV_D). Assuming the foregoing relationship is present, settlement can happen anywhere between the said variables. In negotiation language, this is otherwise known as the zone of possible agreement (ZOPA).[78] The foregoing condition may be expressed in the following formula:

$$EV_P < EV_D \; ; \; (4) \quad \text{or}$$

$$P_P J - C_P < (1 - P_D) J + C_D \; ; (5)$$

One side of the equation represents the plaintiff's minimum demand, while the other represents the maximum offer of the defendant.[79] The logic of the foregoing inequality is that there will be settlement if the plaintiff's demand is less than the maximum offer of the defendant. The converse would mean litigation.[80]

Using our earlier example as a springboard, let us analyze the following: Supposing after the submission of the pleadings but before pretrial, the counsel of D comes to our office with an offer to settle at P300,000. Up to this point, we have billed our client a total of P50,000 in attorney's fees and other out-of-pocket costs, and a full blown trial would cost an additional P150,000 to our client. Should we settle or should we litigate? The following decision tree shows graphically the foregoing data (see Figure 2).
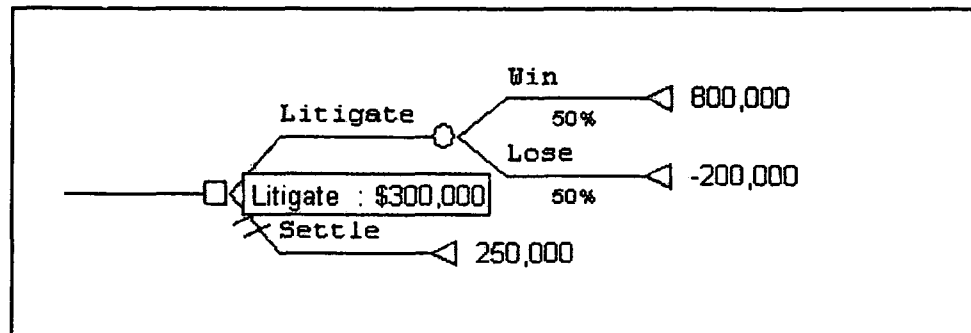
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[77] S. Shavell, *op. cit supra* note 20 at 11.
[78] Brad Spangler, *Zone of Possible Agreement*, available at <http://www.beyondintractability.org/m/zopa.jsp>.
[79] George Priest, *The Simple Economics of Civil Procedure*, 9-SPG KAN. J.L. & PUB. POL'Y 389, 389 (2000).
[80] Later in the paper, we will use the foregoing model to determine the propensity of parties to settle.

Figure 2

Win

Litigate   50%   800,000

Lose

Litigate : $300,000   50%   -200,000

Settle

250,000

As apparent in Figure 2, we have two options: either we settle or continue with the lawsuit. If we settle now, our client realizes P300,000, with minimal attorney's and other collateral costs. If we go on with the lawsuit, then we have a 50% chance of getting a P1,000,000 judgment for our client. On the flipside, we have a 50% chance of getting nothing for our client.

If we have in our hands a rational and risk-neutral client knowledgeable on the use of decision analysis, he would probably be aware that his expected value from litigation would be P300,000.[81] Considering net proceeds from settlement amounting to P250,000,[82] he would most likely continue with the trial. Thus, the expected value of P (EVp) of P300,000 is the minimum possible settlement price, assuming both parties act rationally according to the standard model of litigation behavior.

Now, supposing that we change hats and act as the counsel for defendant D: Assume that our client has ordered us to seek a settlement with the plaintiff, since we evaluated our client D's case to be very weak. We have suggested that our client only has a 40% chance of winning the impending suit. For the service of negotiating a settlement, we have charged our client a flat fee of P50,000. What is our best offer given the foregoing?

Taking the foregoing into consideration, our client has a net expected cost (NEC) of P650,000,[83] meaning our client expects to pay this amount assuming we do not take the litigation option. Thus, he will probably not want us to settle at a price higher than P650,000.

Merging the circumstances of both plaintiff P and defendant D, we see that the zone for possible agreement is between P350,000 and P650,000. As such, both rational and risk-neutral parties would probably settle within this range.

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[81] [.50 (P 1,000,000) + .50(0)] – P 200,000

[82] P 300,000 – P 50,000

[83] (1 - .40) P 1,000,000 + P 50,000

From this illustration, we see that the evaluation of probabilities of winning or losing in litigation (P_P and $1 - P_D$) and possible judgment (J) primarily determine the propensity of the parties to settle. If both parties assume the same possible judgment (J), a higher P_P vis-à-vis the ($1 - P_D$) would probably mean a lessened chance of settlement, assuming minimal litigation costs (C_P and C_D).

To further this discussion, we adopt Prof. Posner's algebraic manipulation of Equation 5:[84]

$$J (P_P + P_D - 1) < C_P + C_D ; (6)$$

Equation 6 is an algebraic manipulation of Equation 5. Using the foregoing equation, we may be able to analyze the settlement rate or the propensity of the parties to settle in a given lawsuit. If the relationship in the equation holds, then settlement becomes possible. If the inequality does not hold, then litigation will ensue.

Studying Equation 6, we see that as long as P_P and P_D are less than or equal to 1, the inequality will most likely hold, thus the parties will most likely settle given this situation. This means that as long as the evaluation of probabilities by the plaintiff and defendant do not vary greatly, there is a great chance of settlement. In practical terms, as long as both defendants and plaintiff both believe that the plaintiff or the defendant will win, the inequality will hold. As such, settlement will probably occur.

Before going into the other ramifications of decision analysis for litigation risk analysis, let's first take a closer look at the different concepts of probabilities.

2. Probabilities

Since decision analysis is essentially a tool to analyze and evaluate possible courses of action given uncertainty, problems requiring its use will invariably encounter and wrestle with the concept of probabilities. As the results of decision analysis are only as reliable as the inputs, there is a need to study the concept of probabilities to have a better understanding of the overall process of decision analysis.

Probability theorists recognize that the concept of probability may be conceived to mean a variety of different things.[85] Throughout history, mathematicians, statisticians and economists have developed different definitions to the term "probability" that it seems prudent to first discuss and delimit our understanding of its concept before continuing with the discussion on decision analysis.

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[84] R. Posner, *op. cit supra* note 69 at 419.

[85] Charles Yablon, *The Meaning of Probability Judgments: An Essay on the Use and Misuse of Behavioral Economics*, 2004 U. ILL. L. REV. 899, 906 (2004).

Among the generally accepted definitions of the term "probability" are the frequentist or statistical definition,- the subjective or personalist definition, the indifference theory and the Bayesian definition.[86]

Frequentist or Statistical Definition

The frequentist view is considered the first, and probably the most familiar concept of probability.[87] This view suggests that a statement concerning the probability of a given event or outcome is a statement describing the relative frequency of an event within a given population.[88] Frequentists assign probabilities only to random events according to their relative frequencies of occurrence or to subsets of populations as proportions of the whole.[89]

A common example of this view would be the outcome of a coin toss or the roll of a dice. Since a coin has only two sides, frequentists would say that the probability of getting "heads" or "tails" (outcomes) in a coin toss would be ½ and ½, respectively. For a dice, each roll will have a 1/6th chance of resulting in any number from 1 to 6, the dice having six equal sides.

One of the most important features of the concept of frequentist probability is that it is empirically based and objectively verifiable.[90] For example, if there are sixteen students in a Negotiations class, nine of which are males and the rest females, we say that there is a 9/16 or 56.25% that a student in our Negotiations class is male. Apparent from the foregoing example, frequentist probability require substantial information on the population while it deemphasizes the individuals forming part of the population.[91]

As a tool for prediction, the frequentist view places great reliance on the probabilities, and assumes that since an individual is part of a population, the probabilities will hold. In our example, if an individual is part of the population "A member of the Negotation class," then we believe that the 56.25% probability will probably hold as to him or her. As is apparent, the foregoing example places great reliance in the population. This may pose no problem in cases where the population is finite and/or clearly delineated, since the probabilities derived from the population will be empirically verifiable through recordkeeping.

This, however, is not oftentimes the case in the real world. Oftentimes, the population is not static nor is it clear cut enough for us to figure out a reliable probability figure. Take for example the statement that "50% of all American marriages

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[86] *Id* at 907-915.
[87] *Id* at 907.
[88] *Id* at 907.
[89] *Probability Interpretations*, available at <http://en.wikipedia.org/wiki/Probability_interpretations>.
[90] C. Yablon, *op. cit. supra* note 85 at 907.
[91] *Id* at 907-908.

end up in divorce."[92] This statistic and the derived probability of 50% are clearly dependent on the population. A sudden sharp increase or decrease in the population would probably change the probability. This would then debunk the statement.

On this matter, it seems apt to examine Professor's Sunstein's statement in the Harvard Law Review: "Do people know which risks lead to many deaths and which risks lead to few?"[93] Research indicates that they do not. In fact, people make huge blunders in estimating these things. To support this proposition, Prof. Sunstein crafted a survey where people were asked to compare two potentially fatal hazards and asked to estimate which were responsible for more deaths.[94] Subjects were asked to state the relative frequency of various potentially fatal hazards.

In connection with this survey, subjects were asked to determine the relative frequency of suicide versus homicide. Most of the subjects believed that people were more likely to die of homicide rather than suicide.[95] This was however, proven untrue. As of 2002, statistics provide that Americans are 1.7 times more likely to die of suicide than homicide.[96] To continue applying frequentist probability immediately after this survey was taken would mean that the statistic of 1.7 times will probability not hold, since the population (in this case, the number of Americans) and/or the sample (the number of Americans who died by suicide and those who died by homicide) have necessarily changed. Applying the same statistic to another time period (say for 2005) necessitates the assumption that the statistic will still hold for the said period.

In connection with the said survey, if we suppose that the survey question was modified to ask whether the subject (in this case, the reader of this article) is more likely to die of suicide or homicide, the answer would probably be very far from the national statistic. To answer the said specific question, a subject would obviously not place great importance in the national statistic, even if he was aware of it. He would necessarily reflect on certain considerations such as his emotional and psychological background, possible bouts with depression, possible financial, emotional and family problems, past violence in the community, etc. With this, it is clear that frequentist probability place great emphasis on population data and little importance on individual information. As is clear in this example, this may pose substantial problems especially in cases where the probability relates to matters not purely covered by chance.

For these reasons, the application of the frequentist definition of probabilities to legal problems may pose problems. Legal problems are often times unique events, with a special combination of facts, thereby causing it to be decided in a certain way. The frequentist view derives probabilities through the study of the population and individual "like" events. Frequentist probability fails to propose a method to assess

[92] Lynn Baker & Robert Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 Law & Hum. Behav. 439, 443 (1993).
[93] Cass Sunstein, *The Laws of Fear*, 115 Harv. L. Rev. 1119, 1126 (2002).
[94] *Id.* at 1126-1127.
[95] *Id.* at 1127.
[96] C. Yablon, *op. cit. supra* note 85 footnote 55.

single, unique events.[97] While some proponents of frequentist probability may propose that legal issues from a certain case be first divided, and the probabilities of the former be analyzed and assessed one by one, this may pose problems. Facts and issues in legal problems are often intertwined, thus, one fact or issue may merely be a subset of another.

As a corollary, frequentist probability is unable to deal with infinite or immeasurable sets. As stated earlier, the computation of probability of frequentist probability requires a determination of the numerical frequency of a given characteristic within a given reference class and that the number of members of the reference class must both be finite and measurable. Although some may believe that the class of actually litigated cases and its various subsets are finite and measurable,[98] we believe the opposite to be true. The class of actually litigated cases as a population is clearly not static. It may vary moment by moment. As such, it is, in a sense, immeasurable.[99]

Also, in analyzing legal problems, judges often take note of certain factors such as collateral facts to make them decide in a certain manner. These considerations are usually not stated in the decision but are analyzed by the judge personally before making a judgment. An example of this would be subjective consideration such as justice and equity, which are clearly unverifiable empirically. For these reasons, the frequentist view of probability is inapplicable.[100]

So, why do we still hear of lawyers and judges making probability statements regarding the outcome of cases? How does a lawyer know that a lawsuit has, say, a 90% chance of winning in the event of litigation when he cannot base said probability from the number of times the court held in a certain manner? This notion of probability has been denoted as the subjectivist or personalist view,[101] which basically represents the degree of rational belief that the speaker holds about the likelihood of occurrence of the event in question.[102]

Subjective or Personalist Definition

When a judge or lawyer states or believes that a plaintiff P has an 80% chance of winning a certain lawsuit X, he is in fact saying that he believes that the plaintiff P will win seven times out of ten lawsuits involving exactly the same facts, issues and other considerations as suit X. Some authors suggest a more objective definition: the subjective probability of X is the betting odds that the person holding the belief would

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[97] *Id* at 909.

[98] *Id* at 910.

[99] Notwithstanding this feature of frequentist probability, the same is still a source of useful information about the probability of outcomes. As such, lawyers, judges and party litigants often make use of this to assess the subjective probability of outcomes.

[100] C. Yablon, *op. cit. supra* note 85 at 910.

[101] *Ibid.*

[102] *Ibid.*

be willing to give or accept as to the occurrence of the event.[103] To illustrate, my claim (before the NBA 2005 Finals) that the Detroit Pistons has a 10% chance of winning the NBA 2005 Finals (as a subjective probability) as opposed to saying that the said team has an even (50%-50%) chance of winning is my subjective belief of the winnability of the team. In betting lingo, I would probably not wager on a 50%-50% arrangement. Considering my subjective probability of the Detriot Pistons in the said championships, I would only be amenable to bet if odds are at 3-to-7 or better.

With these in mind, a proposed subjective probability is merely determined by a genuine belief in the odds and not through objectively verifiable empirical evidence. As such, people will invariably have varying notions of the subjective probability of a certain event. I may believe that the Detroit Pistons only have a 30% chance of winning due to its inconsistent performance during the post-season as compared to the San Antonio Spurs. The next guy may think that the Pistons being the 2004 World Champions would have a higher chance of getting a repeat victory than the Spurs. He may peg Detroit's chances at 60%.

The beauty of subjective probability lies in its simplicity. It is merely based on an evaluative assessment of the odds. It does not care for empirical odds which may sometimes be misleading. Empirical (frequentist) odds may sometimes propound confusing notions of chance as is seen in the "Suicide vs. Homcide" example earlier.

Note, however that due to its "personal" nature, subjective probability is highly subjective.[104] When evaluating the likelihood of a certain event, two people would probably have different opinions as to its propensity of occurrence. This is the reason lawyers and party litigants almost always have varying estimates of the likelihood of the success of a certain lawsuit. Herein lies the benefit of subjective probability used in negotiations. With varying notions of the probability of a certain outcome, legal opponents can settle within a ZOPA. Varying notions of the subjective probability of victory in litigation provides a wider ZOPA where parties can negotiate.

Based on the foregoing, it seems that the subjectivist view of probability is applicable to legal questions. Lawyers often understand probability as "odds" or "bets," which reflect their beliefs as to the likelihood of the possible particular non-repeat outcomes.[105] While some people may discount this notion of probability merely as "hunches," which should be given little or no reliance, this may be considered a small inconvenience considering the potential benefits of applying advanced mathematical and statistical analysis to legal problems. Also, lawyers are expected to work well with this "fuzziness," since the legal profession is, at best, an inexact science.

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[103] *Ibid.*
[104] Pun intended.
[105] C. Yablon, *op. cit. supra* note 85 at 911.

Classical or Indifference Definition

Classical or indifference theory of probability involves an application of the famous and controversial principle of insufficient reason.[106] Under this principle, differing outcomes are assigned equal degrees of probability if there is no available reason to judge one outcome as more likely than another.[107] Accordingly, we assign the following probabilities in a poker game involving a single draw of five cards from a single deck: 1/650,000 for a "Royal Flush", 1/72,000 for "Straight Flush", 1/4,200 for a "Four of a Kind", 1/ 700 for a "Full House", 1/510 for a "Flush", 1/250 for a "Straight", 1/48 for a "Three of a Kind", 1/21 for a "Two Pair" and 1/2.4 for a "One Pair".[108] These probabilities are derived from the notion that each card has a 1/52 chance of getting drawn, since we do not have any information, which may lead us to believe that any one card is more likely to appear than the others.

The classical or indifference theory of probability is obviously not an accurate means of determining probabilities, where different outcomes have different chances of occurrence. To apply this concept in such circumstances would probably lead to inaccurate results. However, the indifference definition is still applied notwithstanding this weakness.

The indifference definition is usually applied to events involving two possible outcomes, since it has been argued to minimize errors in certain circumstances such as in minimizing losses in games of chance.[109] By using this theory (given a situation with two possible outcomes), we assume that both possible outcomes have a 50-50 chance of occurring. A 50-50 outcome decreases the risk of a large loss since it will result in the least mistake no matter what the outcome is.

Also, the said principle is relatively easy to apply. Considering its easy application, the same may be used to make initial estimates of chances. This may have some applications in the fields of litigation and legal study. When a prospective client visits a prospective lawyer to seek representation in an existing or impending lawsuit, the former usually asks about his chances of winning the said lawsuit. Oftentimes, he asks this question even before completely telling the facts of the case or midway through his storytelling. Sometimes, he brings supporting documents and other related pieces of evidence in connection with the lawsuit; however more often than not, these pieces of evidence are incomplete. This is largely because party litigants as non-lawyers usually do not have an objective understanding of evidence and its legal purpose.

If asked, what does the lawyer say? He may be tempted to evaluate the information and pieces of evidence presented to him, and make an assessment of the

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[106] *Id.* at 912.

[107] *Id.* at 912.

[108] Heidi Pascual, *FHM's Ultimate Guide to Poker*, FHM, July 2005, 104.

[109] Ariel Porat & Alex Stein, *Indeterminate Causation and Apportionment of Damages: An Essay on Holtby, Allen and Fairchild*, 23 Oxford J. Legal Stud. 667, 690 (2003).

prospective client's chances in litigation. This however, may cause some overconfidence on the part of the prospective client, considering that the assessment of his chances may be flawed due to the incompleteness of information evaluated. Because of this problem, it may be prudent to first peg the chances of a prospective client's litigation victory to 50%-50% in accordance with the indifference theory of probability.[110] This minimizes the possible over-assessment of his chances in the meantime, before a more objective assessment of his case is made.

Bayes's Theorem

Bayes's theorem is a mathematical formula for combining a prior probability distribution for some individual property or event A, with a "likelihood function" — the general likelihood of A given the observance or occurrence of B.[111] It is used to compute the probability or likelihood of a posterior event A in a given population on the condition that an event B occurred.[112]

While frequentists can easily compute the likelihood of an anterior event by adding up the times such event occurred, subjectivists cannot do so, since their estimate of probabilities are only determined by rational belief. Subjectivists, who maintain that rational belief is governed by the laws of probability, lean heavily on conditional probabilities in their analysis of the likelihood of events, especially those which concern the probabilities of anterior events.[113] The advantage of using Bayes's theorem in combining subjective probabilities is underscored by the ease of applying the formula.

While Bayes's Theorem provides a mathematical formula to determine posterior probabilities given conditions precedent, many behavioral scientists are of the opinion that human reason rarely follows Bayes's Theorem.[114] Numerous studies show that when individuals are asked to estimate posterior proababilites, they oftentimes fail to answer in accordance with Bayes's Theorem.[115]

Note that Bayes's Theorem is just a means at arriving at a correct determination of the probability of a posterior event. It does not attempt to explain the meaning of such probability judgments.[116] It also does not attempt to lend credence to the probabilities, since the result after applying the Bayesian formula is merely a mathematical output of the probabilities inputed to the equation.[117]

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[110] Except if clearly the prospective client's case has little or no merit.
[111] C. Yablon, *op. cit. supra* note 85 at 913.
[112] *Id.* at 913.
[113] James Joyce, Jr., *The Common Law 207 (1881)*, available at <http://plato.stanford.edu/entries/bayes-theorem/>.
[114] C. Yablon, *op. cit. supra* note 85 at 913.
[115] *Id.* at 914.
[116] *Id.* at 913.
[117] *Id.* at 913.

3. Risk Preference

Peoples' attitudes towards risk vary widely. Some people may have strong preferences for risk assumption, while others abhor the thought that risk may be present in everyday life. Risk takers or risk lovers are individuals who prefer an uncertain prospect with a particular expected value to a certainty with the same expected value.[118] Risk takers are more aggressive in taking risk in that they often take NeEV risks. To illustrate, in an even-odds bet (such as a 'fair' coin toss) where there are two possible outcomes both having a 50 percent probability of occurring, a risk-taker would be willing to pay for an amount greater than the EV of the bet. If for example, a person is asked to bet on a coin toss where he will get P100,000 when he correctly calls the outcome and nothing when his call is incorrect, a risk-taker would be willing to bet more than the EV of P50,000. As such, he is more likely to lose over the long run.

At the other side of the spectrum, is the risk-averse person. Most people are of this cut. Risk-averse people tend to stay away from uncertainty even when decision analysis will show that the same is a safe bet, or that the venture has a PEV.[119] A normally risk-averse decision maker would probably not accept an even-odds bet on a two-possibility event (50 percent chance each way) because the loss of the sum at risk would mean more to them (negatively) than would the gain of an identical sum (positively). In our coin toss example, a risk-averse person (depending on the degree of his risk-averseness) would not be willing to pay the EV of P50,000 for the chance of winning P100,000 in a 50-50 bet.

In economic terms, the personal utility functions of the said risk profiles are as follows: Risk-takers consume risky items under an increasing marginal utility, risk-neutral decision makers tend to exhibit a linear risk utility function, while risk-averse decision makers tolerate risk with diminishing marginal utility.[120]

4. Value of Information

Information affects the risks associated with a lawsuit. An abundance of information lessens the degree of risk affecting a party litigant, while a dearth thereof increases the risks associated with litigation. Why is this? As in all decision making models, information determines the quality of decisions made. More information results in better decision-making.

In terms of litigation, if we (party litigants) are represented by brilliant and experienced lawyers, we would naturally be more confident of their assessment of our case. We would place great reliance in their opinion of the strength of our case. Likewise, when we are diagnosed with a certain illness, we often seek a second opinion

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[118] MICHAEL KATZ & HARVEY ROSEN, MACROECONOMICS 179 (2nd Ed., 1994).
[119] *Id.* at 178.
[120] *Id.* at 179.

when we have doubts on the examining doctor's assessment. This usually happens when we are not sure of the credentials of the doctor.

By using decision analysis, we can quantify our comfort with our expert's knowledge, and calculate the value of better information or reduced uncertainty.[121] In this regard, some authors suggest that the following question be answered: "What is the most we would be willing to pay a clairvoyant (someone who can foretell the future with perfect accuracy) to answer our question, 'Will we win the trial'?"[122]

Going back to our earlier example of a lawsuit between plaintiff P and plaintiff D: Assuming the same facts, we now add in a new twist. How would the decision tree look like, if with the help of a clairvoyant we (the counsel for the plaintiff P) knew in advance that we would win? (See Figure 3)

Figure 3
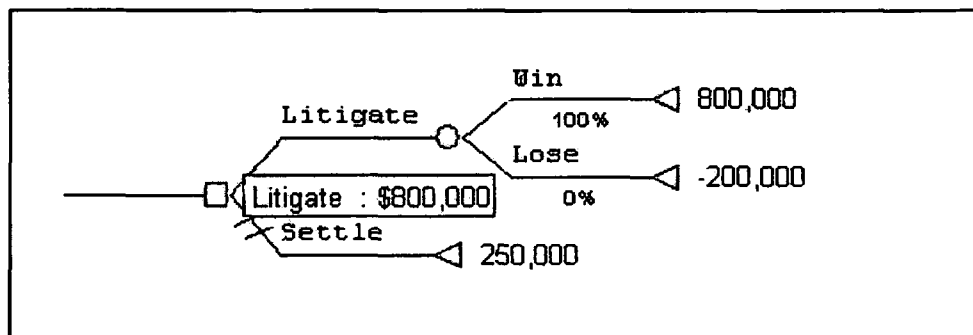
On the other hand, how would the same decision tree look, if we knew in advance that we will lose if we pursue the trial? (See Figure 4)

Figure 4

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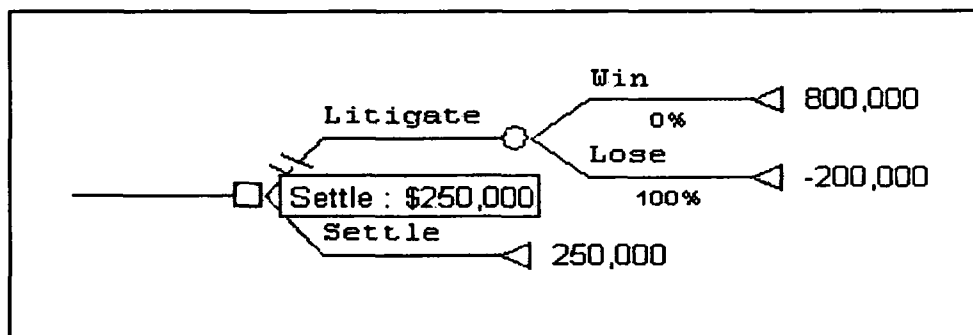
[121] B. Beron, *op. cit. supra* note 19 at 35.
[122] *Ibid.*

If we knew in advance that we would win the said trial, we would obviously opt to litigate, since we are sure that the judgment of P1,000,000 will go to us. Conversely, if we are sure that we will lose, we would surely take the settlement option. At least, we still get something out of the lawsuit.

With this in mind, we determine the expected value of the plaintiff (EVp) with perfect information, as follows:

[Pw x (our EV if the clairvoyant predicts a win)]   +   [PL x (our EV if the clairvoyant predicts a loss)] = EV with perfect information (7)

Where:
Pw is the subjective probability of a plaintiff victory in litigation;

PL is the subjective probabilty of a plaintff loss in ligitation.

Let:

[50% x (P1,000,000-P200,000)] +   [50% x (P300,000-P50,000)] expected value with perfect information

[P400,000] + [P125,000] = expected value with perfect information

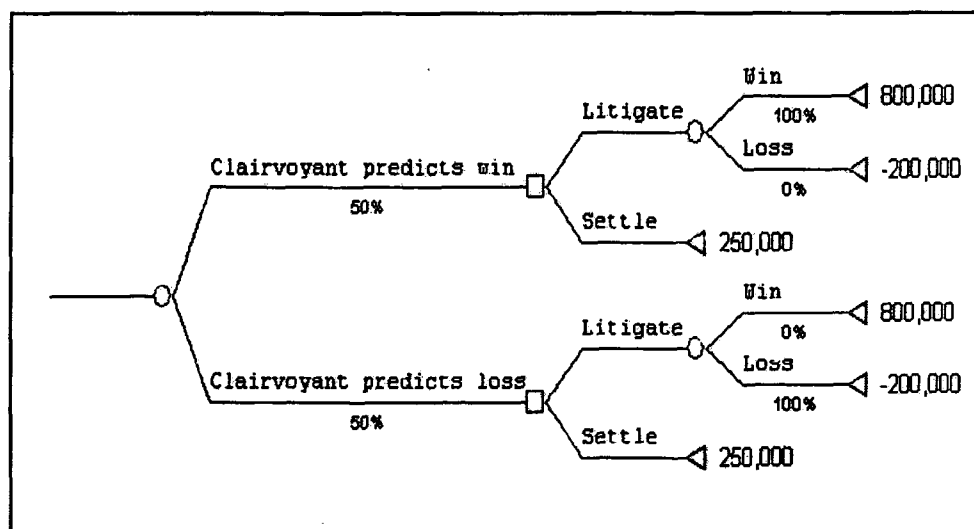P525,000 = expected value with perfect information

Graphically, the same may also be derived through the use of a decision tree (See Figure 5).

Figure 5

Taken alone, the expected value with perfect information has little or no meaning. It is always taken in conjunction with the expected value without further information to determine the value of perfect information. In the case at bar, we compute the value of perfect information, as follows:

Expected value with perfect information	P 525,000
Expected value without perfect information	- 300,000
Value of perfect information	P 225,000

The value of perfect information is the most we would pay for perfect information on the outcome of a trial.[123] Given perfect information, we can decide correctly to litigate or settle, since we will know in advance the results of litigation. In the case at bar, we would pay a maximum of P225,000 to get such information. As such, we would be willing to pay anything below P225,000 to get better-quality information. This would mean anything from hiring an expert as counsel, to the bribing of judicial personnel so as to extract information.

Note however, that perfect information only has value when it can lead to a change in the decisions to be made. As such, it is only applicable when the decision maker is faced with a choice. Thus, its value may only be seen when the decision maker is given the option to litigate or settle.[124] Without this option, perfect information would largely remain a useless statistics.

5. Value of Control

More valuable than perfect information, the value of control theoretically gives the decision maker the power to ensure that the results of litigation go a certain way. In the words of an author, it is like the employment of a wizard in our payroll to ensure that the future turns out the way we want it to.

To begin, we determine the expected value of litigation when we have control (See Figure 6).

Figure 6

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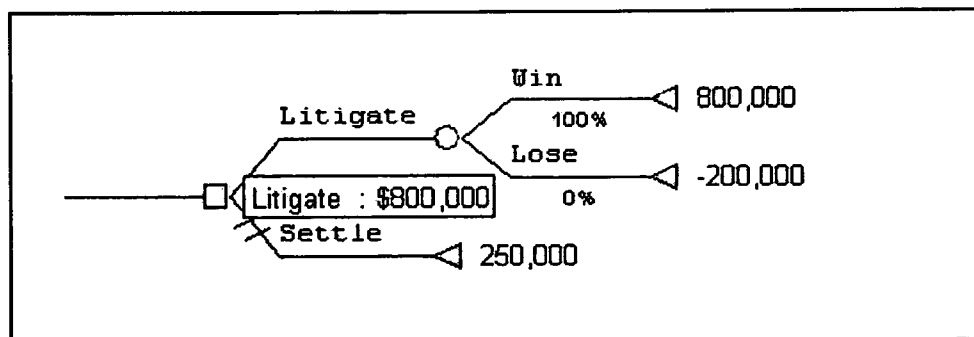
[123] *Id.* at 36.
[124] It may also be important before initiating a case.

As can be seen from the foregoing decision tree, the expected value of litigation with control is P800,000.[125] Similar to the formula to extract the value of perfect information, we deduct the expected value of litigation with perfect control with the expected value of litigation without control. Computations are as follows:

Expected value with perfect control	P 800,000
Expected value without control	- 300,000
Value of perfect control	P 500,000

Some authors might suggest that the foregoing formula has little or no application, since there is no such thing as perfect control.[126] It has been suggested that the value of control may only be applied to determine the value of imperfect control, or the assessment of additional benefits vis-à-vis costs through the introduction of additional evidence.[127] With better evidence quality and quantity-wise, the results of litigation may be, in a sense, controlled.

Given the same example, let us assume that we could "purchase additional control" of the case by spending an additional P 50,000 so that we could increase our probability of winning to 75% as opposed to the original 50% chance of success. The following decision tree simulates this situation: (See Figure 7)

Figure 7
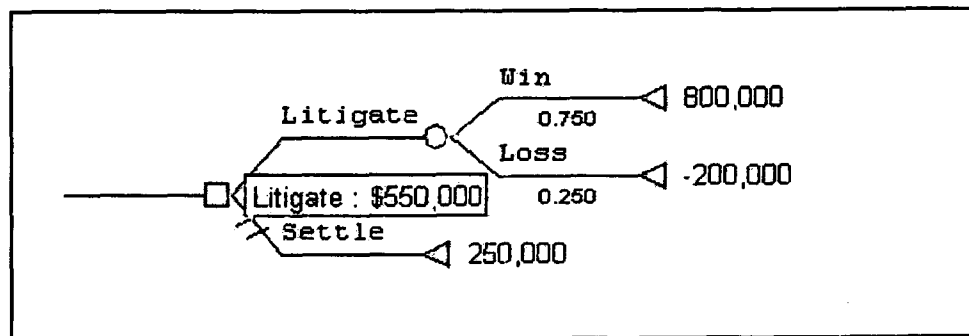
In light of the foregoing additional facts, the expected value of litigation with imperfect control is P550,000.[128] With this, we could determine the maximum amount we are rationally willing to pay for some additional measure of control. Computations are as follows:

Expected value with imperfect control	P 550,000
Expected value without control	- 300,000
Value of imperfect control	P 250,000

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[125] 1.0 (1,000,000) – 200,000

[126] B. Beron, *op. cit. supra* note 19 at 37.

[127] *Id.* at 37-38.

[128] [.75 (P 1,000,000) - .25 (0)] – P 200,000

Clearly, spending an additional P50,000 to increase our chances of a litigation victory is worth it. In fact, spending up to less than P250,000 to improve our chances by 25% may still provide net benefits.

The applicability of the value of control in decision analysis is discussed in further detail in the latter part of this paper. Corruption and the engagement of power brokers have been documented in the Philippines as means to influence judges to decide in a certain manner. This is, likewise, tackled in greater depth in the latter part of this paper.

6. Discounted Cash Flow (DCF) Method

One of the advantages of using decision analysis is its inoperability with discounted cash flow (DCF) analysis. For this reason, some authors have suggested its application in connection with decision analysis.[129]

DCF is a quantitative method used in the field of Finance and Accounting to determine the time value of money.[130] The time value of money concept works on the principal premise that a unit of money (say, one peso) in hand today is worth more than the same unit of money (a peso) to be received in the future, since the unit of money received today would have earned interest and thus ended up more than the unit of money received today.[131] Conversely, a unit of money still to be received in the future will, of course, have a value less than that if it is received today.

DCF Analyses requires the comparison of present dollars and future dollars viewed from one of two perspectives, either from the present or the future.[132] If we use a future time frame as a reference point, all cash flows must be accumulated to that future point,[133] meaning we need to accumulate all the interest which may be earned together with the principal at some future point. Consequently, the effect of interest is to increase the amounts or values over time so that the future amount is greater than the present amount.[134]

If, on the other hand, we want to take the present value as a reference point, then all cash flows must be discounted from the future realizable value to the present value.[135] In this instance, the discounting effect reduces the amounts or values.[136] Present value analysis has been applied to unitize sums of money received over a period

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[129] R. Posner, *op. cit. supra* note 69 at 420.

[130] J. FRED WESTON & EUGENE F. BRIGHAM, ESSENTIALS OF MANAGERIAL FINANCE 188 (10th ed., 1992).

[131] *Id.* at 189.

[132] JAY M. SMITH, K. FRED SKOUSEN, EARL K. STICE, & JAMES D. STICE, INTERMEDIATE ACCOUNTING: COMPREHENSIVE VOLUME 248 (12th ed., 1995).

[133] *Ibid.*

[134] *Ibid.* (This has no special relevance for decision analysis)

[135] *Ibid.*

[136] *Ibid.*

of time. With this, it becomes easier to manipulate data involving these sums of money, since they are assumed to have constant value.

For these reasons, decision analysis involving legal problems may have special use for present value techniques. In typical legal problems involving the "litigate vs. settle" question, the award or judgment comes last, oftentimes after years of spending for litigation.

Present value is computed through the following general formulae:

$$PV_n = A \frac{1}{(1+i)^n} \; ; \; (8)$$

Where:

PV_n is the present value given n number of periods;

A is the accumulated amount to be discounted;

i is the interest/discount rate per period; and

n is the number of periods.

Where the search for the present value involves annuities or a series of equal payments over a specified number of equal time periods, the formula would be as follows:

$$PV_n = R \frac{1 - \frac{1}{(1+i)^n}}{1} \; ; \; (9)$$

Where:

PV_n is the present value of an annuity over n number of periods;

R is the payment to be discounted or the face value of the annuity;

i is the interest/discount rate per period; and

n is the number of periods.

To make computation easier, tables summarizing the discount multiplier have been compiled as a standard inclusion to books on Finance. (See these tables in Appendices 1 and 2.)

Taking the foregoing formula into consideration, the effect of discounting is amplified by two factors. *Ceteris paribus*, the effect of discounting is a function of the time period between actual cash inflow or outflow and the discount or interest rate.

The longer the time period between actual cash inflow or outflow; the greater the discount effect. The larger the discount or interest rate used; the greater the discount effect.

Decision analysis (with the application of DCF) seems especially useful for legal problems. Oftentimes, lawyers require clients to first pay upfront a representation fee before taking up his case. Afterwards, he usually charges per pleading and/or per appearance. This goes on for the duration of the lawsuit. All these expenses are incurred by the client for the chance of getting the judgment in a future period. Thus, computing the said amounts in face value will tend to distort the results thereof, since the said expenses and possible judgment are expected to be disbursed or received in different times. This effect of distortion becomes greater when the litigation is prolonged because of the larger effect of discounting on the face value.

Also, the effect of discounting is also magnified in by a high discount rate. The discount rate is usually determined by the weighted average cost of capital (WACC) of the decision maker or the party litigant making use of decision analysis. The WACC is simply the weighted average of the cost of debt and the cost of equity.[137] The concept of WACC flows from assumption that all funds have internal costs.

For example, in a corporation, funds are derived from a mixture of debt and equity, both having "acquisition costs." For equity, the costs associated may be more intangible and esoteric. Stockholders require a specific return to their invested capital, partly through capital appreciation of their shares and/or through the receipt of dividends. In the formula indicated below, cost of equity is denoted as r_S.[138]

In the case of debt, the borrower needs to pay interest (on top of the amount borrowed) as fee for the use of funds. Ignoring taxes, the formula would simply be the interest or borrowing rate.[139] Taking into consideration the tax effect, the appropriate cost of debt would be $(1 - T_C) r_B$, where T_C is the tax rate and r_B is the borrowing rate. This is otherwise known as the after-tax cost of borrowing.[140]

The formula for determining the WACC or the discount rate for present value computations would be as follows:

$$ \text{WACC} = i = \frac{S}{S + B} \, r_S + \frac{B}{S + B} \, (1 - T_C) \, r_B \quad ; (10) $$

Where S is the total equity capital; and

B is the total debt capital.

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[137] STEPHEN A. ROSS, RANDOLPH W. WESTERFIELD & JEFFREY JAFFE, CORPORATE FINANCE 459, (4th ed., 1996).
[138] *Ibid.* (We will not elaborate on the concept of return to equity.)
[139] *Ibid.*
[140] *Ibid.*

The WACC may be especially useful for corporate bodies, especially since most corporate entities use a mixture of debt and equity to finance their operations. However, questions may be raised as to its applicability for individuals, since most individuals do not really have readily computable return on equity. For simplicity, we suggest that the borrowing rate applied as the discount rate for individuals.

Using the cost of borrowing as a discount rate would be much easier, since there would be no need to derive the figure (no computations needed) However, we must note that borrowing rates are not constant. They are affected by variables such as the credit profile, the term of the loan and the type of security (if any). As such, it is relatively hard to peg a single or an average discount rate for individuals.

These concepts are discussed in more detail in a latter part of this paper.

II. DECISION ANALYSIS AS APPLIED TO THE PHILIPPINE JUDICIAL SYSTEM

A. THE PHILIPPINE JUDICIAL SYSTEM

1. History

The Philippine judicial system like the more encompassing legal structure is a product of both Spanish and American colonization.[141] A hybrid resulting from an intercultural mix of civil and common law systems, the Philippine judicial system is simultaneously a court of law and of equity.

The present judicial system is a far cry from its pre-Spanish ancestor. During the said period, judicial authority was exercised by a barangay chief, who at the same time also exercised executive and legislative powers.[142] The trial system back then was oftentimes through trial by ordeal, a very different judicial system from our current system.

When the Spaniards established a colonial government in 1565, they initially permitted the native inhabitants to continue with many of their indigenous customs instead of imposing their own laws derived from Roman legal codes.[143] As they became more entrenched, however, the Spanish attempted to subvert many of the customary laws.[144] The power of adjudication back then was first assigned to the Spanish Governor-General, the highest civil authority in the Philippines. On May 5, 1583, the Royal Audiencia, the predecessor of our present Supreme Court was constituted with one president, four oldores (justices) and a fiscal.[145] On 1815, the Royal Audiencia had

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[141] Amy Rossabi, *The Colonial Roots of Civil Procedure in the Philippines*, available at <http://www.columbia.edu/cu/asiaweb/v11n1Rossabi.htm>.

[142] *A Brief History of the Supreme Court*, available at <http://www.supremecourt.gov.ph/history.htm>.

[143] A. Rossabi, *op. cit. supra* note 141.

[144] *Ibid.*

[145] *A Brief History of the Supreme Court*, *op. cit. supra* note 142.

been renamed the Audiencia Territorial de Manila, also resulting to addition of the number of justices. Soon thereafter, branches were established in Cebu and Vigan.[146]

American officials, who displaced the Spanish in 1898, generally adopted the same strategy of incorporating certain features of their legal system while simultaneously tolerating some of the remaining Spanish and native legal traditions.[147] During the Philippine-American War, military commissions or court-martial and provost courts were established to temporarily replace the operations of the Audiencias.[148]

On May 29, 1899, Major General Elwell S. Otis issued General Order No. 20 temporarily re-establishing the Audiencia.[149] The said Order named six Filipino members with Cayetano Arellano as the first Chief Justice.[150] Under Act No. 136, the Audiencia, was reorganized into the Philippine Supreme Court patterned after its American counterpart.[151] This organization was reaffirmed in the Philippine Bill of 1902,[152] the organic act of the American colonial government in the Philippines.

Initially, the Philippine Supreme Court had a membership of nine justices — a chief justice and eight associate justices pursuant to the Administrative Code of 1917.[153] This was later increased to 11 justices under the 1935 Constitution. Under the 1973 Constitution, its membership was again increased to 15. Pursuant to the 1987 Constitution, the Supreme Court now stands with a membership of 15 justices (one Chief Justice and 14 Associate Justices).

The post "EDSA I" Revolution was a time of rapid and extensive change for the Philippine judiciary. This was partly due to the need to re-strengthen the Philippine judiciary after its considerable weakening due to Marital Law.[154] The first two Chief Justices after the "EDSA Revolution", Chief Justices Claudio Teehankee and Pedro Yap directed their energies towards removing mechanisms which tended to subvert the administration of justice. Through various Supreme Court circulars,[155] they stressed the importance of judicial expediency in the administration of justice. As an administrative measure, they required the semestral inventory of cases to put court delays in check.[156]

The late Chief Justice Marcelo B. Fernan inherited the fervor of the two preceding chief justices in the eradication of court delays and judicial reform in general. Among his more notable achievements in the field of judicial administration were the

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[146] *Ibid.*

[147] A. Rossabi, *op. cit. supra* note 141.

[148] *A Brief History of the Supreme Court, op. cit. supra* note 142.

[149] *Ibid.*

[150] *Ibid.*

[151] *Ibid.*

[152] *Ibid.*

[153] *Ibid.*

[154] CARMELO SISON & MYRNA S. FELICIANO, PHILIPPINE JUDICIAL REFORMS 1987-2000, 1.

[155] Supreme Court Circular No. 13 (July 1, 1987). "Guidelines on the Administration of Justice"; Comprehensive Administrative Circular (January 28, 1988).

[156] Administrative Circular No. 1-A (July 5, 1988).

Continuous Trial System (CTS), the monitoring and feedback in judicial performance and reforms in court procedure with amendments on the Rules of Criminal Procedure, Summary Procedure and Evidence.[157]

Chief Justice Andres R. Narvasa, the successor of Chief Justice Fernan continued the latter's resolve to reform judicial administration in the Philippines. Although he discontinued the CTS, he developed some measures calculated to improve efficiency in judicial administration. Among these are the creation of the Judicial Reform Committee, the establishment of the Philippine Judicial Academy (PhilJA) and the designation of specialized courts.[158]

Upon the assumption of Chief Justice Hilario G. Davide, Jr. on November 30, 1998, the Philippine judicial system experienced an increased impetus to examine and analyze current problems besetting the judiciary and to develop new and ingenious ways of solving these problems. In his article entitled "My Agenda for the Supreme Court/Judiciary", Chief Justice Davide set the following general goals of judicial independence, expeditious delivery of fair justice and fiscal autonomy for his term.[159] In the last seven years, the judiciary has achieved so much in terms of transparency and judicial administration that it has been cited consistently as the most trusted governmental body/instrumentality.

2. Court System

The Metropolitan Trial Courts (MeTCs), Metropolitan Trial Courts in Cities (MeTCs in Cities), Municipal Trial Courts (MTCs) and Municipal Circuit Trial Courts (MCTCs) comprise the lower rung of the Philippine Judiciary. These courts have similar jurisdictions and are merely distinguished by designation depending on their area of coverage. MeTCs and MeTCs in Cities operate in metropolitan areas, MTCs in other cities and municipalities and MCTCs in each circuit comprising these cities and municipalities.[160]

As the lowest level within the Philippine judicial system, the main elements of their original jurisdiction include: violations of local government ordinances,[161] criminal offenses that are punishable with imprisonment for a period not exceeding six years (including offenses involving damage to property through criminal negligence),[162] forcible entry and unlawful detainer cases,[163] civil cases which involve title to or the possession of real property or any interest therein to the amount of P20,000 (or P50,000 in Metro Manila),[164] and other civil actions involving demands that do not exceed

[157] C. SISON & M. FELICIANO, *op. cit. supra* note 154 at 2.
[158] *Ibid.*
[159] *Id.* at 3.
[160] Batas Blg. 129 (1980), sec. 25, The Judicial Reorganization Act of 1980 as amended.
[161] Batas Blg. 129 (1980), sec. 32, par. (1).
[162] Batas Blg. 129 (1980), sec. 33, par. (2).
[163] Batas Blg. 129 (1980), sec. 33, par. (2).
[164] Batas Blg. 129 (1980), sec. 33, par. (3).

P100,000 (or P200,000 in Metro Manila) excluding interest and other costs of litigation.[165]

The second judicial level is formed by the Regional Trial Courts (RTCs) which are scattered over 13 judicial regions.[166] RTCs are considered courts of general jurisdiction which may preside over all types of cases not specifically assigned to other courts.[167] Presently, RTCs exercise original jurisdiction over the following types of cases: civil cases involving title to or possession of real estate or an interest therein, involving an amount of more than P20,000 (or P50,000 in Metro Manila),[168] other civil cases which involve demands exceeding P100,000 (or P200,000 in Metro Manila) excluding interest and other costs of litigation,[169] actions involving the contract of marriage and marital relations,[170] and criminal offenses punishable by imprisonment for a period more than 6 years.[171] It also exercises appellate jurisdiction over cases decided by the MTCs.[172]

In recent years, the Philippine judicial system has witnessed the "specialization" of RTCs (and some MTCs) into specific fields of law wherein they can exercise their adjudicatory powers in relation to these specialized fields.[173] This shift towards specialization of courts is intended to enhance court efficiency and improve case disposition time by decreasing the learning curves of judges in their fields of specialty. Special courts such as family courts,[174] intellectual property courts,[175] drug courts,[176] and cadastral courts[177] have been constituted either pursuant to law or administrative issuance by the Supreme Court.

The third level is formed by the Court of Appeals located in Manila. This Court essentially reviews decisions and orders issued by RTCs and certain administrative or quasi-judicial agencies and instrumentalities such as the Securities and Exchange Commission, the Social Security Commission, the Employees Compensation Commission and the Civil Service Commission.[178] It is composed of one presiding justice and 50 associated justices exercising adjudicatory functions through 17 divisions with three members each.[179]

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[165] Batas Blg. 129 (1980), sec. 33, par. (1).

[166] JAN WILLEM BAKKER, THE PHILIPPINE JUSTICE SYSTEM: THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY AND HUMAN RIGHTS FROM 1986 TILL 1997, 8 (1997).

[167] Batas Blg. 129 (1980), sec. 19, par. (6).

[168] Batas Blg. 129 (1980), sec. 19, par. (2).

[169] Batas Blg. 129 (1980), sec. 19, par. (8).

[170] Batas Blg. 129 (1980), sec. 19, par. (5).

[171] Batas Blg. 129 (1980), sec. 20.

[172] Batas Blg. 129 (1980), sec. 22.

[173] Raul Pangalangan, *The Philippine Judicial System*, 5 IDE ASIAN LAW SERIES 101; Batas Blg. 129 (1980), sec. 23.

[174] Rep. Act No. 8369 (1997), The Family Courts Act of 1997.

[175] Pursuant to Supreme Court Adm. Order No. 113-95, October 2, 1995.

[176] Rep. Act No. 9165 (2002), The Comprehensive Dangerous Drug Act of 2002.

[177] Pursuant to Supreme Court Adm. Circular No. 64-93, April 21, 1993.

[178] Batas Blg. 129 (1980), sec. 9.

[179] Batas Blg. 129 (1980), sec. 3-4.

The Supreme Court constitutes the highest court of the land, and is the final arbiter of all cases in the Philippines. It is mandated by the Constitution to direct and supervise all lower courts in the administration of justice.[180] Aside from and more important than its administrative functions, the Supreme Court exercises its adjudicative functions over cases affecting or involving ambassadors, other public ministers and consuls, over petitions for *certiorari*, prohibition, *mandamus*, *quo warranto*, and *habeas corpus*[181] and review functions over final judgments and orders of lower courts as allowed by the Constitution and the Rules of Court.[182] Under the Constitution, the Supreme Court exercises extensive powers of judicial review covering action or the non-action of any branch or instrumentality of the Philippine government.[183]

The Supreme Court consists of one Chief Justice and 14 associate justices subdivided into three divisions of five members each.[184] The Constitution however allows the Supreme Court to decide cases in divisions of three or seven members.[185]

Aside from the foregoing, there are also several specialized courts in the Philippines. Some of which are the Court of Tax Appeals (which reviews the decisions rendered by the Commissioner of Customs and the Commissioner of Internal Revenue), the Shari'a Courts (which deal with specific issues of Islamic law) and the Sandiganbayan (which deals with cases involving graft and corruption).[186]

B. DELAYS IN THE SPEEDY DISPOSITION OF CASES

An effective and efficient court system is one of the hallmarks of a genuine democracy. Conversely, one of the greatest banes of a government of laws and justice is judicial delay or the slow disposition of cases, hence the oft-repeated saying "Justice delayed is justice denied." Probably with this in mind, the Framers of the 1987 Constitution thought it fit to include the following provision in the Bill of Rights: "All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies."[187]

With its inclusion in the Bill of Rights, the right to a speedy disposition of cases is classified as a fundamental guarantee. Not being content with this provision for fear of being vague or equivocal, the framers also included the following provisions in a subsequent portion of the said Constitution:

> All cases or matters filed after the effectivity of this Constitution must be decided or resolved within twenty-four months from date of submission for the

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[180] CONST. art. VIII, sec. 6.
[181] CONST. art. VIII, sec. 5, par. (1).
[182] CONST. art. VIII, sec. 5, par. (2).
[183] CONST. art. VIII, sec. 1. This is also known as the expanded concept of judicial review of the CONST.
[184] CONST. art. VIII, sec. 4, par. (1).
[185] CONST. art. VIII, sec. 4, par. (1).
[186] J. BAKKER, *op. cit. supra* note 166 at 9.
[187] CONST. art. III, sec. 16.

Supreme Court, and, unless reduced by the Supreme Court, twelve months for all lower collegiate courts, and three months for all other lower courts.[188]

> Upon the expiration of the corresponding period, a certification to this effect signed by the Chief Justice or the presiding judge shall forthwith be issued and a copy thereof attached to the record of the case or matter, and served upon the parties. The certification shall state why a decision or resolution has not been rendered or issued within said period.[189]

> Despite the expiration of the applicable mandatory period, the court, without prejudice to such responsibility as may have been incurred in consequence thereof, shall decide or resolve the case or matter submitted thereto for determination, without further delay.[190]

Through these provisions, the Framers have at the onset considered the creation of a system of prescriptive periods of the disposition of cases. Taking this as impetus, the State acting through the Legislature and the Judiciary has installed several measures to ensure the said fundamental right is upheld. From as early as the Marcos Regime, the Legislature has enacted several laws which were calculated to de-clog the judiciary with the end of eliminating court delays. The Katarungang Pambarangay was one such measure.

First enacted on 1978,[191] the Katarungang Pambarangay (KP) System is a unique feature of the Philippine Justice system, whereby disputes are settled at the barangay or village level.[192] As a mediation and conciliation system, the KP system was implemented to speed up the settlement of minor civil and criminal cases thereby minimizing the referral of such disputes to courts.[193] In these cases, courts are mandated not to entertain complaints unless there is a certification from the Lupon that the case could not be settled by the parties. The filing of a case without the presentation of a certificate to file action by the barangay may either be dismissed or suspended at the discretion of the judge.[194]

In its initiatory implementation phase, the KP System was documented to have settled 156,527 out of the 179,358 disputes referred to it, or a total of 87.2%, thereby resulting to an estimated savings of almost P156 million pesos worth of judicial man-hours.[195] With these figures, the KP System may be said to have de-clogged its fair share of court dockets.

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[188] CONST. art. VIII, sec. 15, par (1).

[189] CONST. art. VIII, sec. 15, par (3).

[190] CONST. art. VIII, sec. 15, par (4).

[191] Pres. Decree No. 1508, (1978). Establishing A System Of Amicably Settling Disputes At The Barangay Level.

[192] C. SISON & M. FELICIANO, *op. cit. supra* note 154 at 36.

[193] *Ibid.*

[194] Uy v. Contreras, G.R. No. 111416, September 26, 1994.

[195] C. SISON & M. FELICIANO, *op. cit. supra* note 154 at 37.

In light of its initial success, an updated version of the KP system was included in the Local Government Code (LGC) of 1991.[196] The updated KP law included in the LGC provided for both procedural and substantive changes in the settlement of disputes.[197] To deter the indiscriminate, improper or premature issuances of certificates to file action (largely due to the poor work ethics of some barangay officials) which tend to subvert the conciliation process, the Supreme Court has issued guidelines[198] to lower court judges in cases brought to them after barangay conciliation.

Several decades later, through the efforts of the late Senator and former Chief Justice Marcelo B. Fernan, the Speedy Trial Act of 1998[199] was enacted on February 12, 1998. The sponsorship of the Speedy Trial Act by late Senator Fernan was basically a carry-over of his advocacy of an efficient judiciary from his days as Chief Justice. The said act provided for certain time limits for criminal cases, including the following:

- Between the filing of information and arraignment — 30 days;
- Between the plea of not guilty by the accused and trial — 15 days;
- Between start of trial and arraignment — 30 days;
- Between order of new trial and start of trial — 30 days;
- Trial period — 180 days.

In addition, and to complement the various legislative measures enacted to stem court delay, the Supreme Court has also released various issuances. As a primary strategy, the Supreme Court increased its efforts in monitoring the flow of cases by requiring a docket inventory of cases at the end of every semester,[200] the monthly posting of a list of submitted cases,[201] and the submission of monthly reports.[202] Most recently, the monthly posting of the list of submitted cases and the monthly reports are required to be submitted in a standard format through a digital medium. These data are compiled and monitored by the Court Management Office (CMO), an office under the Office of the Court Administrator (OCA).

To improve the likelihood of settlement, the 1997 Rules of Civil Procedure require a mandatory pre-trial.[203] Pre-trial serves to examine and identify contested facts and issues, which will be tackled during the trial proper. All other facts and issues not contested are considered as agreed upon, and cannot anymore be contested during trial proper. During pre-trial, the parties are also exhorted to settle their case.

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[196] *Ibid.*
[197] *Ibid.*
[198] Adm. Circ. No. 14-93 (1993).
[199] Rep. Act No. 8493 (1998), The Speedy Trial Act of 1998.
[200] Adm. Circ. No. 10-94 (1994).
[201] Adm. Circ. No. 17-94 (1994).
[202] Adm. No. 4-95 (1995); Adm. Circ. No. 52-97 (1997).
[203] C. SISON & M. FELICIANO, *op. cit. supra* note 154 at 36.

1. Causes of Delay

Notwithstanding these measures, court delays are still a sad reality in the Philippine Judicial System. Jan Willem Bakker identifies the following as causes of court delays in the Philippines: lack of resources and infrastructure, heavy caseloads, lack of defense lawyers, legal and judicial requirements, "litigation explosion," and increased use of delaying tactics as strategy.[204]

The sorry state of our courts and the lack of sufficient office facilities, equipment and staff have lead to several inefficiencies on the processing of cases and the promulgation of decisions. This state is probability rooted in the lack of meaningful increase of the budget of the judiciary over the years. According to a study conducted by the Action Program for Judicial Reform (APJR), the share of the judiciary in the national budget has been declining over the years. As we can see from Figure 8, the budget of the Judiciary for 2000, 2001 and 2002 were about 1.04% of the national budget. However, for years 2003, 2004 and 2005, there were substantial decreases in the percentage of the budget for the judiciary relative to the national budget. At present (for 2005), the budget for the judiciary is only at 0.88% of the national budget, a significant decrease from the first three years of the 3rd millennium.

Figure 8[205]

Particulars	2000 Actual	% of Total	2001 Actual	% of Total	2002 Actual	% of Total
Judiciary	7.1	1.04	7.4	1.05	7.7	1.04
Legislative	4.7	0.7	4.4	0.6	4.4	0.6
Executive	355.3	52.1	349.3	49.4	362.4	48.8
Other Constitutional Bodies	12.3	1.8	15.3	2.2	13.5	1.8
Total Special Purpose Fund	303.1	44.4	330.5	46.7	353.7	47.8
Total	682.5	100.0	706.9	100.0	741.7	100.0

Particulars	2003 Actual	% of Total	2004 Actual	% of Total	2005 Actual	% of Total
Judiciary	7.7	0.93	7.6	0.88	8	0.88
Legislative	4.6	0.6	4.6	0.5	4.6	0.5
Executive	378.5	45.9	343.8	39.9	351.2	38.7
Other Constitutional Bodies	16.1	2	17	2	13.6	1.5
Total Special Purpose Fund	417.9	50.6	488.4	56.7	529.9	58.4
Total	824.8	100.0	861.4	100.0	907.3	100.0

Corollary thereto, is an increase in the number of vacant positions for judges, especially for courts located in remote regions of the Philippines. According to statistics

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[204] J. BAKKER, op. cit. supra note 166 at 158-166.
[205] Supreme Court Program Management Office, Action Program for Judicial Reform, at 13 (2000-2005).

culled from the APJR, about 31% of the all existing positions for judges (for courts of all levels) are vacant (See Figure 9). This means that the current workforce of judges are doing about 1.4[206] times their required workload, assuming all the positions for judges are filled.

Figure 9[207]

Courts (As of January 2005)	Total Positions for Justices/Judges	No. of Incumbent Justices/Judges	No. of Vacant Positions	% of Vacant Over Total No. of Positions
Supreme Court	15	15	0	0.00%
Court of Appeals	69	69	0	0.00%
Sandiganbayan	15	15	0	0.00%
Court of Tax Administration	6	6	0	0.00%
Regional Trial Court	952	766	186	19.54%
Metropolitan Trial Court	82	71	11	13.41%
Municipal Trial Court in Cities	205	148	57	27.80%
Muncipal Trial Court	388	224	164	42.27%
Municipal Circuit Trial Court	470	221	249	52.98%
Shari'a District Court	5	0	5	100.00%
Shari'a Circuit Court	51	27	24	47.06%
Total	2,258	1,562	696	30.82%

These vacancies have led to the heavy caseload of judges, which in turn greatly facilitate the growth of a backlog.[208] Case disposition backlog worsens as more old judges retire and are replaced by new judges who will probably take longer time to study and resolve inherited cases. Several generations of replacements tend to multiply the effect of backlog, thereby causing large delays. This problem seems to be worsening since cases are piling up every year at an alarming rate. Statistics show that the average judicial disposal of cases is annually pegged at 85.83%[209]; meaning, the docket backlog is increasing at about 14% of the number of cases filed every year.

The lack of defense lawyers has also been identified as another cause of judicial delay. According to Bakker, there are not enough defense lawyers in the Philippines.[210] Out of the 40,000 members of the Philippine bar, only 1/8 or 5,000 practice litigation on a regular basis.[211] With this condition, judges are sometimes constrained to suspend cases because either party litigant has no counsel to represent him.[212]

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[206] 100/71 = 1.4
[207] Data Taken from CMO-OCA.
[208] J. BAKKER, *op. cit. supra* note 166 at 158.
[209] C. SISON & M. FELICIANO, *op. cit. supra* note 154 at 30.
[210] J. BAKKER, *op. cit. supra* note 166 at 159.
[211] *Ibid.*
[212] *Ibid.*

Another factor causing judicial delay relates to the requirements in penning a judicial decision. In the Philippines, judges are required to state all the facts in the decision.[213] Because of this, decisions go for about 35 pages, which take considerable time and effort.[214] To add to this difficulty, the decisions of the court are published in English, but court hearings and interrogations may be conducted in various languages and dialects, depending on the linguistic proficiency of litigants, lawyers, witnesses, and even the judges themselves.[215] Transcription takes up more time than it should, due to the added work of translation.

Some authors have suggested that Filipinos are highly litigious by nature.[216] Several reasons such as *amor propio*, a strong sense of pride and self-respect have been cited as major reasons why Filipinos have a tendency to litigate on the slightest hint of conflict.[217] In his book, Bakker drew court figures from 1985 to 1995 to show that there has been a consistent rise in the number of cases filed on a year to year basis.[218]

Lastly, as to the assertion that lawyers are increasingly using dilatory tactics as part of their litigation strategy, Bakker suggests that certain lawyers frequently make unnecessary requests for postponements, usually to deliberately delay proceedings.[219] Bakker gives two basic reasons for delaying court proceedings. First, he rationalizes it with the usual practice of lawyers charging on a per appearance basis.[220] Through numerous delays, lawyers can charge more appearance fees before a case is eventually resolved. The second reason pertains to the likelihood of winning a case. The longer a case is delayed, the greater the chance the opposite camp loses interest in following through with the case, or the greater the chance witnesses or material evidence is lost.[221] It might be worthwhile to note that this is often the strategy of choice for defense lawyers.

On this matter, the Social Weather Station (SWS) has conducted a survey on lawyers' and judges' perceptions of the Philippine legal system for the years 2003 to 2004. The following results were documented:

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[213] *Ibid.*
[214] *Ibid.*
[215] *Ibid.*
[216] *Id.* at 160.
[217] *Id.* at 160.
[218] *Id.* at 160.
[219] *Id.* at 160.
[220] *Id.* at 160.
[221] *Id.* at 161.

On the question: What do you think is the usual pace of the courts from the time the case is filed?[222]		
	Lawyers	Judges
Speedy	1%	3%
Reasonable	26%	71%
Too Slow	57%	23%
Much Too Slow	14%	1%
Can't Decide	2%	0.4%

On the question: What do you think is the usual pace of the courts from the time the case is submitted for decision?[223]		
	Lawyers	Judges
Speedy	2%	11%
Reasonable	37%	78%
Too Slow	50%	9%
Much Too Slow	9%	0.1%
Can't Decide	3%	0.4%

On the statement: "In general, lawyers deliberately prolong cases to get more income from appearance fees." (in the opinion of judges)[224]	
Agree	70%
Disagree	23%
Can't Decide	6%
No Answer	1%
NET	+47

Based on the foregoing surveys, lawyers and judges have different views as to the pace of litigation. Most lawyers (71%) think that case disposal from the time of filing is unreasonably slow. However, fewer lawyers (59%) think that litigation time from the when the case is submitted for decision is unreasonably slow. This means that lawyers believe that the delay is largely in the submission of pleadings, pretrial and trial phases.

On the other hand, an overwhelming majority of judges (74%) believe that litigation time from the time of filing is still within reasonable limits. A majority of judges (89%) believe that litigation time from the time case is submitted for decision is still within reasonable limits.

The finding that "lawyers believe that the delay is largely in the submission of pleadings, pretrial and trial phases" supports the conclusion of the survey question/statement "in general, lawyers deliberately prolong cases to get more income from appearance fees." Since the delay occurs at the most part before a case is submitted for decision, the delays are caused by lawyers and not judges. The lawyers are

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[222] Marlon Manuel, *2003/04 Surveys of Lawyers and Judges on the State of the Judiciary and the Legal Profession in the Philippines* 24 (2005).

[223] *Id.* at 25.

[224] *Id.* at 27.

usually tasked to set or request dates during these phases, therefore delays would probably be attributable to them.

2. Application of Decision Analysis and Other Quantitative Methods

Earlier, we discussed DCF's inoperability with decision analysis. With the use of DCF, more accurate figures may result in decision analysis computations. Thus, some authors have suggested its use in conjunction with decision analysis.

As we discussed earlier, when applied with decision analysis, DCF can translate expected values and other decision analysis figures to present value terms. Through its use, figures used for decision analysis may be compared with little fear of comparing apples with oranges, since all figures compared at "present-ized," meaning all figures are adjusted to their values at present. As such, apples are compared with apples and oranges with oranges.

Court delays have a special significance to decision analysis applied with DCF or PV methods. In Prof. Posner's groundbreaking article "An Economic Approach to Legal Procedure and Judicial Administration,"[225] he discusses the phenomenon of court delays, and its effect on settlement/litigation, using decision theory as backdrop.

In his article, he discusses the nature and effect of court delays to the propensity of parties to settle (settlement rate). He uses the standard model of litigation to analyze the settlement rate in the presence of court delays.[226] His article however does little to elaborate the effect of discounting in litigation. Our article aims to delve more on this matter.

Court delays seem to be a perennially worsening problem in the Philippine judicial system. We thus suggest the application of DCF with decision analysis in examining and analyzing these problems. This being said, we must note that the said decision tool is particularly applicable in the Philippines considering the relatively long case processing time encountered. Applying decision analysis alone may mean distortions in the analysis of legal problems which may possibly lead to less than optimal or (worse) wrong decisions.

By applying decision analysis with DCF, the monetary effect of court delays becomes apparent. Given some measure of delay in the adjudication process, the judgment (J)[227] is diminished by the PV factor depending on the discount rate of the subject and the extent of delay. With this, distortions due to the effects of inflation and the time value of money are put at bay.

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[225] R. Posner, *op. cit. supra* note 69 at 20.
[226] *Id.* at note 29.
[227] Referred to by Posner as the stakes of litigation.

For example, if we (as plaintiffs) are offered a settlement by the defendant which is less than our NEV of litigation, will we settle or not? Taking this problem in isolation, we may opt to litigate because of the ostensibly low settlement offer. But if we take into consideration the length of time before our case is decided by the court, we may choose to settle, since factoring-in the delay by the use of DCF may mean a lower NEV than the present cash settlement offered by the defendant.

In other countries, this may not be a great problem. Considering their relatively faster and more efficient judicial systems (especially those in first-world countries), less delay may translate to less distortion in the results of decision analysis. In the Philippines, where cases tend to drag on for a long time (sometimes as long as ten to twenty years), the distortive effects of the time value of money may lead to inaccurate results.

Using DCF, delays will mean a decrease in the expected value of judgment, since the same will be diminished in present value terms. The present expected value of a judgment would largely be a function of two variables, the discount rate and the extent of delay. A comparatively high discount rate and relatively long court delays will translate to a lower present expected value, *ceteris paribus*.

How would this translate into the likelihood of settlement? Given a relatively high discount rate and/or relatively longer court processing time, the plaintiff will be hard pressed to settle, while the defendant will have more leeway to either choose the litigation or settlement option. Why? Since the plaintiff sues in anticipation of a judgment in the future, the longer the time from filing to judgment and/or the higher the discount rate, the lesser the risk-weighted judgment. This would translate to a lower NEV after deducting attorney's and other litigation costs.

For the defendant, the longer the case processing time and/or the higher the discount rate, the lesser the risk-weighted judgment he is expected to pay. This would mean a lower NEC for the defendant. As such, he will be relieved of some pressure to settle, since by taking the litigation option, he is only expected to pay his NEC. He may either refuse to settle (thus the settlement rate is lowered) or he can negotiate with the plaintiff to accept a lower settlement (only the settlement price is affected).

In this paper, we attempt to find the applicable PV factor taking into consideration the extent of court delays in the Philippines and the applicable discount rate.

Extent of Delay

In the PV formulas cited earlier (Equations 8 and 9), the extent of delay is denoted by the variable n. How do we determine this value of this variable? Using the DCF method, the variable n may be represented by the case processing time from the time of filing to the time the said case is disposed.

Various entities, both governmental and non-government, have previously conducted studies on this. In a study conducted in the early 1980s by Atty. Daniel T. Martinez, then the Clerk of the Supreme Court, the following findings were noteworthy:[228]

> The trial period was the longest phase of the case processing time. It ranged from 174 days (more than 5 months) to 594 days (more than 2 years) representing 61% to 93% of the total case processing time in criminal cases. In civil cases, it ranged from 148 days (more than 4 months) to 913 days (almost 3 years) representing from 41% to 95% of the total case processing time.

In another study[229] conducted by the UP Institute of Judicial Administration (IJA) in 1991, the average case processing time for criminal cases was pegged at 247.7 days in low caseload RTCs, 245.3 days in medium caseload RTCs and 372.8 days in high caseload RTCs. For civil cases, the time was markedly longer. For low caseload RTCs, average case processing time was 411.3 days, 404.3 days in medium caseload RTCs and 472.1 days in high caseload RTCs.[230]

Aside from these works, we were unable to find studies on this matter.[231] Considering the age of these works (the said data are at least 15 years old), they may already be irrelevant or inaccurate for our purposes. Thus, we decided to measure the case processing time, taking into account more recent data.

Our research led us, the Office of the Court Administrator ("OCA") and its arm, the Court Management Office ("CMO"). At present, the OCA-CMO requires the submission of monthly reports of all lower courts (except the Supreme Court) indicating the following information:[232]

- Case Inflow and Outflow
- Number and Aging of Pending Cases[233]
- List of Cases Submitted for Decision (including case number, nature of the case, date filed, pretrial date, date submitted for decision, target date of decision)
- List of Newly Filed Cases (including the case number, nature of the case and the date filed)

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[228] Beda Fajardo, *Proposed Solutions to Delays in the Trial Courts*, 2-3 (1998).

[229] C. SISON & M. FELICIANO, *op. cit. supra* note 154 at 44-45.

[230] Low caseload RTCs were defined as those having a caseload of 1 to 289 cases, medium caseload RTCs were defined as those have a caseload of 290 to 349 cases and high caseload RTCs were defined as those have a caseload of 350 or more cases. C. SISON & M. FELICIANO, *op. cit. supra* note 154 at 44.

[231] We are not unaware of the studies being conducted by the APJR on case processing time. At present, the APJR is conducting several studies on court delays and case processing time. An example of this would be the Case Flow Management System (CMS) project being conducted in pilot courts in Pasay City RTCs. These were however not yet completed as of the writing of this paper.

[232] Office of the Court Administrator Circular No. 2-2005.

[233] Aging of pending cases is categorized in the following manner: for less than 1 year, more that a year to 2 years, more than 2 years to 3 years, more than 3 years to 4 years, etc.

- List of Revived and Reopened Cases (including the case number, nature of the case, date revived ore reopened, and the reasons for the revival or reopening)
- List of Cases Received from Other Salas/Courts (including the case number, nature of the case, date received and reasons for the transfer of the case)
- List of Cases Transferred to Other Salas (including the case number, nature of the case, date transferred and the reason for the transfer of the case)
- List of Archived Cases (including the case number, nature of the case, date archived and reason for archiving the case)
- List of Cases with Suspended Proceedings (including the case number, nature of the case, date when proceedings were suspended and reason for suspension)
- List of Decided or Resolved Cases
  - After Trial on the Merits (including the case number, nature of the case, date filed, date of decision, date of promulgation and date of entry of judgment)
  - All Others (including the case number, nature of the case, date filed, date of decision, date of promulgation and date of entry of judgment)
  - After Preliminary Investigation (including case number, nature of the case, date filed, date of resolution and date forwarded to the office of the prosecutor)

Although the OCA-CMO acts as the custodian of said documents, they have not yet embarked on the task of documenting (digitally) the case processing time of local courts.[234] Noting this setback, we undertook to make an independent survey the case processing time of local courts (within a specific period).

Due to the large volume of data to be sifted through and analyzed (if we covered the entire Philippines), we decided to measure case processing time on a sample basis (covering a limited geographical area). With this in mind, we resolved to gather data for Quezon City RTCs only. Quezon City, being the (other) capital of the Philippines, is considered a high caseload office among the trial courts in the entire Philippines. As such, it is more representative of the actual situation in the Philippines (Please see Appendix 3 for our methodology and Appendix 4 for the survey data).

In our survey of the said cases, we found the following:

- Out of the 336 cases covered by our survey, 198 cases or 58.9% were criminal in nature, while the remaining 138 or 41.1% were civil cases.

- Of the 198 criminal cases, 38 cases or 19.2% were decided on the merits (the accused was either acquitted or convicted), 48 cases or 24.2% were dismissed, 11 cases or 5.6% were resolved by a plea of guilt by the accused, 98 cases or 49.5% were provisionally dismissed and 3 cases or 1.5% (relating to drug dependency) were decided summarily by order of the judge. With

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[234] This is probably due to the refusal of some courts to follow the standard format of the monthly report as described in OCA Circular No. 2-2005, which requires all trial courts to follow the therein described format for all monthly reports submitted from January 2004.

the 138 civil cases, 24 cases or 17.4% were dismissed by the judge, 5 cases or 3.6% were resolved through a compromise agreement between the parties and the remaining 109 cases or 80% were decided on the merits.

• Of all the civil cases decided on the merits, only 9 cases involved subject matters subject to pecuniary estimation (either damages and/or sum of money).

• For the criminal cases surveyed, the shortest disposal time was 0 days (the said cases were immediately dismissed), while the longest disposal time was 4,270 days or 11 years, 8 months and 10 days. For the civil cases, the shortest disposal time was 1 day (by dismissal), while the longest disposal time was 3,452 days or 9 years, 5 months and 11 days.

• On the average, the criminal cases were disposed (either decided on the merits, dismissed, resolved by a plea of guilt, provisionally dismissed or resolved by order) after 609.77 days after the said cases were filed. For those criminal cases which had undergone a full-blown trial, average case processing time is at 937.26 days.

• On the other hand, civil cases were disposed (either by a decision on the merits, dismissal or through a compromise agreement) after an average of 601.42 days after filing. For those cases which underwent a full-blown trial average processing time was at 577.98 days.

• The average case processing time of the 9 cases whose subject matters were subject to pecuniary estimation (see finding no. 3) was at 1,450.11 days.

After perusing the said findings, it seems that the problem of delay in the judicial system is indeed worsening. From our data, it seems that the civil cases involving sums of money and/or damages are the longest to resolve.

Discount Rate

In an earlier part of this paper, we discussed the concept of a discount rate. We have also discussed the use of the WACC and the borrowing rate as suitable discount rates.

The Philippines financial system is quite different from the US and other more mature financial markets. Since time immemorial, the Philippines has consistently pegged its interest rates higher than international benchmark rates. This may be attributable to the higher risk premium in connection with the higher political and exchange rate risk, among others. This would consequently mean a higher discount rate whether WACC or the borrowing rate is used as the discount rate since both have interest rate components, since both rates have a debt component.

As discussed earlier, it is really hard to peg an average WACC or borrowing rate applicable for all classes of entities in the Philippines, because of the varying economic and financial circumstances of possible litigants. For expediency, we chose to peg the

discount rate at 18% p.a. or 1½% per month compounded annually. We believe that the said rate may be a fair (or conservative) representation of the discount rate for the normal Filipino given the high interest rate regime in the Philippines.

Computations

Given the foregoing data, we can now compute the PV factor to be used to present-ize judgments and litigation costs. Since most criminal cases do not really deal with sums of money, we will concentrate our analysis on civil actions.

We have stated earlier that the average processing time of civil cases based on our sample was 601.42 days. For those which underwent a full-blown trial, the average case processing time was at 577.98, while the average case processing time for civil cases involving subject matters subject to pecuniary estimation was 1,450.11 days. We will use these figures.

Using the following figures and assuming an 18% p.a. discount rate compounded annually, the PV factor would be as follows:

Case Processing Time	PV Factor
601.42 days (1.67 years)	0.7563[235]
577.98 days (1.61 years)	0.7636[236]
1,450.11 days (4.03 years)	0.5130[237]

Translating the foregoing to more meaningful figures, a PV factor of 0.7563 would mean that for every peso to be acquired 601.42 days or 1.67 years after the reference point, (the date of filing) would only have a value of 0.7563 pesos today.

As we can see from the foregoing table, the PV is experiencing a diminishing marginal decrease relative to increasing delay. Consequently, this would mean that over the long term, the incremental PV change for every additional delay of one year decreases. For the short-term (meaning from 0 to 5 years), the incremental PV changes tend to be larger.

Taking these things into consideration and considering that the average civil case involving subject matters subject to pecuniary estimation, if we take litigation as an option to collect sums of money and/or damages, we are immediately limited to collecting only about 50% of our claim.

So how does delay affect the propensity of parties to litigate and to subsequently settle? We will discuss these questions in seriatim.

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[235] $1/[(1.18) + (1.18 \times 0.18 \times .67)]$

[236] $1/[(1.18) + (1.18 \times 0.18 \times .61)]$

[237] $1/[(1.18)^4 + (1.18 \times 0.18 \times .03)]$

As a tool to determine whether to litigate or not (using the NeEV test), decision analysis when applied with DCF decreases the incidence of litigation. Because of the relatively large effect of discounting during the short-term (See Figure 10), the EV of potential plaintiffs tends to be smaller. In many cases, the EV may even be negative, thus litigation would not be a logical option.

Figure 10
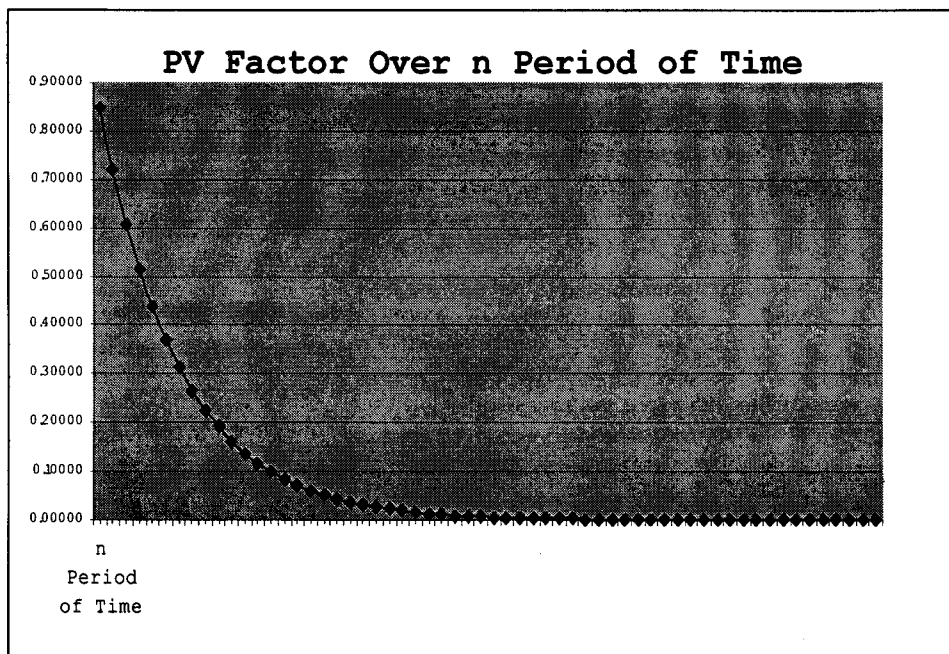
In our earlier example where we supposed that plaintiff P was contemplating suing defendant D for a sum of money, we see as cousel that there is a 50% chance of winning the case. If we win, we will probably have a judgment of P1,000,000 in our favor. We also estimate that the trial would cost our client approximately P200,000 in attorney's costs and other out-of-pocket expenses. Assuming the trial is estimated to take 4.03 years, the average court processing time for civil cases of similar character and assuming an 18%p.a. discount rate, we would have the P56,500 as the NEV. As such, we still continue with litigation.

If we tweak the numbers a little bit and assume that the judgment is merely P750,000 or that the chances of victory in litigation is only 35%, then we would have a NeEV suit in our hands. With these, we will probably advise our client to desist from any action.

If we assume a higher discount rate and/or an extended delay in litigation, at some point the NEV of P56,500 may turn negative.

Assuming a case has already been initiated, how does court delay affect the settlement rate? We revisit Equation 5 on the condition to settlement.

$$P_P J - C_P < (1 - P_D) J + C_D \quad (5)$$

If we factor in the present value of the judgment, the equation will probably look like this:

$$P_P J \, PVfn - C_P < (1 - P_D) J \, PVfn + C_D; \quad (11)$$

Where PVfn is the present value factor given f discount rate and n case processing time (in years).

Supposing the foregoing inequality holds true, then the parties will most likely settle. If the foregoing does not hold, meaning if the left side of the equation is either greater or equal to the right side of the equation, then litigation will ensue. Posner suggested that we tweak the foregoing formula algebraically to study with more depth the relationship of settlement and probabilities.[238] The following inequality is an algebraic manipulation of Equation 11.

$$J \, PVfn \, (P_P + P_D - 1) < C_P + C_D \quad (12)$$

As discussed earlier, we can see that as long as the sum of P_P + P_D is less than or equal to 1, the parties will probably settle. This means that as long as the evaluation of probabilities by the plaintiff and defendant do not vary greatly, there is a great chance of settlement. In practical terms, as long as both defendants and plaintiff both believe that the plaintiff or the defendant will win, the inequality will hold. As such, settlement will probably occur.

With regard to the variable PVfn (which is always less than 1 when the discount rate is positive), the lesser the said variable, the greater the propensity of the parties to settle. Using this logic with court delays, we can surmise that, all things being equal, there is an increasing probability of settlement given the increasing discount rates and/or court delays.

With our current PV factors ranging from .7636 to .5130 (as opposed to the benchmark of 1.00), it seems that there should be an increased chance of settlement in the Philippines. And since cases could go as long as 3,452 days, the settlement rate in the Philippines should be greater than in other countries where there is less incidence and extent of court delays.

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[238] R. Posner, *op. cit. supra* note 69 at note 29.

With Prejudgment Interest

The foregoing analysis may however be altered to an extent by the court's award of prejudgment interest. Prejudgment interest is the interest which may be awarded by the court accruing even before a judgment is rendered by the court. Our Civil Code provides the following instances when prejudgment interest can be rightfully awarded to a plaintiff:

Section 2209 of the Civil Code provides:

> If the obligation consists in the payment of a sum of money, and the debtor incurs
> in delay, the indemnity for damages, there being no stipulation to the contrary,
> shall be the payment of the interest agreed upon, and in the absence of stipulation,
> the legal interest, which is six per cent per annum.

The foregoing must be read in conjunction with Central Bank Circular No. 416 which states:

> By virtue of the authority granted to it under Section 1 of Act 2655, as
> amended known as the 'Usury Law', the Monetary Board in its Resolution No.
> 1622 dated July 29, 1974, has prescribed that the rate of interest for the loan, or
> forbearance of any money, goods, or credits and the rate allowed in judgments, in
> the absence of express contract as to such rate of interest, shall be twelve (12%)
> per cent per annum. This circular shall take effect immediately.

Based on the foregoing, interest accrues even before the rendition of judgment (prejudgment interest) in cases where a debtor incurs delay in connection with the payment of a sum of money. The proper interest rate in such a case would be the interest rate agreed upon or in its absence the legal rate. What is the legal rate? Is it 6% or 12% p.a.?

On this issue, the Supreme Court has held that the 12% interest rate provided in Central Bank Circular No. 416 pertains to loans or forbearance of money, or to cases where money is transferred from one person to another and the obligation to return the same or a portion thereof is adjudged.[239] In cases where the monetary judgment does not involve any of the foregoing, the proper legal interest rate would be 6% p.a., since the authority to peg interest rates in such instances would not be within the ambit of the Central Bank.[240] Consequently, the Civil Code provision will apply.

The above notwithstanding, it has been held that interest may be recovered from the time judgment becomes final until its full satisfaction at the rate of 12% p.a., since the foregoing is deemed to be equivalent to a forbearance of credit.[241]

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[239] Pilipinas Bank v. CA, G.R. No. 97873 (1993).

[240] GSIS v. Court of Appeals, G.R. No. 103590 (1993).

[241] Eastern Shipping Lines, Inc. v. CA, G.R. No. 97412 (1994).

On top of the stipulated interest, Article 2212 of the Civil Code allows the award of legal interest from the time of judicial demand. This has been interpreted by the Supreme Court to contemplate only situations where conventional interest is stipulated or agreed upon by the parties.[242] Meaning, legal interest on top of interest may only be recovered if there was a stipulated interest and judicial demand for payment has been made.

Note however that the foregoing provisions only apply to cases involving sums of money. In tort, accident or damage cases, no prejudgment interest is usually awarded. As such, the plaintiff/claimant cannot compensate the effects of discounting.

In cases where the court awards prejudgment interest, the loss of a party litigant in relation to the time value of money or the DCF concept is usually not fully covered. With the prejudgment interest rate at 6 or 12% p.a., the effects of discounting (at 18% p.a.) is merely mitigated, since the discount rate is far greater than prejudgment interest rate.

However, in the event that the contract stipulates an interest rate higher than the discount rate, and that the interest shall run even during the existence of litigation, the propensity of the plaintiff to litigate is increased, since he earns more by litigating (at the stipulated interest rate) in relation to the opportunity loss he may experience through delay (at the discount rate). To illustrate, assuming that the suit involves a violation of a contract which stipulates an interest rate higher than the discount rate and that the interest shall accrue even in the pendency of an action, the equation will look something like this:

$$J \times (1 + i)^n \times PVfn \, (P_P + P_D - 1) \; < \; C_P + C_D ; \quad (13)$$

This may be substituted to:

$$J \times (1 + i)^n \times \frac{1}{(1 + i_f)^n} \, (P_P + P_D - 1) \; < \; C_P + C_D ; (14)$$

Where:

i is the interest rate stipulated;

i_f is the discount rate; and

n is the case processing time (in years).

Analyzing the forgoing inequality, we see that as long as the interest rate stipulated (i) is higher than the discount rate (i_f), the effect of discounting will be fully compensated. As such, the condition for settlement will not be met.

[242] Philippine American Accident Insurance v. Flores, G.R. No. L-47180 (1980).

In tort cases, however, there is no prejudgment interest. Thus, the plaintiff is usually left to bear the full effects of discounting. This probably explains why tort cases are often settled by the parties. In terms of medical malpractice in the Philippines, we can see that lawsuits documented are few and far between.

In summary, prejudgment interest and court delays have opposite effects. While delays tend to increase settlement, prejudgment interest encourages litigation, since it partially offsets the effects of discounting to a judgment. However, regardless of whether or not the court awards prejudgment interest (whether stipulated or legal), prejudgment interest would most likely not compensate the discounting effect of PV. This is primarily because of the fact that the discount rate is almost always larger than the prejudgment interest to be awarded, if any. As such, the effect of discounting on settlement still holds notwithstanding an award of prejudgment interest.

C. JUDICIAL CORRUPTION

Corruption has subsisted and thrived in the Philippines for a long time.[243] In the last few years, corruption has reached a point where it has severely affected the everyday operations of the government. In fact, in the last few years, corruption has led to some massive shifts in Philippine politics (e.g., EDSA I, EDSA II and the (Non-) Impeachment of Gloria Macapagal Arroyo, among others).

Far removed from its present form, corruption traces its roots from various unethical practices done by government officials during the Spanish period.[244] During that time, some government officials committed various excesses and unethical practices in the management of the government's tobacco monopoly.[245] There were also reports of payment of fees by the Chinese immigrants to Filipino and Spanish officials to obtain fake resident permits to smuggle illegal aliens into the Philippines.[246] Other examples would be the manipulation and/or falsification of accounting records for tax evasion purposes (due to the very high taxes levied) and the Filipino custom of gift-giving during special occasions.[247] Through the years, these practices were not successfully curbed, notwithstanding the vigorous attempts of the American colonial government to stamp out the social malady of corruption.[248] Thus, these and other corrupt practices still continue to wreak havoc in Philippine bureaucracy.

Due to the deep roots of corruption in the Philippines, it has become a cultural malady so pervasive in character that it covers almost all aspects of government action. And despite its clandestine nature, almost every one is aware of its existence. In fact, in a nationwide study conducted on graft and corruption in 1999, about 91% of the

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[243] COMMITTEE FOR THE EVANGELIZATION OF CULTURE, CROSS-SECTORAL STUDY OF CORRUPTION IN THE PHILIPPINES 14 (2002).
[244] *Id.* at 15.
[245] *Id.* at 15.
[246] *Id.* at 15.
[247] *Id.* at 15.
[248] *Id.* at 15.

respondents believed that corruption is prevalent in the government. This was especially true for the class A, B and C respondents.[249]

Due to this perception of rampant and largely unchecked corruption in the country, it has been ranked as 43rd among 145 countries in terms of the perception of corruption in their bureaucracy.[250] In Transparency International's Corruption Perception Index ("CPI"), the Philippines achieved a score of 2.6 as compared to 7.5 for the United States, 6.9 for Japan and 3.7 for China.[251] Among all the countries surveyed, Bangladesh and Haiti both having achieved scores of 1.5 are considered the most corrupt countries.[252]

In a survey conducted by the SWS on the judiciary and the legal profession in 2003-2004,[253] there seems to be an increasing perception among lawyers that court corruption is worsening. Comparing recent data with those gathered in a similar survey in 1994-1995, the perceived level of corruption in the judicial system (as seen by lawyers) have substantially increased for all courts (RTCs, MTCs, Court of Appeals, Sandiganbayan and Supreme Court).[254] This may be taken to signify the increasing distrust in the judiciary among lawyers.

This perception of corruption in the Philippines has not spared any government office from its reproachful eyes. Corruption is not only perceived to exist in the political branches of government (the Executive and the Legislative Branches) but also in the Judiciary. In fact, the APJR considers the perception of corruption as one of the great challenges to efficient and effective judicial administration in the Philippines.

In one of its reports, the APJR admits that the certain areas of court operations are vulnerable to corruption. It however fails to locate and quantify the extent of corruption in the Judiciary due to the difficulty of measuring and documenting its incidence. This does not mean however that corruption does not exist in the Philippines judicial system.

Notwithstanding the lack of more formal reports on judicial corruption, various sectors of society such as the Church, non-governmental organizations (NGOs) and the media have bonded together to report incidents of judicial corruption in the hope of eradicating this malady. The Philippine Center for Investigative Journalism (PCIJ), an independent, non-profit media agency specializing in investigative

[249] *Id.* at 14

[250] Transparency International, *The 2004 Transparency International Corruption Perceptions Index*, available at <http://www.infoplease.com/ipa/A0781359.html.>.

[251] *Ibid.* The CPI scores ranged from 10.0 to 1.0, with 10.0 going to the most corruption-free nation and 1.0 going to the most corruption-infested nation. A CPI of 5.0 is considered the borderline figure distinguishing nations with a serious corruption problem from those without this problem.

[252] *Ibid.*

[253] M. Manuel, *op. cit. supra* note 222 at 68.

[254] *Id.* at 68.

reporting,[255] has released several articles on judicial corruption and other forms of judicial impropriety.

In the article written by Stella Tirol-Cadiz entitled "Judiciary on Trial,"[256] allegations of judicial impropriety and violations of the Code of Judicial Conduct were made. In this article, she reports of stories of some unnamed judges and/or justices routinely receiving and entertaining litigants and their lawyers.[257] She also reports of allegations of influence peddling or power brokering done by certain lawyers perceived to be closely connected with the (then) current crop of justices.[258] Breaches of court secrecy the release of confidential information by court employees and the vigorous follow-up of cases pending before the Supreme Court and the Court of appeals were also alleged in the said article.[259]

In another article entitled "Justice to the Highest Bidder"[260] (which incidentally won the 1997 Jaime V. Ongpin Award for Investigative Reporting), Sheila Coronel reports on claims of bribery in several high profile cases decided by the Supreme Court. In her article, she alleged that payoffs were made in connection with the Banco Filipino and the Asia Brewery cases to influence the justices to decide in favor of one side.[261]

Taking the following cases in isolation, we may be tempted to see judicial corruption as an unmitigated evil without any social or economic purpose whatsoever. This may be due to years and years of mental conditioning in relation to the term "corruption". By its very term, "corruption" with its connotations of disintegration and decay, of perversion from a state of innocence, makes it difficult for readers to assume that anything else aside from bad consequences arise from its application.[262] And of course, we cannot downplay the fact that statesmen and politicians throughout the world have habitually and regularly labeled corruption as the primary obstacle to development, freedom, national regeneration and virtually everything else.[263]

But the fact that corruption is useful in some respects cannot be denied. Corruption may be taken as a market mechanism to expedite and/or impede judicial processes. This insight traces its origin from the application of economic theory, specifically Adam Smith's dictum that "businessmen" are averse to unregulated competition (because it tends to lower profits) and thus will invariably strive to create privileged positions for themselves.[264]

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[255] Philippine Center for Investigative Journalism, available at <http://www.pcij.org/impact.html>.

[256] Stella Tirol-Cadiz, *A Fake Ruling*, in BETRAYALS OF THE PUBLIC TRUST 200 (1993).

[257] *Id.* at 211.

[258] *Id.* at 211-213.

[259] *Id.* at 213.

[260] Sheila Coronel, *Justice to the Highest Bidder*, in BETRAYALS OF THE PUBLIC TRUST 217 (1997).

[261] *Id.* at 218-231.

[262] ROBIN THEOBALD, CORRUPTION, DEVELOPMENT AND UNDERDEVELOPMENT 107 (1990).

[263] *Id.* at 107.

[264] *Id.* at 108.

With dog-eat-dog or perfect (unhampered) competition, "businessmen" end up as losers because of the market pressure to lower their prices, resulting to lower profits. Conversely, with some measure of agency regulation, competition becomes, to some extent, controlled. This measure of control comes with market distortions, which tend to favor "businessmen." This leads them to increase prices to maximize their profits.[265]

With this government-imposed regulation, the agency head otherwise known as the "boss" is given the role of an 'economic czar' controlling and rationalizing the access to desirable resources (not necessarily tangible benefits) of "businessmen."[266] Of course, he doesn't do this for free. Because the "boss" knows that his role of controlling and rationalizing resources and competition may provide benefits (which sometimes the government doesn't have the power to legally give) to "businessmen" he favors, he extracts appropriate considerations for this service. These exactions thus compensate him for the underpayment he receives as a civil servant. The exchanges between "bosses" and "businessmen" may not be exactly legal but in rationalizing the relationships between business and government they seem functional for both, and presumably, for society.[267]

A good example of this set-up is the power of the judiciary to decide economic cases. The Supreme Court has, on several occasions, decided cases having grave economic underpinnings. A good example of this would be the Manila Hotel case. The facts in the Manila Hotel case[268] are as follows: the Government Service Insurance System (GSIS), a government owned and controlled corporation, bided out its share in the Manila Hotel, the most culturally and historically significant hotel in the Philippines. Two bidders, Manila Prince Hotel Corporation (MPHC), a Filipino corporation, and Renong Berhad, a Malaysian corporation, participated in the bidding. The latter gave the higher bid. This notwithstanding, the former wanted to take control of the said hotel so it took its case to court (after matching the bid of the Malaysian company). The Supreme Court ruled in favor of the MPHC even though the bidding rules did not allow bid matching. The Court used the now infamous "national patrimony" doctrine to rule that the Manila Hotel should be sold to Filipinos, and not to aliens.

Of course, the Court used legal arguments in the said case to rationalize the sale to MPHC. However, looking at the bare facts of the case, it is clear that the decision simply involves a determination of who (among the bidders) gets Manila Hotel. Consequently, it is an example of the "boss" (the Supreme Court) deciding who among the "businessmen" (the two bidders) gets the preferential treatment. It is not to say that the Supreme Court was "compensated" for deciding the way that it did, but it may not be a far stretch to take "compensation" and "economic decisions" like "a horse and carriage."

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[265] *Id.* at 108.
[266] *Id.* at 108.
[267] *Id.* at 108.
[268] Manila Prince Hotel v. GSIS et al., 335 Phil. 96 (1997).

The foregoing describes the market-centered approach of corruption, which we will use in our analysis. The market-centered approach regards corruption as a process of exchange, and the balance between supply and demand for both the "boss" (government official) and the "businessman" (offeror).[269] According this orientation, "the corrupt official behaves like a businessman who tends to use his office as a venue for maximizing his own profit." Profit is maximized when demand is greater than supply — that is, when clients are willing to pay more and more for the rare service the corrupt officer renders."[270] This is logically the case when the businessman acquires something of value to him — value being not necessarily in monetary terms, but sometimes in terms of efficiency or expediency. Using this mechanism, both parties get something from each other: the government official gets his equilibrium level pay (the market rate for the power he wields and the services he provide the public), while the businessman gets his desired efficiency or expediency.

To our mind, the benefit of using the market-centered approach as opposed to the traditional values-based (moral vs. immoral) approach is that the former does not prejudge the benefits (or the lack thereof) of corruption. Using a values-based framework can cause us to immediately think that corruption is inherently wrong. As such, no good could come out of it. With a market-centered approach, we are forced to think in terms of economic theory to see the benefits and the transactional costs of corruption. With this, we may be more able to understand its mechanics and thereby render a more objective evaluation of it.

In the judiciary, the market-centered framework may be applied. We may have "businessmen" willing to pay "judges" and "other court officials" to influence a judicial decision, expedite the judicial process or to get insider information, etc. Using the above framework as a springboard, we can now attempt to define judicial corruption.

Judicial corruption may be defined as "the use of public authority for the private benefit of court personnel when this use undermines the rules and procures to be applied in the provision of court services."[271] It may be classified as either administrative or operational corruption.

Administrative corruption occurs when court administrative employees (e.g., clerks of court, research staff, custodians, secretaries, etc.) violate formal and informal administrative procedures for their private benefit.[272] Examples of administrative corruption include instances where court users such as litigants and/or their lawyers pay bribes to administrative employees in order to alter the legally-determined treatment of

[269] COMMITTEE FOR THE EVANGELIZATION OF CULTURE, CROSS-SECTORAL STUDY OF CORRUPTION IN THE PHILIPPINES 11 (2002).
[270] Ibid.
[271] Edgardo Buscaglia, An Analysis of Judicial Corruption and Its Causes: An Objective Governing-Based Approach, 21 INT'L REV. L. & ECON. 233, 235 (2001).
[272] Ibid.

files and discovery material in violation of procedural rules[273], or cases where court users pay court employees to accelerate or delay the processing of a case by illegally altering the order in which the case is to be attended by the judge, or even cases where court employees are paid to commit fraud and embezzle public property or private property in court custody.[274] Administrative corruption also includes procedural and administrative irregularities such as antedating the receipt of pleadings by court employees, and the disclosure by court personnel of confidential court information for a consideration.

On the other hand, operational corruption involves the influence of the exercise of the adjudicatory function of judges. These cases involve substantive irregularities in the decision rendered by the judge.[275] Politically-motivated court rulings and/or undue changes of venue where judges stand to gain professionally or economically as a result of corrupt acts are clear cases of operational corruption.[276] Influence peddling and/or power brokering are natural consequences of this type of corruption.

It is interesting to note that in countries where judicial corruption is perceived to be a major problem, both types of judicial corruption exist.[277] As such, there may be a connection between these two classes of corruption.

1. Causes

As discussed earlier, the Philippine judiciary suffers from a lack of public trust due to corruption — or the perception of corruption. The low salary level of judges and administrative personnel has been the most frequently cited reason for its existence.[278] Judges are often selected from the cream of the crop in the legal profession. Many of the staff members are also competent workers usually taken from the administrative personnel of established law firms. And due to its motivation to remain independent, the judiciary has consistently given higher compensation to both judges and officials as compared to those worked for the other branches of government.

However, notwithstanding this salary premium, court employees are still considered underpaid as compared to their private counterparts. Oftentimes, court officials shifting from the private sector often experience large pay-cuts when appointed or employed as public servants.

For judges, the problem is often worse due to the large disparity between the perceived status of the position of a judge and the salary he receives.[279] Being members

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[273] In the Philippines, this may include following up cases pending with the Supreme Court and the Court of Appeals.

[274] E. Buscaglia, *op. cit. supra* note 271.

[275] *Ibid.*

[276] *Ibid.*

[277] *Ibid.*

[278] J. BAKKER, *op. cit. supra* note 166 at 121.

[279] *Ibid.*

of the local elite, judges are expected to live a life befitting this status. The problem is that the salaries of judges are, more often than not, not enough to support this ideal lifestyle. In some cases, the salaries of judges are not even enough to support a normal lifestyle. This may consequently lead some judges to some form of corruption.

Another possible reason for judicial corruption in the Philippines is the culturally-ingrained systems of patronage politics and nepotism.[280] Patronage politics and nepotism involve the appointment of people to positions on the basis of personal connections instead of merit.[281] Notwithstanding legal measures enacted to curb these practices, appointments of court offices especially those of judges are increasingly becoming politicized. This perception has reached even the highest rung of the judiciary in recent years, with the appointment of certain Supreme Court justices. Many people believe that these appointments were largely based on the perceived loyalty of the appointees rather than anything else. This then creates a notion that judges may be swayed by their political affiliations ("padrinos"), if called upon.

Taking this a step further, some "padrinos" are believed to peddle their influence over judges and/or justices. The PCIJ articles reported many of these alleged transactions.

As a result of low wages and patronage politics, some judges appointed into the bench may lack professionalism and familiarity with law.[282] With these judges, decisions are often unpredictable because of their unfamiliarity with legal principles and judicial precedents. In cases where judges fail to understand important legal principles affecting a case, they can more easily be influenced to decide in a certain manner, primarily since they are not really aware that they might be committing a mistake or two in so doing.

Another cause of judicial corruption or the perception thereof is the lack of transparency in the judicial process.[283] This is especially true in the Philippines. Due to the secretive nature of the judiciary, litigants and/or lawyers are often forced to spend some "grease money" to extract the status of their cases from unscrupulous court staff. Of course, "grease money" is not exactly money. It may be in other forms such as gifts during Christmas and other special occasions or free lunches and/or "meriendas".

The lack of transparency also increases the likelihood that a decision will be perceived to be biased. Without some measure of transparency, the decisions rendered by the courts may always be suspect.

This problem is slowly being remedied by increased pressure from media, the Church and NGOs. By being the public's watchdogs, these entities may have –to a certain degree- curbed corrupt and other unauthorized practices by courts and other

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[280] *Id.* at 127
[281] *Id.* at 127
[282] E. Buscaglia, *op. cit. supra* note 271 at 239.
[283] *Ibid.*

government bodies. A watchful and vigilant media has contributed a lot in this regard. Due to its extensive exposure, media has probably discouraged a number of judges and court official from actively soliciting bribes.[284]

In connection with the lack of transparency comes the lack of monitoring of court personnel. Without adequate monitoring, court officials may have additional reason to work inefficiency. This consequently leads to a slowing down of the judicial process. With this, litigants and/or lawyers are sometimes driven to give "incentives" to these court officials for the performance of their duties.

2. Application of Decision Analysis and Other Quantitative Methods

In an earlier part of this paper, we discussed the application of decision analysis to derive the value of information and control. We derived the value of information by computing the marginal value of acquiring information to enable us to decide correctly every time. The value of information in effect allows us to decide the option with the greatest utility by foreknowledge of the outcome. The value of information has been illustrated as the maximum amount a decision maker is willing to pay to employ the services of a clairvoyant (who is 100% accurate) to determine the end result of an uncertain event, in this case, a lawsuit.

On the other hand, the value of control has been defined as the value in exchange for additional control or influence over supposedly uncertain events. Control in the context of decision theory has been classified as either perfect or imperfect: perfect control ensures that the decision-maker has the ability of influence the supposedly uncertain event to have an outcome with the most value to him, while imperfect control merely means a certain level of influence which increases the probability of happening of an outcome most favorable to the decision-maker. In both cases, the decision-maker has added value because of this power of control or influence. As such, the value of perfect or imperfect information indicates the maximum amount the decision maker is willing to pay for this power or influence.

The power of perfect control has been theoretically exemplified by the hiring of a powerful wizard who could ensure that uncertainty always results in an outcome most favorable to the decision maker, while the power of imperfect control may refer to the hiring of a less capable wizard, who is only able to influence to a certain extent the probability of the outcome resulting from an uncertainty. With imperfect control, the power of influence merely increases the probability of the occurrence of an outcome to a point below 100%, while perfect control refers to the power to fully control the probability of occurrence of an outcome to 100%.

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[284] J. BAKKER, *op. cit. supra* note 166 at 137; Note however that a strong and vigilante media may be counterproductive to an independent and corruption free judicial system, if there is a failure to observe correct journalistic responsibilities. With a strong media sometimes comes a lack of professional conscience to verify reports of corruption. Worse, there may be instances of abuse by media men such as in cases of extortion. This being the case, the people's confidence in the judiciary may be shattered due to false reports.

It has been suggested that the foregoing figures are not really useful, in that the judicial forum does not offer either perfect information or control to a party litigant or counsel. Imperfect control, on the other hand, has been exemplified by the acquisition of evidence with more probative value or the hiring of a more experienced lawyer, among others. We believe that the foregoing figures may be applied in decision analysis problems involving problems with underpinnings of judicial corruption.

With this suggestion, we do not imply that the Philippine judicial system is pervaded by corruption, nor do we suggest or promote the execution of corrupt practices in the judicial forum. We suggest the application of the foregoing methods as theoretical and academic aids to better understand the value of judicial corruption to lawyers and litigants.

Applications to Administrative Corruption

As we discussed earlier, administrative corruption may exist in the Philippine judicial system in the form of petty bribes, where court staff usually bypass procedural rules to help lawyers and party litigants in expediating or delaying the judicial process without altering substantive aspects of the case (e.g., decisions). Among the examples given earlier, the most common example of such type of corruption would be the release of confidential information to party litigants and /or lawyers. In some cases, court staff may prematurely inform parties of sensitive and/or confidential information such as decisions rendered by courts even before the actual release of the decision by the court involved.

Although rather unlikely, judges may also prematurely confide their decisions in certain cases to the benefit of certain parties. This may be the case when a judge or a justice does not decide individually (acts through a division or en banc) such being the case in decisions rendered by collegial courts (Court of Tax Appeals, Sandiganbayan, Court of Appeals and the Supreme Court). In such a case, a partisan judge or justice may not necessarily prefer to influence his co-judges or justices to side in favor of a certain interest; but he may simply not find it morally reprehensible to inform his favored side about the direct of the decision of the said collegiate court.

Although largely unverified, this seems to have been the case when the Supreme Court decided on economically sensitive cases such as the Mining Act case. Some days before the Court decided against its constitutionality, the stock market especially the mining index had fallen for several consecutive days. On the other hand, several days before the Court due to a motion for reconsideration reversed its initial decision, the stock market and the mining index had increased for several days. The facts taken alone, we may just dismiss the foregoing as a conspiracy theory, but we must note that the Court did not inform the public in advance of an impending decision on this matter. So, how could the public and the investors know when and what the decision would be?

To my (overly active) mind, this could have been due to an information leak before both decisions were made public. With this type of foreknowledge, punters could have bought up shares leading to sharp price increases even before the said decisions were made public. Note that this phenomenon has occurred many times over, especially in cases where the court decision has a considerable impact of the financial position of listed companies.

In such a case, we could apply the value of information. On this, we start with the question: "How much are we willing to pay to know in advance the decision to be rendered by the court?"

To illustrate this problem, we again invoke the same facts on plaintiff P and defendant D. Assuming that we are tasked to represent plaintiff P in connection with a suit involving said parties. In our best judgment, we believe that there is a 50% chance we will win the said case. If we win, we will most likely have a judgment of P1,000,000 in our favor. We also estimated that attorney's costs and other litigation expenses will be at about P200,000 for the entire case. During the length of the trial, defendant D has proposed a settlement of P300,000 good for the entire trial.

If say, it would cost us an additional P50,000 to bribe a member of the administrative staff or a judge or justice to inform us in advance how the decision would turn out several weeks before the decision is to be actually rendered, thus providing us with the opportunity to decide correctly whether to settle or to continue with the suit, would the same be worth it?[285]

In a problem like this, we first determine the expected value of the plaintiff (EVp) with perfect information using Equation 7[286]:

[50% x (P1,000,000-P200,000)] + [50% x (P300,000-P200,000)] = expected value with perfect information

[P400,000] + [P50,000] = expected value with perfect information

P450,000 = expected value with perfect information

Graphically, the same may also be derived through the use of a decision tree (See Figure 11).

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[285] Note that in the problem at bar, we assume that we incur the entire estimate of P200,000 of attorney's fees, since the earliest time we would know the future outcome of a decision would be several weeks before the actual rendition of the judgment. At this point, the trial has already reached a late phase. As such, to be conservative, we already assumed the said amount as cost.
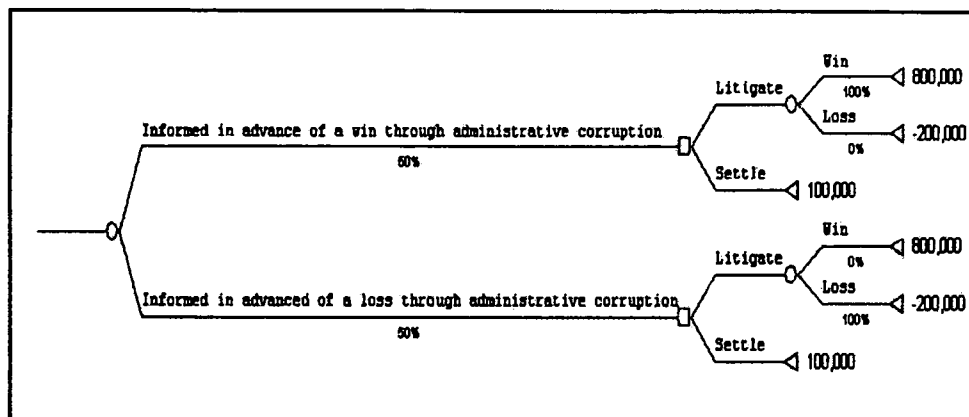
[286] [Pw x (our EV if the clairvoyant predicts a win)] + [PL x (our EV if the clairvoyant predicts a loss)] = EV with perfect information (7)

Where:

Pw is the subjective probability of a plaintiff victory in litigation;

PL is the subjective probability of a plaintiff loss in ligitation.

Figure 11

We then derive the value of perfect information by deducting the foregoing result with the expected value without perfect information, as follows:

Expected value with perfect information	P 450,000
Expected value without perfect information[287]	- 300,000
Value of perfect information	P 150,000

From the foregoing, it seems that the P50,000 bribe in exchange for perfect information is a feasible option. In fact, we could go as high as P150,000 for the said information without negatively affecting our expected value.

Applications to Operational Corruption

Operational corruption, on the other hand, involves more than the mere facilitation of a case. It may include some influence or control over how judges or justices decide cases. Examples of this form of judicial corruption invariably include some form of influence peddling or power brokering, since almost always the lawyer for either party or a person perceived to be close the judge or justice communicates with the judge or the justice involved. Although we may note that in some unusual situations especially in high stakes cases or in cases where the party litigants are acquainted with the judge or justice deciding the case, the litigants may themselves approach the judges or justices involved.

Some forms of operational corruption may even be "free," especially in cases involving politicians and other "patrons" of judges, where the latter exerts a great deal of influence over the judge or justice concerned. In such cases, mere relationship may be enough to influence the judge or justice to decide in a certain manner.

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[287] [.50 (P 1,000,000) + .50(0)] – P 200,000

In cases involving operational corruption where the adjudication power of a judge may be affected either through control or influence, money whether given directly or indirectly is usually a mainstay. The value of control may have some value for legal decision making involving operational corruption.

Taking the same basic facts, we assume that the a bribe of P200,000 would be enough to influence a judge or a majority of a collegiate court to rule in favor of the briber. To a decision maker (plaintiff and/or counsel), is an offer of P200,000 worth the certainty that the said judge or court will decide in our favor?

We can answer the question through the application of Figure 6. To begin, we determine the expected value of litigation when we have control:

Figure 12
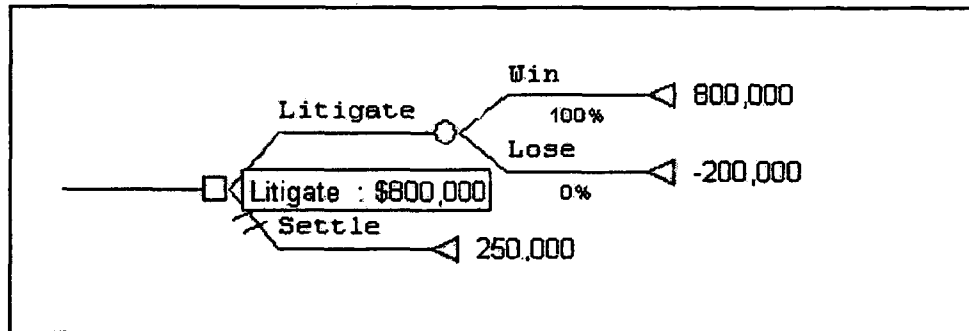
Since a win in the said case provides the greatest value to the plaintiff (or the counsel of the plaintiff) as the decision-maker, we assume that he will prefer to win the said case. In this case, seeing that we can achieve perfect control, we assume that we are 100% certain that we will win the case. As can be seen from the foregoing decision tree, the expected value of litigation with control is P800,000.[288] Similar to the formula to extract the value of perfect information, we deduct the expected value of litigation with perfect control with the expected value of litigation without control through the following computation:

Expected value with perfect control	P 800,000
Expected value without control[289]	- 300,000
Value of perfect control	P 500,000

Since the value of perfect control is P500,000, it seems that the P200,000 bribe would be a relatively inexpensive bribe, considering the stakes of the case. In the case at bar, we could go as high as P500,000 in exchange for the certainty of getting a decision in our favor.

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[288] 1.0 (1,000,000) – 200,000

[289] [.50 (P 1,000,000) + .50(0)] – P 200,000

In problems involving the value of perfect control, we assume that the measure of control we are planning to take (e.g., bribery) is enough to ensure that the uncertain decision becomes a certainty; meaning, in the case of perfect control, we are 100% certain that the outcome of the decision is our preferred outcome.

This however, is not usually the case, even with those which involves the exchange of money and/or the explicit promise by the decision maker to rig a decision. It has been an oft-said reality that nothing is really 100% certain in this world. Even cases which are supposed to be "in-the-bag" may be derailed due to some unforeseen event.

In cases of bribery, many things may happen. The judge or justice in the payroll may suddenly die or the other party may opt to pay a higher price for the decision or (on a more legal note) the other party may decide to appeal the case (to a incorruptible judge or justice).

In these situations, it is better to use the method to derive imperfect control. Through imperfect control, the decision maker may improve his subjective probability of winning the case to less than 100%. For example, if by bribing a judge or a justice P150,000, we could increase our chances of success to 80% from our original 50% chance of success. Would the foregoing amount be worth the increase chance of winning? The following decision tree simulates this situation: (See Figure 7)

Figure 13
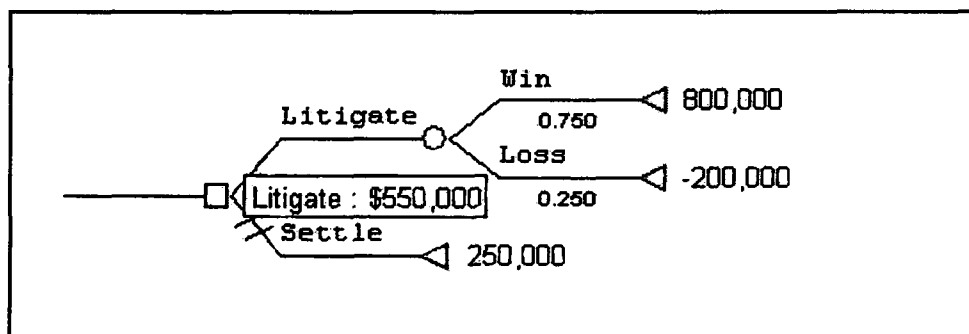
In light of the foregoing additional facts, the expected value of litigation with imperfect control is P550,000.[290] With this, we could determine the maximum amount we are rationally willing to pay to increase the chances that the judge will rule in our favor to 80% from 50%. Computations are as follows:

Expected value with imperfect control	P 550,000
Expected value without control[291]	- 300,000
Value of imperfect control	P 250,000

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[290] [.75 (P 1,000,000) - .25 (0)] – P 200,000
[291] [.50 (P 1,000,000) + .50(0)] – P 200,000

From the foregoing computations, spending an additional P150,000 on bribery is worth the increased chance of winning. In fact, we could go as high as P250,000 for the additional control of the said case.

CONCLUSION

In summary, decision analysis with various modifications may be applied in a myriad of legal problems. Taken alone, decision analysis may be considered a powerhouse of rationality enabling complex (and simple) legal problems to be modeled into coherent mathematical models easily appreciated by both legal professional and laypersons. With these mathematical models, decision makers are better equipped to make rational decisions in light of uncertainty.

However, with modifications, decision analysis becomes an even more powerful tool capable of solving more unique problems. The simplicity of decision analysis allows its customization with several other financial and other quantitative tools to allow a more localized application. With this, decision making (with the aid of decision analysis) becomes more relevant, thereby having greater benefit to the decision maker.

In this paper, we have suggested various additions and modifications to decision analysis calculated to suit our legal environment, the Philippine judicial system. With these additions and modifications, we hope to achieve even greater accuracy and flexibility in analyzing legal problems which will undoubtedly lead to more rational decision

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