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*The articles published in IBP Journal do not necessarily represent the views of the Board of Editors. The articles are representative of the views of the author/s alone and the author/s are responsible for the views expressed therein.*

# EDITOR'S NOTE

In this issue marking the beginning of the term of a new set of officers for the Integrated Bar of the Philippines, we are pleased to share insights coming from an esteemed jurist, current members of the Judiciary, and an author whose work covers areas beside law. Four scholarly pieces fill this issue. This however, may be the last of its kind.

For several decades, the IBP Journal has primarily focused on academic papers. This term however, the Board operates with an express mandate to consider other pieces. The scope of the content being considered is quite broad - from essays, to thought pieces, to analyses. Rather than the usual treatises, we are now accepting work that's just 10 pages long. It may seem sacrilegious but, the intent is to allow more participation from those who often do not have the time to flesh out a scholarly article but may have equally important (and compelling) ideas to share.

Post-Covid, the world has changed dramatically. And so has the profession. In keeping with these movements, the IBP Journal's pivot is designed to help it reach a much broader audience and adapt to this new world.

To be clear, there will still be space for the traditional, academic paper. But that space will now be shared with other forms of writing. It is hoped that a diverse, multi-faceted journal that allows more voices would benefit the profession as a whole.

* * *

# THE ART OF FREE SOCIETY[*]

*Justice Vicente V. Mendoza*[**]

The title of my talk is derived from the work on symbolism of the English mathematician and philosopher Alfred North Whitehead. Whitehead wrote:

> It is the first step in sociological wisdom to recognize that the major advances in civilization are processes which all but wreck the societies in which they occur– like unto an arow in the hand of a child. The *art of free society* consists first in the maintenance of the symbolic code; and secondly in the fearlessness of revision, to secure that the code serves those purposes which satisfy an enlightened reason. Those societies which cannot combine reverence to their symbols with freedom of revision, must ultimately decay either from anarchy, or from the slow atrophy of a life stifled by useless shadows.[1]

Today several proposals are pending in Congress for the amendment or revision of the Constitution. Some relate to its economic provisions, others to such matters as the form of government and, as almost always, whenever there is a cha-cha, to the removal of term limits or the extension of terms of office of elective officials.

The reaction of two key members of Congress to these proposals presents interesting studies of attitudes toward change

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[*] This lecture was originally delivered as the inaugural lecture of the *Magister* Lecture Series organized by the U.P College of Law Constitutional Law Cluster and the Justice George Malcolm Foundation held on June 30, 2023 at the Malcolm Theater, U.P. College of Law.

[**] Associate Justice, Supreme Court of the Philippines (1994–2003); Presiding Justice, Court of Appeals (1994); Chairman, Second Division, Court of Appeals (1993–1994); Assistant Solicitor General, Office of the Solicitor General (1973–1980); Chair, Student Editorial Board, PHILIPPINE LAW JOURNAL Vol. 31 (1956). Ll.M, Yale Law School (1971); Ll.B, University of the Philippines College of Law (1957);

[1] ALFRED NORTH WHITEHEAD, SYMBOLISM: ITS MEANING AND EFFECT 88 (1927). (Emphasis supplied.)

of the Constitution as the symbolic code. When told that the Senate was cool to proposals to amend the Constitution's economic provisions and advised to seek the support of the President, Sen. Robinhood Padilla said, "I will never do that. If I ask for the President's blessings, that means we are a subordinate of the executive."[2] That is the art of free society, a person's determination, regardless of political consequences, to seek the amendment of the Constitution because of what he perceives is a necessity for change.

Rep. Richard Gomez was also for charter change, but his reason was different. The Constitution, he said, was already old. Like an old car, it must be changed. ("*Parang lumang kotse iyan, eh. Ang lumang kotse kailangan inaayos na.*")[3] That is not the art of free society. The change must be for "purposes which satisfy an enlightened reason." For that matter, there are people who think that because the Constitution has lasted, it is good and must not be amended. I remember a member of the Constitutional Commission, which framed the present Constitution, saying this during a Senate committee hearing on charter change.

Taking the Constitution seriously and changing it whenever necessary without changing its essential nature is what the Art of Free Society is about.

The Constitution is our symbolic code. The ideals and principles stated in its Preamble, the basic rights and duties enshrined in its Bill of Rights, and the system of government established by it must be taught to the people at an early age, in the primary schools and the high schools, so that the Constitution will live in their action and their being. The Constitution is also our social contract, as the Supreme Court said.[4] It is similar to what two or more persons make when they enter into a contract of

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[2] Beatrice Pinlac, *Padilla won't ask for Palace support for cha-cha*, PHIL. DAILY INQUIRER, Mar. 14, 2023, at 4.

[3] Vivienne Gulla, *Sandro Marcos, Richard Gomez attend House workshop for solons*, ABS-CBN News, July 4. 202, *available at* https://news.abs-cbn.com/news/07/04/22/sandro-marcos-richard-gomez-attend-house-workshop-for-solons (last accessed Oct. 21, 2023)

[4] Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, 693, Sept. 15, 1989.

partnership. It is similar to what two persons make when they enter into a contract of marriage. It is binding on us the people and imposes on us certain obligations. If the Constitution has not worked out the way we expect it to work, perhaps it is because "We, the sovereign Filipino people" have not lived up to our obligations under it.

However, reverence of the Constitution must not be allowed to degenerate into idolatry. Times change and with them the Constitution must change consistent with its essential nature. As Chief Justice Marshall said, the American Constitution was intended by its framers "to endure for ages to come and *consequently to be adapted to the various crises of human affairs*."[5]

How well have we practiced the art of free society in our country?

At the threshold of independence, in 1947, we amended the Constitution, to grant equal rights for 28 years to Americans and their corporations in the exploration, exploitation, and development of our natural resources and the operation of public utilities. We did this so that our goods could continue to enjoy free trade in the American market after independence, what with our economy destroyed by the last war. The grant was for 28 years, or until 1975, but even before that year, we endeavored and succeeded in getting some adjustments which enabled us to maintain the Constitution as our symbolic code.

In 1969 we revised the Constitution in response to urgent social and economic changes. Unfortunately, lawless elements took advantage of the occasion, justifying the establishment of an authoritarian regime. Thanks to the resilience of our country, however, our society eventually redeemed itself and in no time the constitutional order was restored with the present Constitution.

We have been able to do this because we have the means, formal and informal, for adapting the Constitution to change

[5] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819). (Emphasis supplied.)

without changing its essential nature change. The formal means for doing this are to be found in Art. XVII, the provisions of which are intended to act as safety valves to prevent violent expressions of popular will or revolutions. Unfortunately, Sec. 1 of this Article fails to provide whether, when acting as a constituent assembly, the two houses of Congress must sit jointly or separately, and, if they sit jointly, whether they must vote as one assembly or in two divisions as in the 1935 Constitution. This problem has arisen, because the provision in question was originally intended for a unicameral National Assembly. But the Constitutional Commission later decided to have a bicameral Congress. Several provisions of the draft constitution were revised to reflect this decision, but the correction of Art. XVII, Sec. 1 was overlooked.

Thus, in the following cases, it was provided that the two houses of Congress must meet jointly but vote separately:

- To declare the existence of a state of war."[6]
- To canvass the votes for President and Vice President and proclaim the winners, and, in case of tie, to break the tie.[7]
- To revoke the President's proclamation of martial law or suspension of the privilege of habeas corpus, or to extend the period of proclamation.[8]
- To confirm the President's nomination of a Vice President whenever a vacancy occurs in the office during the term of the Vice President.[9]
- To decide a dispute between the President and his cabinet, if, after declaring himself unable to discharge the duties of his office, he subsequently claims to be fit to resume his office, but a majority of his cabinet disagrees.[10]

[6] CONST. art. VI, sec. 23 (1).
[7] Art. VII, sec. 4.
[8] Art. VII, sec. 18.
[9] Art. VII, Sec. 9.
[10] Art. VII, sec. 11.

If the two houses of Congress are required to meet in joint session but to vote separately in performing these non-legislative functions, with more reason must they be required to do the same in performing their function under the Amendment Clause. To read the Amendment Clause as simply requiring Congress, when acting as a constituent assembly, to require one house to propose amendments or revisions and then to send its proposals to the other house for concurrence and, if they have some disagreements, to thresh them out in a conference committee, is to recognize no distinction between lawmaking and amending or revising the fundamental law.

On the hand, the informal means of changing the Constitution are to be found in the power of judicial review of the Supreme Court and in the power of executive officials to execute the Constitution and the laws. The Supreme Court functions as a "continuing constitutional convention," treating the Constitution as a "living organism," capable of adaptation and change. Its interpretation of what the Constitution means constitutes part of the law of the land.

To a lesser degree other agencies of government, which are charged with administering or executing the Constitution and the laws, also contribute to the clarification of the meaning of the Constitution. Their contemporaneous constructions of its provisions are given great weight by the courts. For example, in the early case of *Krivenko v. Register of Deeds,*[11] which also involved an interpretation of the economic provisions of the1935 Constitution, reliance was likewise placed on the contemporaneous construction of land laws for its ruling that an alien cannot own a piece of residential land. Under that Constitution, public lands were classified into "agricultural, timber and mineral." Those classified as "agricultural" can be conveyed to Filipinos and to corporations 60 per cent of the capital of which is owned by them. With respect to private agricultural lands, the Constitution provided that they could be conveyed only to those qualified to own public lands. The

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[11] 79 Phil. 461 (1947).

only exception from the ban are foreigners claiming rights by hereditary succession.

Relying on the construction by the Executive and Legislative Departments of the government of the term "agricultural land" as meaning land that is susceptible of cultivation for agricultural production and that is neither a "mineral" nor a "timber" land, the Supreme Court held that a piece of private residential land is an agricultural land and therefore cannot be conveyed to aliens.

Mention may also be made of two recent efforts to liberalize the restrictions on foreign investments in the country. They illustrate the informal ways by which contemporaneous construction of the provisions of the Constitution by agencies of government contribute to our understanding of these provisions.

First is the initiative of the Department of Energy in allowing the exploration, development and utilization of renewable energy to foreign citizens and foreign-owned corporations. The move followed the issuance of an opinion by the Secretary of Justice that Art. XII, Sec. 2 of the Constitution, which declares all "natural resources" of the country as exclusively belonging to citizens of the Philippines, refer to those which are capable of being depleted. Sources of renewable energy are inexhaustible and therefore are not off limits to foreigners. While the Constitution also mentions "forces of potential energy" as part of our natural resources, neither is renewable energy inalienable "potential energy" or "energy at rest." Renewable energy is "kinetic energy" or "energy in motion," derived from the sun, wind, and hydro and tidal currents. The Secretary of Justice explained: "If a ball is held up at head height, it has potential energy relative to floor due to gravity. But when the ball is released, its potential energy decreases and such is transformed into increasing kinetic energy until it hits the floor and stops." We can share with foreigners the exploration, development and utilization of renewable resources without fear of being left with nothing else afterward because these resources are inexhaustible.

The second initiative to liberalize the restrictions on foreign investments is the opening of public services to foreigners and foreign owned corporations. This has been accomplished by the amendment of the Public Service Act by defining what "public utilities" are and considering other public conveniences "public services." **Public utilities** are public conveniences which operate, manage or control for public use any of the following: (1) Distribution of electricity; (2) transmission of electricity; (3) petroleum and petroleum products pipeline transmission systems; (4) water pipeline distribution systems and waste water pipeline systems, including sewerage pipeline systems; (5) seaports; and (6) public utility vehicles.[12] On the other hand, **public services** are those which render (1) transport services for carrying passengers and goods by air, road or water, (2) postal services, (3) telephone services, (4) power facilities, (5) lighting facilities, (6) water facilities, and (7) insurance service. Consequently, as the constitutional restriction refers only to the operation of public utilities, the operation of public services can be opened to foreigners and foreign corporations.

Thus, the Constitution is brought up to date not only by Congress as the principal department of the government for amending and revising the Constitution but also by the Supreme Court and by other agencies of the government which are charged with administering or executing its provisions.

It's not a denigration of a document intended to endure for ages to say that its meaning changes over time. That is precisely how and why it endures. In a sense, the Constitution does not change. Indeed, as the French writer Jean Baptiste Alphonse Karr put it, "the more things change, the more they stay the same." Consider how technological advances have changed the meaning of the phrase "land and naval forces" in the provision of the Constitution of the United States enumerating the powers of the U.S. Congress.[13] Strictly construed the phrase would exclude the maintenance of an air force. Would anyone argue today that the

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[12] Com. Act No. 146 (1936), § 13(d), *amended* by Rep. Act No. 11659 (2022). Public Service Act.

[13] U.S. CONST. art. I, § 1(14).

organization of the U.S. Air Force is unconstitutional, because the U.S. Constitution provides only for the organization of “land and naval forces”?

It is the duty of every generation to keep the Constitution up to date. This task requires the utmost dedication of mind and spirit of those who would undertake this solemn and sacred duty. “He who would bring home the wealth of the Indies, must carry the wealth of the Indies with him,” as the Spanish proverb says. Not to him whose outlook is limited by parish or class, or whose motive is solely to prolong the stay in power of those in public office or to seek material gain or political advantage, should the task be entrusted.

We are not likely to see a reduction of tension and other concerns in the future. We should be grateful we have decent, civilized procedures provided by our Constitution for adapting to change, as we strive to elevate to an art form our efforts to preserve our free way of life.

After witnessing the constitutional crisis of 1959, which was brought about by the refusal of then President Elpidio Quirino to give up the exercise of his emergency powers despite the fact that Congress had been able to meet in session after the war, Claro M. Recto, the president of the 1935 Constitutional Convention, spoke grimly of the future of the constitution. “Perhaps,” he said, “we believe in the Constitution only because it is the thing to do, because we have learned its provisions by rote in school like arithmetic and spelling and the Lord’s prayer, and not because we sincerely and conscientiously it to be the best and surest guaranty of the way of life which we regard as the sole foundation of our present and future welfare.” He concluded with the story of the Moorish king of Granada who was upbraided by his mother with these words: “Weep not like a woman for the loss of a kingdom you cannot defend like a man.” [14]

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[14] Claro M. Recto, *The Future of the Constitution*, MANILA CHRON., Feb. 9, 1953, at 8.

May the moral of that story not be lost on us. May it guide us in our efforts to establish in our land a government of the people, for the people, and by the people in our day and in the days we may not see.

* * *

# POST-PANDEMIC COURT: LEGAL PROSPECTS AND EMPIRICAL BASIS FOR CONTINUITY OF THE VIDEOCONFERENCING HEARINGS[*]

*Judge Leilani Marie Dacanay-Grimares*[**]

## INTRODUCTION

The Philippine Judiciary faced unprecedented challenges during the coronavirus pandemic. Yet, it became an opportunity for the Courts to innovate and transform the judicial system. To protect the health of the members of the Judiciary, personnel, lawyers, and litigants while balancing the people's access to justice, trial and non-trial proceedings were conducted through fully remote videoconferencing through Microsoft Teams Platform. The objective was to make the Courts resilient to the pandemic situation by using technology as a means. Realizing that technology was the solution to the problem of maintaining and enhancing access to the justice system, the "On-Line Courts" were activated.

Prior to the pandemic, the Philippine Rules of Court requires face-to-face or actual In-Court proceedings. But the Supreme Court has been employing modern technology like the use of Live-Link Television Testimony in criminal case where the witness or the victim is a child relative to A.M. No. 004-07-SC[1] (Rule on Examination of Child Witness) and when presenting testimonial evidence through electronic means in both civil and criminal cases

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[*] Editor's Note: The Journal published this abridged version of the Study conducted by the Author due to the significance to the Legal System post-COVID. To access the full un-abridged version, interested parties may contact the Author.

[**] Judge, Regional Trial Court Branch 294, Parañaque City; Acting Presiding Judge, Regional Trial Court Branch 296, Parañaque City. Assistant Treasurer, Philippine Women Judges Association. LL.M, *cum laude,* University of Sto. Tomas Faculty of Civil Law (2018).

[1] CHILD WITNESS RULE, A.M. NO. 004-07-SC, November 21, 2000.

under A.M. No. 01-7-01-SC[2] (Rule on Electronic Evidence). In fact, on 25 June 2019, the Supreme Court issued A.M. No. 19-05-05-SC[3] on the *"Proposed Guidelines on the Use of Videoconferencing Technology for the Remote Appearance or Testimony of Certain PDLs in Jails or National Penitentiary"* which was pilot tested between Davao City Hall of Justice and Davao City Jail; Davao City Hall of Justice and SICA, Bicutan; and Davao City Hall of Justice and the New Bilibid Prison, Muntinlupa, beginning September 1, 2019, for a period of not more than 2 years.

On 01 December 2020, the Supreme Court issued A.M. No. 20-12-01-SC[4] to establish the guidelines on the conduct of videoconferencing to address the restricted movement and travel of court users during the pandemic. A.M. No. 20-12-01-SC[5] took effect on 16 January 2021, and it will remain effective even after the pandemic, unless revoked. The guidelines in A.M. 20-12-01-SC will govern the conduct of videoconferencing before the first and second level courts, Court of Appeals, Sandiganbayan, and Court of Tax Appeals. It will apply to all actions and proceedings, including small claims cases, in whatever stage when the court finds that the conduct of videoconferencing will be beneficial to the fair, speedy, and efficient administration of justice.

In a way, the ability of all Courts to conduct videoconferencing hearings has been a welcome alternative in addressing the delay of case dispositions during the state of public health emergency. Videoconferencing have fully protected public health with advantages such as convenience and efficiency for litigants, as they save time by not having to travel or wait in courtrooms, and the Courts benefited by having a more reliable

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2 ELEC. EVID. RULE, A.M. No. 01-7-01-SC, July 17, 2001.

3 Re: Proposed Guidelines on the Use of Videoconferencing Technology for the Remote Appearance or Testimony of Certain Persons Deprived of Liberty in Jails and National Penitentiaries, A.M. No. 19-05-05-SC, June 25, 2019.

4 Re: Proposed Guidelines on the Conduct of Videoconferencing, A.M. No. 20-12-01-SC, December 9, 2020.

5 Re: Proposed Guidelines on the Conduct of Videoconferencing, A.M. No. 20-12-01-SC, December 9, 2020.

schedule. Thus, all participants involved in case handling appreciated the ability to dispose cases more promptly.

Yet, videoconferencing hearings also introduced new challenges for the Philippine Judiciary. In some instance, there were manifestation of inhibition of effective communication and at times, the difficulty to hear, observe and understand the proceedings *i.e.* the use of video hindered the effective confrontation of the witness pertaining to evidence and might prejudice the court's perception of the parties and their respective witnesses. The pandemic kicked off the necessity for the conduct of videoconferencing hearings, and thus invites a systematic assessment of its advantages and disadvantages.

## RATIONALE AND SCOPE

The study identifies the varying concerns in the conduct of videoconferencing hearings in the Philippines, during the Covid-19 pandemic, and determine its implication in the Philippine Judicial System, specifically:

1. To review the current practices on videoconferencing adopted by different Courts of jurisdiction.

2. To identify the different issues and areas of concerns on the conduct of videoconferencing hearings.

3. To identify the benefits and risks involved in the continuance of videoconferencing hearings.

4. To identify measures to minimize risk in the continuance of videoconferencing hearings.

5. To establish a Standardized Rules of Procedure as continuing guidelines for the conduct of videoconferencing hearings.

6. To endorse the Standardized Rules of Procedure for Videoconferencing Hearings to the Supreme Court considering that it has the vested power "to promulgate

rules concerning the protection and enforcement of constitutional rights, pleadings, practice, and procedure in all Courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged" under **Section 5(5), Article VIII of the 1987 Philippine Constitution.**

7. To propose a Bill on the Substantive Rights of the Parties during Videoconferencing Hearings in all cases before Appellate Collegiate, First and Second Level Courts.

The study identifies the determinants of videoconferencing hearings in terms of: Substantive Outcome, Perception on Credibility, Attorney-Client Communication and Relationship, Access to Justice and Consideration for Marginalized Communities. It attempts to adopt a Standardized Rules of Procedure that will address the issues and concerns regarding the conduct of videoconferencing hearings in the Philippines and to propose a Bill on the Basic of Rights of the Parties, more so Rights of the Accused, in Videoconferencing Hearings in all cases before Appellate Collegiate, First and Second Level Courts.

The study is limited to videoconferencing hearings conducted by Regional Trial Courts in Metro Manila, namely: Caloocan, Las Pinas, Malabon, Mandaluyong, Manila, Marikina, Makati, Muntinlupa, Navotas, Pasig, Pasay, Paranaque, Quezon City, Taguig, Valenzuela, and San Juan, and shall be further limited to Civil Actions.

## Theoretical Framework - Videoconferencing Defined

Videoconferencing is comprised of interactive telecommunication technologies that allow two or more locations to interact (via two-way video and audio transmissions) simultaneously. Electronic communication aims to improve the interchange of information between users. This technology permits both real-time sound and images of conversation between

people in different locations through a system of monitors, microphones, cameras, computer equipment, and other devices.[6]

As an interactive medium, videoconferencing offers individuals the ability to appear and communicate from remote locations, exchange information, engage in debate, and work toward resolution or disposition.[7]

Videoconferencing eliminates the physical risk to officers who transport and secure defendants during a hearing. Videoconferencing supporters argue that a defendant can better preserve personal dignity by remaining in jail and not entering the courtroom in an orange jumpsuit and handcuffs.

Specifically, the use of videoconferencing is spreading through the federal and state Court systems to streamline legal proceedings and provide the accused greater access to justice. Videoconferencing has been used in arraignments, bail, sentencing, and post-conviction hearings, but no criminal trial has yet been conducted in this medium.[8]

Wisconsin Statutes Supports Use of Videoconferencing, Subchapter III of Wisconsin Statutes Chapter 885, Witnesses and Oral Testimony, outlines the use of videoconferencing in the circuit Courts. Below are the applicable statutes supporting videoconferencing and additional information on using videoconferencing outside of the courtroom[9]:

1. It is the intent of the Supreme Court that videoconferencing technology be available for use in the circuit Courts of Wisconsin to the greatest extent possible consistent with the limitations of the technology, the rights of litigants and other participants in matters before the courts, and the need to preserve

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[6] Eric Bellone, *Videoconferencing in the Courts: An Exploratory Study of Videoconferencing Impact on the Attorney-Client Relationship in Massachusetts*, Northeastern University, March 2015.

[7] WISCONSIN SUPREME COURT, *Bridging the Distance: Implementing Videoconferencing in Wisconsin*, Revised: August 2017.

[8] WISCONSIN SUPREME COURT, *supra* note 7.

[9] *Id.*

the fairness, dignity, solemnity, and decorum of court proceedings. Further, it is the intent of the Supreme Court that circuit court judges be vested with the discretion to determine the manner and extent of the use of videoconferencing technology, except as specifically set forth in this subchapter.

2. In declaring this intent, the Supreme Court finds that careful use of this evolving technology can make proceedings in the circuit Courts more efficient and less expensive to the public and the participants without compromising the fairness, dignity, solemnity, and decorum of these proceedings. The Supreme Court further finds that an open-ended approach to the incorporation of this technology into the court system under the supervision and control of judges, subject to the limitations and guidance set forth in this subchapter, will most rapidly realize the benefits of videoconferencing for all concerned.

3. In declaring this intent, the Supreme Court further finds that improper use of videoconferencing technology or use in situations in which the technical and operational standards set forth in this subchapter are not met, can result in abridgement of fundamental rights of litigants, crime victims, and the public, unfair shifting of costs, and loss of the fairness, dignity, solemnity, and decorum of court proceedings that is essential to the proper administration of justice.

In Davis R. et. al (2015)[10], the following are the summary of key considerations for implementation and planning videoconferencing:

> 1. Videoconferencing implementation and planning (e.g., sources of funding; collaboration among key stakeholders; sustainability planning; governance and administration roles and responsibilities; system maintenance; offsetting costs with other technology uses);

[10] Robin Davis et al., *Research on Videoconferencing at Post-Arraignment Release*, ICF International, March 31, 2015.

2. Training and staff needs (e.g., cross-training of individuals to minimize disruption due to staff turnover; dedicated staff; judicial leadership and buy-in);

3. Security considerations (e.g., password protection and encryption of data; physical security and storage of videoconferencing equipment);

4. Decorum (e.g., traditional versus videoconferencing environments and procedures; ability to maintain eye contact and communicate clearly; ability for defendant to fully participate and understand the nature of the proceedings)

5. Audio and video equipment (e.g., clarity, quality, views, and controls of technology; bandwidth of videoconferencing system);

6. Accommodating court and jail procedures and restrictions (e.g., safety procedures for moving inmates to and from videoconferencing rooms);

7. Inclusion of victims as a part of the videoconferencing process for post arraignment release (e.g., whether to include victim notifications at post arraignment stages of court procedures);

8. Defendant's rights and accommodating special needs (e.g., interpreter services for both spoken and sign languages, accommodating persons in hospitals; ability of defendant to understand proceedings and ask questions of defense counsel while communicating remotely; privacy considerations)

9. Court document imaging and sharing (e.g., availability and capacity to share document imaging in videoconferencing settings); and

10. Storing, archiving, and use of videoconferencing.

Online proceedings can save time and resources for participants in criminal cases and can provide broader access to

the Courts for the public. Respondents also noted dangers, particularly in contested or evidentiary hearings or trials.[11]

## Advantages of Videoconferencing

Among the most commonly cited advantages of videoconferencing in a legal setting are increased safety for court stakeholders and corrections personnel, reductions in costs associated with transportation, and enhanced court efficiency. Potential advantages[12] include the following:

**Improved safety:** By allowing individuals to appear in court remotely, telepresence eliminates the need to transport defendants and offenders from correctional facilities to courthouses, reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public;

**Cost reductions:** Telepresence technologies have the potential to reduce expenditures on the transportation of defendants and offenders to and from court facilities; the medical services made necessary by the exposure of sick inmates to court personnel; and travel for the attorney, correctional staff, and other inmates;

**Increased court efficiency:** By cutting down transportation time, videoconferencing could allow for faster case processing, reducing case backlogs;

**Reduced detention time for defendants:** Eliminating the need to transport and secure defendants could expedite pretrial proceedings, reducing the amount of time defendants spend in jail prior to their court dates;

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11 Jenia Turner, *Remote Criminal Justice*, 53 TEX. TECH L. REV. 197 (2021)

12 Camille Gourdet et al., *Court Appearances in Criminal Proceedings Through Telepresence: Identifying Research and Practice Needs to Preserve Fairness while Leveraging New Technology*, Rand Corporation (2020) *available at* https://doi.org/10.7249/RR3222.

**Expanded access to the criminal justice system:** Telepresence conferencing that must be preserved according to court policies can be both costly and burdensome;

**Greater access to language interpreters:** Telepresence technologies can facilitate the provision of language interpretation services, allowing non-English speakers and individuals with communications disabilities to access the criminal justice system more easily; and

**Reduced trauma for victims:** Telepresence technology enables victims of crimes, such as rape, sexual assault, and child abuse, to testify against the defendant without experiencing the revictimization and trauma of being physically present with their offenders.

As Courts decide whether and how to use videoconferencing during the pandemic, it is important to consider the perspectives[13] of those judges and practitioners who have experience with the practice. These views can help inform decisions not only during but also after the pandemic, as Courts and policymakers weigh whether to use remote proceedings more broadly in ordinary times. The survey reveals general agreement among judges and practitioners that online proceedings can save time and resources for participants, primarily by reducing travel and waiting times. By allowing people to join in from work or home, remote proceedings can also improve access to the proceedings for defendants, victims, witnesses, and other interested parties. They can reduce failure to appear rates and facilitate more frequent attorney–client consultations. Finally, online broadcasting of the proceedings can expand public access, which in turn can enhance the fairness and legitimacy of the process.

The impact of the videoconferencing differs depending on each person involved in a court proceeding. According to *The Impact of Telepresence Technology*[14] *on Judges*, one factor that affects how widely telepresence technology is used in the

13 Gourdet et al., *supra* note 12.
14 Gourdet et al., *supra* note 12.

courtroom is the judge's level of comfort with the technology. Panel members explained that the judge is often the one who decides whether and when telepresence technology will be used, and these decisions are relatively arbitrary. In the *The Impact of Telepresence Technology on Defendants*, there are potential violation of a defendant's legal and constitutional rights through the use of telepresence technology. In both civil and criminal proceedings, the credibility of a defendant can be an essential element in the strength of a litigant's case. According to *The Impact of Telepresence Technology on Defense Attorneys,* younger attorneys, jurors, witnesses, and other participating individuals who have grown up with access to widespread technology and sophisticated technological devices might be more at ease with the use of telepresence technology. For some attorneys, the use of telepresence technology can be as routine as filing legal documents through e-filing systems. In addition, a remote appearance might be less unique to younger attorneys, jurors, and witnesses who are more used to virtual interactions in their personal and professional lives and might be more adept at incorporating technology into court proceedings. As per *The Impact of Telepresence Technology on the Court*, there is increased Efficiency because video conferencing capabilities made it easier to meet these deadlines. Telepresence technology offers state and local Courts, which often work with limited resources to meet the demands of a heavy caseload, there is potential for increased efficiency in case processing and cost savings.

In Nangia, Perkins & Salerno (2020), there are notable pros in the conduct of virtual hearing via Zoom Court Hearings, such as:

**Timing** - During shutdowns and office closures, cancelled hearings became back logged cases. When virtual hearings were introduced, Courts and litigants were finally able to move forward with hearing dates that previously stalled;

**Convenience** - Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes, offices or cars;

**Witness Credibility** - Some judges feel that Zoom hearings allow them to truly assess witness credibility since they are making prolonged eye-to-eye contact, often on a large screen in their courtrooms as it allows for fewer distractions and more focus on the witness than in a traditional courtroom;

**First-hand Home Assessment -** Judges can immediately resolve a parental dispute about the other parent's home being deficient by seeing the premises, the child's room and other amenities required for the welfare of the kid; and

**Exhibits** - Teleconferencing will force attorneys to be better prepared and reach agreements with opposing counsel presentation and submission of exhibits.[15]

However, in Poulin A. (2004)[16], Courts should not extend their reliance on videoconferencing further and instead must undertake studies to explore the impact of the technology in criminal proceedings. Courts should take steps to ameliorate the negative impact of videoconferencing through design of videoconferencing systems and training of those who participate in videoconference proceedings.

The fair trial requirements and the principle of equity of arms in the court proceedings require equal opportunities for parties to take part in the proceedings. However, in some instances a disruptive party could be temporary excluded from the proceedings upon decision of a judge. The rights of an excluded party in such case shall be well balanced. Although there is a case law of the European Court related to exclusion of parties from courtrooms, it seems there have not been yet respective occurrences in online hearings at a national level. In England, there

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15 Shalini Nangia et al., *The Pros and Cons of Zoom Court Hearings*, NATIONAL LAW REVIEW, May 20, 2020, *available at* https://www.natlawreview.com/article/pros-and-cons-zoom-court-hearings.

16 Anne Poulin, Criminal Justice and Videoconferencing Technology: The Remote Defendant, Working Paper Series (2004) *available at* https://digitalcommons.law.villanova.edu/wps/art15.

have been some discussions about disruptive witnesses, difficulty in controlling them, and their muting as a short-term solution with due regard to the overall fairness of the proceedings. For the professional legal community in France, the idea of muting a party would not be accepted as jeopardizing the requirement of equal resources for defense and prosecution.[17]

## Theories of Communications via videoconferencing[18]

Theorists are examining the possible negative effects of videoconferencing to help clarify how people communicate, from working relationships, establish trust, and make informed decisions. How information is assessed, they theorize, depends on how information is gathered.

### 1. Emergent Meaning Theory[19]

This theory assesses how a listener considers various elements of a speaker's story – the story itself, the level of trust between speaker and audience, the effectiveness of the message, the speaker's credibility, and so forth – to create understanding. In videoconferencing, largely unnoticed attributes of the medium contribute to the quality of communication. The medium often over or under-emphasizes certain content on an adjudicator without the adjudicator being aware. Video technology, according to this theory, can never truly capture all of the physical and psychological cues that humans innately understand or consider when forming an opinion about a certain person.

Video is two-dimensional, while reality is three-dimensional. Camera angles, lighting, and background can either emphasize or minimize certain characteristics that people consider when communicating. Emergent Meaning Theory maintains that videoconferencing interferes with the "emergent meaning" that users apply to the quality of exchanged information and erodes the

17 EUROPEAN UNION, *Videoconference in court proceedings: human rights standards* (Regional online round table July 2020).
18 Bellone, *supra* note 6.
19 *Id.*

trust necessary to an attorney-client relationship. The theory attempts to shed light on the medium through the following questions:

(1) What does videoconferencing (the technology) make better (enhance) in the attorney-client dynamic in the courtroom?
(2) What does videoconferencing (it) change or replace in the attorney-client dynamic in the courtroom (make obsolete)?
(3) What does videoconferencing bring back from the past that may have been missing from the attorney-client dynamic in the courtroom (it retrieve)? (i.e. a closer, more personal relationship. More frequent contact between attorney and client, etc.)
(4) What do you see videoconferencing in the future with respect to the attorney-client dynamic in the courtroom (becoming does it become when pushed to extremes)?

Videoconferencing makes it harder for people to detect sincerity or deception, appreciate cultural differences, or understand non-verbal cues than if the applicant appeared before the court in person

### 2. Information Integration Theory[20]

Information Integration Theory argues, conversely, that videoconferencing may have little impact on attorney-client communication in the courtroom. This theory assumes that people use a process to integrate information, form impressions and communicate ideas. Most of the research relevant to Information Integration Theory suggests that communication and social judgments, whether towards individuals or groups, are the result of a weighted average of the different sources of available information. All pieces of information are not treated equally; some are given greater "weight" in forming relationships and opinions.

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[20] Bellone, *supra* note 6.

The key variables and the types of information most important to a judge's Decisions are: (1) the severity of the crime; (2) a defendant's prior record; (3) the defendant's local ties to the community; (4) the recommendation of the district attorney and (5) the defense attorney's recommendation.

### 3. Communication Theories[21]

Communication theories attempt to explain how information is conveyed and interpreted. Claude Shannon wrote a pillar of these theories, the Information Theory of Communication. This theory asserts that "noise" (defined as anything that interrupts or distracts a speaker and listener), is the enemy of information. Shannon's Information Theory of Communication is broken-down into eight components:

1. The Source – the speaker sending the message;
2. The Message – sent by the Transmitter (speaker) and received by the Destination (listener/audience);
3. The Transmitter – two layers: the sound (voice) and (body) of the speaker, and the method used to convey these sounds and gestures, either face-to-face or via camera and microphone;
4. The Signal – the Message from the Source that flows from the two layers of the Transmitter;
5. The Channel – how the Signal is carried, perhaps via the Internet or the hardwires that carry the video;
6. The Noise – ancillary signals that obscure or confuse the Signal;
7. The Receiver – that which receives the Message from the Source. In the example of videoconferencing, it is the video monitor from the Transmitter.
8. The Destination – the listener/audience who hears/receives the Signal.

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[21] *Id.*

## Effects of Video Technology in Court Proceedings[22]

Increasing use of remote video technology poses challenges for fair judicial proceedings. Though video conferencing technology has been a valuable tool during the Covid-19 pandemic, existing scholarship suggests reasons to be cautious about the expansion or long-term adoption of remote court proceedings. Judges should adopt the technology with caution. More research is necessary, both about the potential impact of remote technology on outcomes in a diverse range of cases, as well as the advantages and disadvantages with respect to access to justice. In the meantime, as Courts develop policies for remote proceedings, they should consult with a broad set of stakeholders, including public defenders and prosecutors, legal services providers, victim and disability advocates, community leaders, and legal scholars.

### 1. Video Proceedings and Substantive Outcome[23]

Based on study, there is a direct relationship between video proceedings and outcomes, such as conviction or deportation rates. In one study, criminal bail hearings found that defendants whose hearings were conducted over video had substantially higher bond amounts set than their in-person counterparts, with increases ranging from 54 to 90 %, depending on the offense. Also, a study of immigration Courts found that detained individuals were more likely to be deported when their hearings occurred over video conference rather than in person. Several studies of remote witness testimony by children found that the children were perceived as less accurate, believable, consistent, and confident when appearing over video.

### 2. Video and Perceptions of Credibility[24]

Other research has looked at whether video testimony by a witness has an impact on how they are perceived by factfinders.

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22 Alicia Bannon & Janna Adelstein, *Impact of Video Proceedings on Fairness and Access to Justice in Court*, Brennan Center For Justice, September 10, 2020.

23 Bannon & Adelstein, *supra* note 22.

24 Bannon & Adelstein, *supra* note 22.

Because credibility determinations are often central to case outcomes, the effect of video appearance on credibility has important implications for the overall fairness of remote proceedings. Several other studies have looked at the impact of video testimony by children on their perceived credibility in the context of sexual abuse cases, finding that video testimony had an impact on jurors' perceptions of the child's believability. Other research suggests that technological limitations may affect immigration judges' ability to assess credibility in video proceedings.

### 3. Attorney-Client Communications and Relationship[25]

In a 2010 survey by the National Center for State Courts, 37 % of courts that used video proceedings reported that they had no provisions to enable private communications between an attorney and client when they were in separate locations. A study by the advocacy organization Transform Justice surveyed lawyers, magistrates, probation officers, intermediaries, and other officials about the use of remote proceedings in the United Kingdom. Fifty-eight percent of respondents thought that video hearings had a negative impact on defendants' ability to participate in hearings, and 72 % thought that video hearings had a negative impact on defendants' ability to communicate with practitioners and judges.

Videoconferencing is detrimental to attorney-client private communications specifically when the attorney is in the courtroom, and the client is at a remote location, such as a jail or prison.[26] The use of videoconferencing leads to decreased personal contact between users and the possible alienation of defendants in the criminal justice system. Videoconferencing separates an attorney and client, complicating and diminishing basic communication. A defendant who has little or no private communication with his/her attorney may believe that their lawyer is merely processing their case without any real personal connection, which can only weaken their relationship.

25 *Id.*

26 Bellone, *supra* note 6.

People who use videoconferencing consider body language important in establishing trust, but the ability to read non-verbal gestures and cues is limited. In effective communication, some of the strongest predictors of believability concern the speaker's confidence and consistency. In videoconferencing, many non-verbal cues, including gaze and deictic gestures, are dependent on the spatial faithfulness of the system. Any technical problem can render the exchange worthless.

### 4. Access to Justice Considerations[27]

Another question raised by remote video proceedings is how their use impacts the public's access to justice in civil cases, where there is generally no right to counsel and where other safeguards for litigants are weaker than in criminal cases. One critical issue is the extent to which videoconferencing increases or diminishes burdens for self-represented litigants in arenas like housing or family court. Understanding the relationship between video proceedings and access to justice can inform Courts' use of video both now and in the future and help identify areas where Courts should invest in additional resources or support for litigants.

### 5. Consideration for Marginalized Communities[28]

Other research raises potential equity concerns about the broad use of video proceedings, particularly for marginalized communities and in cases where individuals are required to participate by video. These concerns underscore the need for additional research and evaluation as Courts experiment with remote systems, as well as the need for Courts to consult with a wide array of stakeholders when developing policies for video proceedings. For instance, there is a substantial digital divide associated with access to the internet and communication technology. One critical unanswered question is whether and how video proceedings may exacerbate existing inequalities. According to studies by the Pew Research Center, there are

[27] Bannon & Adelstein, *supra* note 22.
[28] Bannon & Adelstein, *supra* note 22.

substantial disparities in access to internet broadband and computers according to income and race. Americans who live in rural communities are also less likely to have access to broadband internet. The same is true for people with disabilities, who may also require special technology in order to engage in online activities such as remote court proceedings.

Technology disparities potentially pose significant hurdles to the widespread use of video court proceedings for marginalized communities, particularly when Covid-19 has led to the closure of many offices and libraries. The pandemic has also caused a massive spike in unemployment, which may hinder litigants' abilities to pay their phone and internet bills.

Because there is currently a dearth of research on how the digital divide impacts access to video proceedings, courts and other stakeholders should conduct their own studies before committing to the use of video hearings in the long term.

## Drawbacks of Videoconferencing[29]

The first drawback of videoconferencing is the lack of access and experience with the technology. Often, court personnel do not have experience with videoconferencing equipment. The communication problems this creates in turn change the behavior of participants in the courtroom. It becomes difficult for defendants in detention to see, hear, and understand what taking place in court is; they may also be impressed or intimidated by being "on TV," and they may alter the way they would normally behave. Not all people are comfortable with communicating via videoconferencing.

A second drawback is the failure of equipment or technical problems associated with videoconferencing, which is detrimental to effective communication. Many systems are low quality and offer little or no interaction between client and lawyer, leading to reduced trust and obvious negative outcomes.

[29] Bellone, *supra* note 6.

Inferior, problematic videoconferencing yields inferior, problematic communication.

A third drawback is videoconferencing's inability to allow attorneys and clients to set an agenda in advance. Defense attorneys and clients must be able to meet ahead of time to discuss and strategize the issues of their case; this is not always the case in busy or disorganized Courts. Sometimes defense counsel is appointed just before the hearing. The information exchanged before a hearing or trial impacts what happens afterward. The defendant may, for example, be able to point out errors in the record or provide some illuminating piece of evidence that will assist his/her counsel. Often, private communication must occur immediately (as in a fast-paced bail hearing).

Yet another detriment of videoconferencing is a reduced opportunity for full participation among all users. Communications in the courtroom, whether privately or in open court, are complex. Studies show that the more complex the communication in court, the less effective the videoconferencing. Certainly, any medium that inhibits confident and consistent testimony between attorney and client must be viewed with caution. It is clear that the larger the audience, the more negative issues emerge with videoconferencing.

Lastly, users unfamiliar with videoconferencing communicate less effectively and could harm their cases by projecting themselves in a negative light. Child witnesses who testified via Closed-Circuit Television (CCTV) were viewed as less believable that those children who testified in person, despite the fact that they testified more accurately on TV. Surprisingly, witnesses on video were also viewed as less attractive, intelligent, accurate, and credible.

In Nangia, Perkins & Salerno (2020), the following are the cons of Zoom Court Hearings being broadcasted on YouTube:

**Control -** Judges cannot control a virtual courtroom the same way they can a real courtroom in terms of who is physically present, who is using a cell phone, who is talking to whom, who is coaching witnesses, etc.;

**Who Really Is Watching? -** In theory, anyone can walk into a real courtroom to watch a family law hearing, but the reality is that most people are not going to take the time from work, drive to court, find parking, go through security, etc., unless it is a very compelling reason;

**Protecting the Integrity of Testimony -** In trials/evidentiary hearings judges will usually sequester third-party witnesses in the hallway outside the courtroom, while With YouTube access and Zoom, sequestration and cell phone usage is much harder to enforce in so far as judges would not be able to tell if witnesses are being coached or using notes;

**Illegal Recordings -** YouTube is supposed to display a warning that the court hearings are not allowed to be recorded by the public – only courts are able to use the record feature on Zoom, nonetheless, realistically, courts have no way of knowing if third parties have illegally recorded the hearing on their cell phones;

**Disclosure of Confidential Information -** Litigants may need to share confidential financial, medical or personal information in family law hearings – tax records, bank statements, CPS reports, psychological evaluations, etc. and in a case documents are being introduced into evidence through Zoom's share screen feature, these will also be visible on YouTube;

**Safety in Domestic Violence Cases -** If parties are residing in the same home, it may be dangerous for domestic violence survivors to safely participate in court hearings;

**More Time and Expense** - As we all learn how to maneuver in this new virtual world, it takes attorneys and courts more time to prepare clients and exhibits; and

**Judging Witness Demeanor** - While some believe this technology gives judges a clearer line on judging witness demeanor, some believe it does not since judges may not be able to see a witness's body language such as shaky hands.[30]

In an exploratory study[31], the following are the noted concerns on videoconferencing, namely:

1. Trust in the Attorney-Client Relationship;
2. Less Communication;
3. Private Communication in the Attorney-Client Relationship;
4. Technical Problems;
5. Perception of Justice;
6. Distraction;
7. Relevancy;
8. Training;
9. Standardized Rules;
10. Criminal and Civil Actions; and
11. Administrative Hearings.

**Trust in the Attorney-Client Relationship.** It was made clear that a trusting relationship is necessary for effective representation. Regular contact, especially personal contact when both attorney and defendant stand together in court, was deemed very important in establishing trust. Building trust is created by personal contact between attorney and client, but also by establishing a defendant's faith in the legal system overall.

**Less Communication.** There is less communication as videoconferencing does not permit attorneys to sit with the defendant before pretrial hearings, exchange a few words in court before formal proceedings begin, or offer private words immediately after the hearing. Such communication was not

[30] Poulin, *supra* note 16.
[31] Bellone, *supra* note 6.

possible or, even, if possible, were not private given the public nature of videoconferencing.

**Private Communication in the Attorney-Client Relationship.** Most attorneys voiced the necessity of private communication to the attorney-client relationship, at all times, specifically in the courtroom. Private communication is the cornerstone of the relationship; as such, communication is covered under the privilege of communication between attorney and client. Trial strategy, often an evolving and complex set of issues based on pretrial hearings and evidence, becomes less effective if private communication is not achieved. This basic issue is a huge problem with the use of videoconferencing.

**Technical Problems.** Most attorneys have experienced technical problems with videoconferencing. Defense attorneys believe that these problems occur to the detriment of their clients. Attorneys believe that defendants become frustrated and demoralized by technical problems, which makes their jobs of representations much harder. Further, technical problems inhibited the communication between attorney and defendant, hampering the attorney's ability to counsel and/or comfort clients while the technical problems were being resolved.

**Perception of Justice.** Videoconferencing created a defendant's perception that they were not getting justice. Defendants believe that videoconferencing is an unjust part of an unjust system, and that the benefits go to the court (in terms of efficiency) rather than in the protection of their rights. Videoconferencing is an attempt to fix a broken system, but the cure only added to the problem.

**Distractions.** Some attorneys believed that videoconferencing distracts from the more relevant facts of the case. In many pretrial hearings, the file offers more necessary information necessary to render a decision than does testimony or information offered by the attorney through the defendant. In these instances, the novelty of videoconferencing did more harm

than good. Attorneys who made this observation limited their view to more basic pretrial hearings such as arraignments or bail review hearings.

**Relevancy.** A minority of attorneys did not see the relevance of videoconferencing in a select group of pretrial hearings. They saw little or no need for the defendant's presence, either in person or via video.

**Trainings.** Attorneys expressed the universal view that training is required for clerks (or IT people) who administer videoconferencing. The prevalent view is that the administrators must be trained to properly operate the technology as well as troubleshoot technical problems. Some attorneys also strongly suggest that judges and attorneys should be trained in the proper use of videoconferencing to ensure that the technology does not favor one side or the other. Some attorneys believe that training should begin in law school, to inform law students of the pros and cons of the technology and how to use it in accurately presenting evidence and testimony. Attorneys who are informed of the use of videoconferencing could coach their clients on the best way to present themselves via the medium.

**Standardized Rules.** Another universal view is that videoconferencing needs standardized rules. Standardized rules would present a more regularized procedure and remove the ad hoc administration of the medium.

**Civil/Criminal Actions.** Many attorneys opine that videoconferencing is better suited for civil rather than criminal actions. They cite the legal standard in decision-making (in a criminal case – beyond a reasonable doubt and in a civil case by a preponderance of the evidence) as the main reason for the difference. Criminal actions have a higher burden of proof, more stringent rules of procedure, and greater stakes in the outcomes/punishments.

**Administrative Hearings.** Most attorneys state that videoconferencing is admissible for administrative hearings.

Most administrative hearings are appealable to formal courts of law and the interviewees believe that any irregularities concerning videoconferencing could be cured through appeal.

In Bellone (2015)[32], to improve the use of videoconferencing in the Courts, there must be:

1. Installing/Upgrading Videoconferencing Equipment;
2. Training of Administrators and Attorneys;
3. Education in the Understanding of Videoconferencing and its Use in Trust Building;
4. Prioritizing Procedures for Private Communications Between Attorneys and Defendants;
5. Standardizing Rules of Procedure for the Use of Videoconferencing; and
6. Possibly Limiting the Use of Videoconferencing to Administrative and/or Civil Actions.

## METHODOLOGY

### Nature of Methodology Employed

The study utilizes the descriptive method which has for its general purpose of describing a phenomenon that existed. (Good, 1973) With this methodology, it will describe the nature of a situation as it exists at a time of the study and explores the course of a particular phenomenon. It will be utilized to discover facts, which could be the basis for professional judgment involving the description, recording, analysis and interpretation of what it is. (Travers, 1973)

The Descriptive method involves studying the conditions at different periods of time and evaluating the change or progress, which took place between the periods for any value it gives. The research was also normative because it utilized a set of survey instruments in determining the experience and perceptions of the stakeholders of the judicial system over videoconferencing

[32] WISCONSIN SUPREME COURT, *supra* note 7.

hearings based on different factors taking into consideration the advantages and disadvantages of such remote hearings.

## Scope and Limitations

The study was undertaken among the stakeholders of the judicial system such as the Court, Lawyers, and Party Litigants before the Regional Trial Courts in Metro Manila (NCJR) in both Civil and Criminal Actions. According to the Court Management Office of the Supreme Court, per its Videoconference Hearing Report (via Reports Portal Extract on November 5, 2022) for the period of May 2020 to October 2022, there were a total of 1,167,664 videoconference hearings conducted by the Regional Trial Courts in the National Capital Region, total of 1,073,844 are criminal cases and 89,784 are civil case.

In this study, simple random sampling is utilized to obtain best results representing the mainstream of the courts of jurisdiction in the Philippines. There are currently 398 Regional Trial Court Judges in the National Capital Judicial Region.

In determining the sample size, Slovin's Formula is used to calculate the sample size (n) given the population size (N) and a margin of error (e).

It is computed as:

$$n = N / (1+Ne2)$$

It is not possible to study the entire population of the Philippines in terms of the different stakeholders of the judicial system, thus, a smaller sample is taken using a random sampling technique amongst the Regional Trial Courts in Metro Manila, with reference to the number of Regional Trial Court Judges in the National Capital Judicial Region. With the use of Slovin's formula, the desired degree of accuracy will still be achieved.

The Slovin's Formula [x = N/(1+Ne2)] will be adopted with a 10% margin of error allowable for preliminary research of this kind.

For the Court, it shall refer to members of a Courts of Law who are in active participation in a videoconferencing hearing, namely: Presiding Judge, Branch Clerk of Court, Court Interpreter, Clerk in Charge, and Court Stenographer. For a better perspective on their viewpoint, Judges are separated from the Court Staff.

Using the Slovin's Formula [x = N/(1+Ne2)] and adopting a 10% margin of error allowable for preliminary research of this kind, there are 398 Regional Trial Court Judges in the National Capital Judicial Region, hence, based on the calculation (79.9197), 80 respondents for Regional Trial Court Judges in the National Capital Judicial Region will be the subject of the study and the questionnaires are to be accomplished accordingly. However, upon distribution of survey questionnaires to one hundred (100) Regional Trial Court Judges in the National Capital Judicial Region, only eighty (88) Regional Trial Court Judges in the National Capital Judicial Region responded. Upon careful evaluation of the survey questionnaires retrieved, all eighty-eight (88) were validated to have answered the survey questionnaire completely.

For the Court Staff, the survey questionnaire was distributed to 100 respondents in different Regional Trial Court within the National Capital Judicial Region, however, 82 respondents were distributed with the survey questionnaire but only sixty-six (66) were retrieved.

Meanwhile, for Lawyers, it refers to a member of the Philippine Bar who have participated in videoconferencing hearings before any Regional Trial Court in the National Capital Judicial Region for civil and criminal actions. Based on Statistics of existing IBP Chapters in Metro Manila, there are 27,930 lawyers; 9,475 for IBP Quezon City; 4,632 for IBP Makati; 4,310 for IBP RSM Chapter; 2,499 for PPLM Chapter, 1,302 for Calmana Chapter; 790

for Manila I Chapter; 947 for Manila II Chapter; and 1,462 for Manila III Chapter.

One hundred (100) survey questionnaires were distributed randomly to different lawyers appearing before the Regional Trial Courts within the National Capital Judicial Region and out of the retrieved survey questionnaires, only fifty-five (55) survey questionnaires were validated to be complete in answers.

On the other hand, Party Litigants should either refer to plaintiff or defendant to an existing civil action and have actually participated in a videoconferencing hearing conducted by any Regional Trial Court in Metro Manila. One hundred (100) survey questionnaires were distributed randomly and out of the retrieved survey questionnaires, only seventeen (17) survey questionnaires were validated to be complete in answers. However, the researcher conducted a re-survey of the questionnaires to additional fifty (50) party litigants respondents. Upon validation, an additional thirty-one (31) respondents were duly accounted, hence, the total respondents for party litigants totaled, forty eight (48) respondents.

**Particular Sources of Empirical Data**

There is only one set of survey questionnaires for the Court (Judges and Court Staff), Lawyers and Party Litigants. The survey questionnaire was validated by showing the first draft to a statistician to know if the construction of the set of questions and the proposed measurement can be treated statistically. After securing the comments of the statistician, the questionnaire was shown to selected representatives of the respondent Courts, Lawyers and Party Litigants for technical comments regarding the terminologies and operational matters indicated therein. After which, the proponent submitted the questionnaire to the adviser and panel members for comments and approval.

Upon validation, the proponent conducted a pre-test survey to at least ten (10) Regional Trial Court Judges, ten (10) Court Staff within the National Capital Judicial Region, ten (10)

Lawyers, and ten (10) party-litigants, which were not included in the list of participants. The dry run for the survey was determinative on whether the questionnaire can be easily understood by the respondents.

The results determined the validity of the questionnaire but, the validity index of each item of the questionnaire, with low correlation coefficient, will serve as basis to improve the items in the questionnaire. For internal consistency, the result will be subjected to validation statistics – Cronbach's Alpha.

To compute Cronbach's alpha:

$$\alpha = \frac{N \cdot \bar{c}}{\bar{v} + (N-1) \cdot \bar{c}}$$

Here N is equal to the number of items, c-bar is the average inter-item covariance among the items and v-bar equals the average variance.

**Table 1**
**Reliability Analysis Results**

| Variable | Cronbach $\alpha$ | Remarks |
|---|---|---|
| Advantages of Videoconferencing Hearings | 0.904 | All items are reliable |
| Disadvantages of Videoconferencing Hearings | 0.902 | All items are reliable |

The validated and revised questionnaire was distributed to the targeted participants of the study. The proponent collected all accomplished questionnaire and carefully reviewed and tabulated the responses of the respondents.

The study capitalized on the powers of SPSS version 17. Descriptive Statistics generated the basic information needed. Then, advance multivariate portion of the SPSS program was used in the validation of the questionnaire (Cronbach's alpha).

**Frequency and Percentage.** The profile of the respondents will be shown in frequency and together with the percentage of responses, the inferences will be drawn on the basis of the differences observe in the frequency and percentage distribution of data. The Percentage, also known as relative frequency, will be utilized to describe frequency of responses against the total number of respondents of the study. It will present the ratios of the information. However, the individual quotients will be multiplied by 100 to transform them into the per centum per hundred bases. The total number of cases is the base. Hence, percentage is ratio multiplied by 100.

The formula is:

$$\text{Percentage} = (f/n)\ 100$$

Where:

$f$ = frequency of scores
$n$ = total number of all cases

**Mean.** This measure of central tendency will be used to show the average of the variables used and will be solved using the formula:

$$\bar{X} = X + \frac{(\Sigma fd)}{Ni}$$

Where:

$\bar{X}$ = the mean
$X$ = the midpoint of the assumed mean
$f$ = the frequency of the assumed mean
$d$ = the deviation of the range
$\Sigma fd$ = the sum of the product of the frequencies and the deviations
$I$ = the interval of each range

5-Point Likert Scale below will be used:

| VALUES | RANGE | DESCRIPTION |
|---|---|---|
| 5 | 4.21 – 5.00 | Always True |
| 4 | 3.41 – 4.20 | Often |
| 3 | 2.61 – 3.40 | Sometimes |
| 2 | 1.81 – 2.60 | Rarely |
| 1 | 1.00 – 1.80 | Never |

Further, during the period of documentary analysis, the proponent likewise noted the comments of the respondents over the conduct of video conference hearings, noting its advantages and disadvantages.

## PRESENTATION, ANALYSIS AND DISCUSSION

### Profile of Respondents

The study identified the profile of the respondents, as Judges, Court Staff, Lawyers and Party-Litigant, and particularly identified their respective gender.

**Table 2**
**Profile of Respondents**

| Court-User Role | Frequency | Percent |
|---|---|---|
| Court Staff | 66 | 25.7 |
| Judge | 88 | 34.2 |
| Lawyer | 55 | 21.4 |
| Party-Litigant | 48 | 18.7 |
| **Total** | **257** | **100.0** |

| Sex | Frequency | Percent |
|---|---|---|
| Female | 171 | 66.8 |
| Male | 86 | 33.2 |
| **Total** | **257** | **100.0** |

As shown in Table 1, ranging with the highest frequency and percentage, eighty-eight (88) out of Two Hundred Fifty-Seven (257) or about 34.2% are Judges, while Sixty-Six (66) or about 25.7% are Court Staff. Fifty-Five (55) or about 21.4% are Lawyers

and Forty-Eight (48) or about 18.7% are Party-Litigants. In reference to their gender, One Hundred Seventy-One (171) out of Two Hundred Fifty-Seven (257) or about 66.8% are Female, while Eighty Six (86) or about 33.2% are Male Respondents.

## Advantages and Disadvantages of Videoconferencing Hearings

A vital concern of the study was to identify the Advantages and Disadvantages of Videoconferencing Hearings from the viewpoint of the stakeholders of the judicial system in the conduct of videoconferencing hearings, are there existing issues, gaps and areas of concern insofar as Judges, Court Staff, Lawyers and Party-Litigants.

## Advantages of Videoconferencing Hearings for Judges

**Table 3**
**Advantages of Videoconferencing Hearings for Judges**

| ADVANTAGES OF VIDEOCONFERENCING HEARINGS | Mean | Description |
|---|---|---|
| 1. They save time or resources for litigants | 3.92 | Often |
| 2. They save time or resources for lawyers | 3.82 | Often |
| 3. They save time or resources for the Court | 3.49 | Often |
| 4. They allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public | 4.36 | Always True |
| 5. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices | 4.20 | Often |

| | | |
|---|---|---|
| 6. They allow proper reception of documentary and object evidence. | 2.72 | Sometimes |
| 7. They assure the credibility over video testimony | 2.85 | Sometimes |
| 8. They protect the attorney-client communication and relationship | 2.98 | Sometimes |
| 9. They help end cases more quickly | 3.28 | Sometimes |
| 10. They make proceedings more broadly and easily available to the public | 3.25 | Sometimes |

Table 3 shows the Judges' assessment as regards the Advantages of Videoconferencing Hearings. It obtained a mean value of 3.92 if they save time or resources for litigants, a mean value of 3.82 for lawyers and a mean value of 3.49 for the Court. Insofar as allowance for appearance remotely for safety, it derived a mean value of 4.36. For convenience to litigants, it garnered a mean value of 4.20, while it obtained a mean value of 2.72 for over allowance of proper reception of evidence. With regard to assuring the credibility over video testimony, it acquired a mean value of 2.85 and as regards protection of the attorney-client communication and relationship, it obtained a mean value of 2.98. If they help end cases more quickly, it has a mean value of 3.28 and if they make proceedings more broadly available to the public, it has a mean value of 3.25.

When referred to the mean value interpretation in Chapter 2, the mean values obtained for remote appearance for litigants, as an advantage of videoconferencing hearings, can be interpreted that it is Always True as per Judges' Assessment. However, for saving time or resources for litigants, lawyers, and courts, as well as convenience to litigants, it can be interpreted as Often Advantageous for Judges. Judges have seen as Sometimes Advantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean values obtained over allowance for proper reception of evidence; assuring credibility over video testimony; protection of attorney-client communication and relationship; ending cases more quickly; and making proceedings more broadly and easily available to the public.

From the results, it can be deduced that Judges firmly believes that the conduct of videoconferencing hearings allows appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public. Judges still agree that the conduct of videoconferencing hearings is still advantageous considering that it save time and resources for litigants, courts and lawyers with the convenience provided to Litigants who do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices. But judges are undecided insofar as the advantage of videoconferencing hearings over reception of evidence, credibility of video testimony, protection of attorney-client relationship and communication, ending cases more quickly and making proceedings more broadly available to the public.

Based on the perspective of the Judges, it can be gleaned that the topmost advantage of videoconferencing hearings is that they allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public.

## Disadvantages of Videoconferencing Hearings for Judges

**Table 4**
**Disadvantages of Videoconferencing Hearings for Judges**

| DISADVANTAGES OF VIDEO CONFERENCING HEARINGS | Mean | Description |
|---|---|---|
| 1. The online setting interferes with attorney-client confidentiality | 3.14 | Sometimes |
| 2. The online setting makes it difficult for the parties to present the case effectively | 3.53 | Often |
| 3. The online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility | 3.55 | Often |

| | | |
|---|---|---|
| 4. The online setting increases the potential of disregard to the integrity of the proceedings | 3.18 | Sometimes |
| 5. The online setting increase the risk of illegal recording | 3.63 | Often |
| 6. The online setting makes it more likely that sensitive information will be disclosed to the public | 3.31 | Sometimes |
| 7. The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints) | 3.77 | Often |
| 8. Frequent technology malfunction negatively affects the fairness of the proceeding | 3.68 | Often |
| 9. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings | 4.09 | Often |
| 10. The online setting makes it difficult for disabled defendants to participate in proceedings | 3.15 | Sometimes |

Table 4 shows the Judges' assessment as regards the Disadvantages of Videoconferencing Hearings. It obtained a mean value of 3.14 if videoconferencing hearings interferes with attorney-client confidentiality. A mean value of 3.53 was obtained over difficulty for presentation of case effectively while a mean value of 3.55 was garnered over the disadvantage of making it difficult for the parties to assess and challenge witness credibility. Insofar as the increase of potential disregard of the integrity of proceedings and risk of illegal recording, it derived a mean value of 3.18 and 3.63, respectively. For disclosure of sensitive information to the public and special challenges over preparation of paperwork, mean values of 3.31 and 3.77 were obtained. If frequent technology malfunction negatively affects the fairness of the proceeding, it garnered a mean value of 3.68. With regard to difficulty of access of technology by indigents and participation of disabled defendants, a mean value of 4.09 and 3.15 were obtained.

When referred to the mean value interpretation in Chapter 2, the mean values for 1. Difficulty to present Case; 2. Difficulty to challenge witness credibility; 3. Increase of risk of illegal recording; 4. Special challenges in obtaining paperwork; 5. Frequent technology malfunction; and 6. Difficulty of access to technology of indigents, derived an interpretation of "Often" as disadvantageous in the conduct of videoconferencing hearings. As per Judges' assessment, Judges have seen as Sometimes disadvantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean values obtained over: 1. Interference with attorney-client confidentiality; 2. Increase of disregard of integrity of the proceedings; 3. Likelihood of disclosure of sensitive information to the public; and 4. Making it difficult for the disabled to participate.

From the results, it can be deduced that Judges opined that the conduct of videoconferencing hearings is still disadvantageous as regards presentation of the case, how to challenge the witness, risk of illegal recording, special challenges over paperwork and access of indigents to technology. Judges neither agree nor disagree that the conduct of videoconferencing hearings will have interference with attorney-client confidentiality, increase of disregard of integrity of the proceedings, likelihood of disclosure of sensitive information to the public and making it difficult for the disabled to participate.

Based on the Table, it showed that the most concern of Judges, as a disadvantage over the conduct of videoconferencing hearings, is that indigent defendants have difficulty accessing the technology necessary to take part in online proceedings.

**<u>Advantages and Disadvantages of Videoconferencing Hearings for Judges</u>**

**Table 5**

**Advantages and Disadvantages of Videoconferencing Hearings for Judges**

| Indicator | Mean | Description |
|---|---|---|
| **Advantages of Videoconferencing Hearings** | 3.38 | Sometimes |
| **Disadvantages of Videoconferencing Hearings** | 3.49 | Often |

Overall, Table 5 shows that Judges neither agree nor disagree that it is advantageous to conduct videoconferencing hearings. But respondent Judges opined that the conduct of videoconferencing hearings is disadvantageous.

**<u>Advantages of Videoconferencing Hearings for Court Staff</u>**

**Table 6**
**Advantages of Videoconferencing Hearings for Court Staff**

| ADVANTAGES OF VIDEOCONFERENCING HEARINGS | Mean | Description |
|---|---|---|
| 1. They save time or resources for litigants | 4.30 | Always True |
| 2. They save time or resources for lawyers | 4.23 | Always True |
| 3. They save time or resources for the Court | 4.14 | Often |
| 4. They allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public | 4.70 | Always True |
| 5. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices | 4.53 | Always True |
| 6. They allow proper reception of documentary and object evidence. | 3.11 | Sometimes |

| | | |
|---|---|---|
| 7. They assure the credibility over video testimony | 3.55 | Often |
| 8. They protect the attorney-client communication and relationship | 3.68 | Often |
| 9. They help end cases more quickly | 3.86 | Often |
| 10. They make proceedings more broadly and easily available to the public | 3.82 | Often |

Table 6 shows the Court Staff's assessment as regards the Advantages of Videoconferencing Hearings. It obtained a mean value of 4.30 if they save time or resources for litigants, a mean value of 4.23 for lawyers and a mean value of 4.14 for the Court. Insofar as allowance for appearance remotely for safety, it derived a mean value of 4.70. For convenience to litigants, it garnered a mean value of 4.53, while it obtained a mean value of 3.11 over allowance of proper reception of evidence. With regard to assuring the credibility over video testimony, it acquired a mean value of 3.55 and as regards protection of the attorney-client communication and relationship, it obtained a mean value of 3.68. If they help end cases more quickly, it has a mean value of 3.86 and if they make proceedings more broadly available to the public, it has a mean value of 3.82.

When referred to the mean value interpretation in Chapter 2, the mean values obtained for remote appearance for litigants' convenience to litigants, saving time for litigants and lawyers, all as advantages of videoconferencing hearings, it can be interpreted that it is Always True as per Court Staff's Assessment. However, for saving time or resources for courts, credibility over video testimony, protection of attorney-client communication and relationship and making proceedings more broadly and easily available to the public, it can be interpreted as Often Advantageous for Court Staff. Court Staff have seen as Sometimes Advantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean value obtained over allowance for proper reception of evidence.

From the results, it can be deduced that Court Staff firmly believes that the conduct of videoconferencing hearings allows remote appearance for litigant's convenience to litigants, saving

time for litigants and lawyers. Court staff still agree that it is still advantageous insofar as saving time or resources for courts, credibility over video testimony, protection of attorney-client communication and relationship and making proceedings more broadly and easily available to the public. However, Court Staff are uncertain insofar as the aspect of allowance for proper reception of evidence.

As per Court Staff, the top amongst the advantages of the conduct of videoconferencing is that they allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public.

## Disadvantages of Videoconferencing Hearings for Court Staff

**Table 7**
**Disadvantages of Videoconferencing Hearings for Court Staff**

| DISADVANTAGES OF VIDEO CONFERENCING HEARINGS | Mean | Description |
|---|---|---|
| 1. The online setting interferes with attorney-client confidentiality | 3.26 | Sometimes |
| 2. The online setting makes it difficult for the parties to present the case effectively | 3.42 | Often |
| 3. The online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility | 3.47 | Often |
| 4. The online setting increases the potential of disregard to the integrity of the proceedings | 2.98 | Sometimes |
| 5. The online setting increase the risk of illegal recording | 3.77 | Often |
| 6. The online setting makes it more likely that sensitive information will be disclosed to the public | 3.53 | Often |
| 7. The online proceedings present special challenges in obtaining or | 3.91 | Often |

| | | |
|---|---|---|
| preparing the relevant paperwork (e.g. signatures, fingerprints) | | |
| 8. Frequent technology malfunction negatively affects the fairness of the proceeding | 3.55 | Often |
| 9. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings | 3.97 | Often |
| 10. The online setting makes it difficult for disabled defendants to participate in proceedings | 3.29 | Sometimes |

Table 7 shows the Court Staff's assessment as regards the Disadvantages of Videoconferencing Hearings. It obtained a mean value of 3.26 if videoconferencing hearings interferes with attorney-client confidentiality. A mean value of 3.42 was obtained over difficulty for presentation of case effectively while a mean value of 3.47 was garnered over the disadvantage of making it difficult for the parties to assess and challenge witness credibility. Insofar as the increase of potential disregard of the integrity of proceedings and risk of illegal recording, it derived a mean value of 2.98 and 3.77, respectively. For disclosure of sensitive information to the public and special challenges over preparation of paperwork, mean values of 3.53 and 3.91 were obtained. If frequent technology malfunction negatively affects the fairness of the proceeding, it garnered a mean value of 3.55. With regard to difficulty of access of technology by indigents and participation of disabled defendants, a mean value of 3.97 and 3.29 were obtained.

When referred to the mean value interpretation in Chapter 2, the mean values for 1. Difficulty to present Case; 2. Difficulty to challenge witness credibility; 3. Increase of risk of illegal recording; 4. Likelihood of disclosure of sensitive information to the public; 5. Special challenges in obtaining paperwork; 6. Frequent technology malfunction; and 7. Difficulty of access to technology of indigents, derived an interpretation of "Often" as disadvantageous in the conduct of videoconferencing hearings. As per Court Staff's assessment, the respondents have seen as

Sometimes disadvantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean values obtained over: 1. Interference with attorney-client confidentiality; 2. Increase of disregard of integrity of the proceedings; and 3. Making it difficult for the disabled to participate.

From the results, it can be deduced that Court Staff opined that the conduct of videoconferencing hearings is still disadvantageous as regards presentation of the case, how to challenge the witness, risk of illegal recording, likelihood of disclosure of sensitive information to the public, special challenges over paperwork and access of indigents to technology. Court Staff neither agree nor disagree that the conduct of videoconferencing hearings will interference with attorney-client confidentiality, increase of disregard of integrity of the proceedings, and making it difficult for the disabled to participate.

Based on the Table, it showed that the most concern of Court Staff, as a disadvantage over the conduct of videoconferencing hearings, is that indigent defendants have difficulty accessing the technology necessary to take part in online proceedings.

**Advantages and Disadvantages of Videoconferencing Hearings for Court Staff**

**Table 8**
**Advantages and Disadvantages of Videoconferencing Hearings for Court Staff**

| Indicator | Mean | Description |
|---|---|---|
| **Advantages of Videoconferencing Hearings** | 3.91 | Often |
| **Disadvantages of Videoconferencing Hearings** | 3.50 | Often |

Overall, Table 8 shows that Court Staff agree that the conduct of videoconferencing hearings has advantages and disadvantages.

## Advantages of Videoconferencing Hearings for Lawyers

**Table 9**
**Advantages of Videoconferencing Hearings for Lawyers**

| ADVANTAGES OF VIDEOCONFERENCING HEARINGS | Mean | Description |
|---|---|---|
| 1. They save time or resources for litigants | 4.09 | Often |
| 2. They save time or resources for lawyers | 4.15 | Often |
| 3. They save time or resources for the Court | 3.95 | Often |
| 4. They allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public | 4.62 | Always True |
| 5. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices | 4.51 | Always True |
| 6. They allow proper reception of documentary and object evidence. | 3.05 | Sometimes |
| 7. They assure the credibility over video testimony | 3.16 | Sometimes |
| 8. They protect the attorney-client communication and relationship | 3.51 | Often |
| 9. They help end cases more quickly | 3.65 | Often |
| 10. They make proceedings more broadly and easily available to the public | 3.40 | Sometimes |

Table 9 shows the Lawyer's assessment as regards the Advantages of Videoconferencing Hearings. It obtained a mean value of 4.09 if they save time or resources for litigants, a mean value of 4.15 for lawyers and a mean value of 3.95 for the Court. Insofar as allowance for appearance remotely for safety, it derived a mean value of 4.62. For convenience to litigants, it garnered a mean value of 4.51, while it obtained a mean value of 3.05 over allowance of proper reception of evidence. With regard to assuring the credibility over video testimony, it acquired a mean value of 3.16 and as regards protection of the attorney-client communication and relationship, it obtained a mean value of 3.51. If they help end cases more quickly, it has a mean value of 3.65 and if they make proceedings more broadly available to the public, it has a mean value of 3.40.

When referred to the mean value interpretation in Chapter 2, the mean values obtained for remote appearance for litigants and convenience to litigants, it can be interpreted that it is Always True as per Lawyer's Assessment. However, for saving time or resources for litigants, lawyers and courts, as well as protection of attorney-client communication and relationship, and ending cases quickly, it can be interpreted as Often Advantageous for Lawyers. Lawyers have seen as Sometimes Advantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean value obtained over allowance for proper reception of evidence, assuring credibility over video testimony and making proceedings broadly available to the public.

From the results, it can be deduced that Lawyers firmly believes that the conduct of videoconferencing hearings allows remote appearance for litigants' convenience and convenience to litigants. Lawyers still agree that it is still advantageous insofar as saving time or resources for litigants, lawyers and courts, as well as protection of attorney-client communication and relationship, and ending cases quickly. However, Lawyers are uncertain insofar as the aspect of allowance for proper reception of evidence, assuring credibility over video testimony and making proceedings more broadly and easily available to the public.

It is shown in the Table above that Lawyers believe that the topmost advantage of the conduct of videoconferencing hearings is that they allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public.

## Disadvantages of Videoconferencing Hearings for Lawyers

**Table 10**
**Disadvantages of Videoconferencing Hearings for Lawyers**

| DISADVANTAGES OF VIDEO CONFERENCING HEARINGS | Mean | Description |
|---|---|---|
| 1. The online setting interferes with attorney-client confidentiality | 2.73 | Sometimes |
| 2. The online setting makes it difficult for the parties to present the case effectively | 3.47 | Often |
| 3. The online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility | 3.47 | Often |
| 4. The online setting increases the potential of disregard to the integrity of the proceedings | 3.96 | Often |
| 5. The online setting increase the risk of illegal recording | 3.71 | Often |
| 6. The online setting makes it more likely that sensitive information will be disclosed to the public | 3.24 | Sometimes |
| 7. The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints) | 3.75 | Often |
| 8. Frequent technology malfunction negatively affects the fairness of the proceeding | 3.65 | Often |
| 9. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings | 3.85 | Often |

| | | |
|---|---|---|
| 10. The online setting makes it difficult for disabled defendants to participate in proceedings | 3.36 | Sometimes |

Table 10 shows the Lawyers' assessment as regards the Disadvantages of Videoconferencing Hearings. It obtained a mean value of 2.73 if videoconferencing hearings interferes with attorney-client confidentiality. A mean value of 3.47 was obtained over difficulty for presentation of case effectively while a mean value of 3.47 was garnered over the disadvantage of making it difficult for the parties to assess and challenge witness credibility. Insofar as the increase of potential disregard of the integrity of proceedings and risk of illegal recording, it derived a mean value of 3.96 and 3.71, respectively. For disclosure of sensitive information to the public and special challenges over preparation of paperwork, mean values of 3.24 and 3.75 were obtained. If frequent technology malfunction negatively affects the fairness of the proceeding, it garnered a mean value of 3.65. With regard to difficulty of access of technology by indigents and participation of disabled defendants, a mean value of 3.85 and 3.36 were obtained.

When referred to the mean value interpretation in Chapter 2, the mean values for 1. Difficulty to present Case; 2. Difficulty to challenge witness credibility; 3. Increase of risk of illegal recording; 4. Increase of disregard of integrity of the proceedings; 5. Special challenges in obtaining paperwork; 6. Frequent technology malfunction; and 7. Difficulty of access to technology of indigents, derived an interpretation of "Often" as disadvantageous in the conduct of videoconferencing hearings. As per Lawyers' assessment, the respondents have seen as Sometimes disadvantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean values obtained over: 1. Interference with attorney-client confidentiality; 2. Likelihood of disclosure of sensitive information to the public; and 3. Making it difficult for the disabled to participate.

From the results, it can be deduced that Lawyers opined that the conduct of videoconferencing hearings is still disadvantageous as regards presentation of the case, how to challenge the witness, increase of disregard of integrity of the proceedings, risk of illegal recording, special challenges over paperwork and access of indigents to technology. Lawyers neither agree nor disagree that the conduct of videoconferencing hearings will interference with attorney-client confidentiality, likelihood of disclosure of sensitive information to the public, and making it difficult for the disabled to participate.

From the Table, it can be deduced that Lawyers are more concern on the fact that online setting increases the potential of disregard to the integrity of the proceedings.

**Advantages and Disadvantages of Videoconferencing Hearings for Lawyers**

**Table 11**
**Advantages and Disadvantages of Videoconferencing Hearings for Lawyers**

| Indicator | Mean | Description |
|---|---|---|
| **Advantages of Videoconferencing Hearings** | 3.71 | Often |
| **Disadvantages of Videoconferencing Hearings** | 3.38 | Sometime |

Overall, Table 11 shows that Lawyers opined that the conduct of videoconferencing hearings is advantageous, and they are uncertain as to whether the conduct of videoconferencing hearings has disadvantages.

**Advantages of Videoconferencing Hearings for Party Litigants**

**Table 12**

## Advantages of Videoconferencing Hearings for Party Litigants

| ADVANTAGES OF VIDEOCONFERENCING HEARINGS | Mean | Description |
|---|---|---|
| 1. They save time or resources for litigants | 4.36 | Always True |
| 2. They save time or resources for lawyers | 4.3 | Always True |
| 3. They save time or resources for the Court | 4.18 | Often |
| 4. They allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public | 4.5 | Always True |
| 5. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices | 4.5 | Always True |
| 6. They allow proper reception of documentary and object evidence. | 4.0 | Often |
| 7. They assure the credibility over video testimony | 3.78 | Often |
| 8. They protect the attorney-client communication and relationship | 3.98 | Often |
| 9. They help end cases more quickly | 3.90 | Often |
| 10. They make proceedings more broadly and easily available to the public | 3.78 | Often |

Table 12 shows the Party Litigants' assessment as regards the Advantages of Videoconferencing Hearings. It obtained a mean value of 4.36 if they save time or resources for litigants, a mean value of 4.3 for lawyers and a mean value of 4.18 for the Court. Insofar as allowance for appearance remotely for safety, it derived a mean value of 4.5. For convenience to litigants, it garnered a mean value of 4.5, while it obtained a mean value of 4.00 over

allowance of proper reception of evidence. With regard to assuring the credibility over video testimony, it acquired a mean value of 3.78 and as regards protection of the attorney-client communication and relationship, it obtained a mean value of 3.98. If they help end cases more quickly, it has a mean value of 3.90 and if they make proceedings more broadly available to the public, it has a mean value of 3.78.

When referred to the mean value interpretation in Chapter 2, the mean values obtained for remote appearance for litigants and convenience to litigants, as well as saving time or resources for the litigants and lawyers, it can be interpreted that it is Always True as per Party Litigants' Assessment. However, for saving time or resources for courts, as well as protection of attorney-client communication and relationship, ending cases quickly, over allowance for proper reception of evidence, assuring credibility over video testimony and making proceedings broadly available to the public, it can be interpreted as Often Advantageous for Party Litigants.

From the results, it can be deduced that Party Litigants firmly believe that the conduct of videoconferencing hearings allows remote appearance for litigants' convenience and convenience to litigants, as well as saving time or resources for the litigants and lawyers. Party Litigants still agree that it is still advantageous insofar saving time or resources for courts, as well as protection of attorney-client communication and relationship, ending cases quickly, over allowance for proper reception of evidence, assuring credibility over video testimony and making proceedings broadly available to the public.

For Party Litigants, it is shown in the Table above that they believe that the top most advantage of the conduct of videoconferencing hearings is that they allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public, and as well that they provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices.

## Disadvantages of Videoconferencing Hearings for Party Litigants

**Table 13**
**Disadvantages of Videoconferencing Hearings for Party Litigants**

| DISADVANTAGES OF VIDEO CONFERENCING HEARINGS | Mean | Description |
|---|---|---|
| 1. The online setting interferes with attorney-client confidentiality | 4.15 | Often |
| 2. The online setting makes it difficult for the parties to present the case effectively | 2.90 | Sometimes |
| 3. The online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility | 3.10 | Sometimes |
| 4. The online setting increases the potential of disregard to the integrity of the proceedings | 2.91 | Sometimes |
| 5. The online setting increase the risk of illegal recording | 4.00 | Often |
| 6. The online setting makes it more likely that sensitive information will be disclosed to the public | 3.40 | Sometimes |
| 7. The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints) | 3.15 | Sometimes |
| 8. Frequent technology malfunction negatively affects the fairness of the proceeding | 3.51 | Often |
| 9. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings | 4.01 | Often |
| 10. The online setting makes it difficult for disabled defendants to participate in proceedings | 3.20 | Sometimes |

Table 13 shows the Party Litigants' assessment as regards the Disadvantages of Videoconferencing Hearings. It obtained a mean value of 4.15 if videoconferencing hearings interferes with attorney-client confidentiality. A mean value of 2.90 was obtained over difficulty for presentation of case effectively while a mean value of 3.10 was garnered over the disadvantage of making it difficult for the parties to assess and challenge witness credibility. Insofar as the increase of potential disregard of the integrity of proceedings and risk of illegal recording, it derived a mean value of 2.91 and 4.00, respectively. For disclosure of sensitive information to the public and special challenges over preparation of paperwork, mean values of 3.40 and 3.15 were obtained. If frequent technology malfunction negatively affects the fairness of the proceeding, it garnered a mean value of 3.51. With regard to difficulty of access of technology by indigents and participation of disabled defendants, a mean value of 4.01 and 3.20 were obtained.

When referred to the mean value interpretation in Chapter 2, the mean values for 1. Interference with attorney-client confidentiality; 2. Increase of risk of illegal recording; 3. Frequent technology malfunction; and 4. Difficulty of access to technology of indigents, derived an interpretation of "Often" as disadvantageous in the conduct of videoconferencing hearings. As per Party Litigants' assessment, the respondents have seen as Sometimes disadvantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean values obtained over: 1. Difficulty to present Case; 2. Difficulty to challenge witness credibility; 3. Likelihood of disclosure of sensitive information to the public; 4. Increase of disregard of integrity of the proceedings; 5. Special challenges in obtaining paperwork; and 6. Making it difficult for the disabled to participate.

From the results, it can be deduced that Party Lawyers opined that the conduct of videoconferencing hearings is still disadvantageous insofar as its interferences with attorney-client confidentiality, increase of risk of illegal recording, frequent technology malfunction, and difficulty of access to technology of

indigents. Party Litigants neither agree nor disagree that the conduct of videoconferencing hearings will make it difficult to present the case, difficulty to challenge witness credibility, likelihood of disclosure of sensitive information to the public, increase of disregard of integrity of the proceedings, special challenges in obtaining paperwork, and making it difficult for the disabled to participate.

For Party Litigants, they believe that online setting interferes with attorney-client confidentiality.

**Advantages and Disadvantages of Videoconferencing Hearings for Party Litigants**

**Table 14**
**Advantages and Disadvantages of Videoconferencing Hearings for Party Litigants**

| Indicator | Mean | Description |
|---|---|---|
| **Advantages of Videoconferencing Hearings** | 4.10 | Often |
| **Disadvantages of Videoconferencing Hearings** | 3.20 | Sometime |

Overall, Table 14 shows that Party Litigants, same as lawyers, opined that the conduct of videoconferencing hearings is advantageous, and they are uncertain as to whether the conduct of videoconferencing hearings has disadvantages.

**Comparison of Assessment over Advantages of Videoconferencing Hearings**

**Table 15**
**Comparison of Assessment over Advantages of Videoconferencing Hearings**

| ADVANTAGES OF VIDEOCONFERENCING HEARINGS | JUDGES | COURT STAFF | LAWYERS | PARTY LITIGANT |
|---|---|---|---|---|
| 1. They save time or resources for litigants | Often | Always True | Often | Always True |
| 2. They save time or resources for lawyers | Often | Always True | Often | Always True |
| 3. They save time or resources for the Court | Often | Often | Often | Often |
| 4. They allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public | Always True | Always True | Always True | Always True |
| 5. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices | Often | Always True | Always True | Always True |
| 6. They allow proper reception of documentary and object evidence. | Someti mes | Sometim es | Sometimes | Often |
| 7. They assure the credibility over video testimony | Someti mes | Often | Sometimes | Often |
| 8. They protect the attorney-client | Someti mes | Often | Often | Often |

| | | | | |
|---|---|---|---|---|
| communication and relationship | | | | |
| 9. They help end cases more quickly | Sometimes | Often | Often | Often |
| 10. They make proceedings more broadly and easily available to the public | Sometimes | Often | Sometimes | Often |

Table 15 Shows that all the respondents, as stakeholders of the judicial system, strongly agree that the conduct of videoconferencing hearings allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public. Also, except for judges, respondents likewise strongly agree that the videoconferencing hearings provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices.

Insofar as saving time or resources for the litigants and lawyers, both Court Staff and Party Litigants strongly agree, while both Judges and Lawyers merely agree to such advantage. However, all respondents likewise agree that it likewise save time or resource for the courts.

Based on the Table above, all respondents, except for Judges, agree that the attorney-client communication and relationship is still protected, and the fact that videoconferencing hearings help end cases more quickly. Both Judges and Lawyers are uncertain as to the advantage of videoconferencing hearings as regards assuring the credibility over video testimony and making more proceedings broadly and easily available to the public.

All respondents, except party litigants, share the same sentiment as they neither agree nor disagree that videoconferencing hearings allows proper reception of documentary and object evidence.

**Comparison of Assessment over Disadvantages of Videoconferencing Hearings**

**Table 16**
**Comparison of Assessment over Disadvantages of Videoconferencing Hearings**

| DISADVANTAGES OF VIDEO CONFERENCING HEARINGS | JUDGES | COURT STAFF | LAWYERS | PARTY LITIGANTS |
|---|---|---|---|---|
| 1. The online setting interferes with attorney-client confidentiality | Sometimes | Sometimes | Sometimes | Often |
| 2. The online setting makes it difficult for the parties to present the case effectively | Often | Often | Often | Sometimes |
| 3. The online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility | Often | Often | Often | Sometimes |
| 4. The online setting increases the potential of disregard to the integrity of the proceedings | Sometimes | Sometimes | Often | Sometimes |
| 5. The online setting increase the risk of illegal recording | Often | Often | Sometimes | Often |
| 6. The online setting makes it more likely that sensitive information will be disclosed to the public | Sometimes | Often | Often | Sometimes |

| | | | | |
|---|---|---|---|---|
| 7. The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints) | Often | Often | Often | Sometimes |
| 8. Frequent technology malfunction negatively affects the fairness of the proceeding | Often | Often | Often | Often |
| 9. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings | Often | Often | Often | Often |
| 10. The online setting makes it difficult for disabled defendants to participate in proceedings | Sometimes | Sometimes | Sometimes | Sometimes |

Table 16 shows that all the respondents agree that frequent technology malfunction and difficulty of indigent to access technology are the disadvantages of videoconferencing hearings. All of the respondents are uncertain as to whether it is difficult for disabled defendants to appear during videoconferencing hearings.

All respondents, except for Party Litigants, share the assessment that, with videoconferencing hearings, it is still difficult to present the case effectively, to assess and challenge the witness, and there are special challenges in obtaining and preparing the relevant paperwork.

To the exclusion of Lawyer, all respondents are uncertain as to whether the online setting increases the potential of disregard to the integrity of the proceedings. On the other hand, only Lawyers expressed their view towards the uncertainty over increase the risk of illegal recording, while the other respondents conveyed their concurrence that such risk exists.

Based on the Table above, only party litigants opined that the conduct of videoconferencing hearings interferes with the attorney-client relationship. Meanwhile, both Court Staff and Lawyers agree that online setting makes it more likely that sensitive information will be disclosed to the public, however, Judges and Party Litigants share their uncertainty over the matter.

## Issues and Concerns on the Conduct of Videoconferencing Hearings

One of the objectives of the study is to review the current practices on videoconferencing adopted by different courts of jurisdiction and accordingly, identify the different issues and areas of concerns on the conduct of videoconferencing hearings. Such practices, issues and concerns will be best identified by identifying the top advantages and disadvantages garnering the highest mean values.

## Top Advantages of Videoconferencing Hearings for Judges

**Table 17**
**Top Advantages of Videoconferencing Hearings (Judges)**

| ADVANTAGES OF VIDEOCONFERENCING HEARINGS | MEAN |
|---|---|
| They allow appearance remotely thereby reducing potential threats to the safety of court personnel, | 4.36 |

| | |
|---|---|
| corrections staff, victims, witnesses, and the public | |
| They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices | 4.20 |
| They save time or resources for litigants | 3.92 |
| They save time or resources for lawyers | 3.82 |
| They save time or resources for the Court | 3.49 |

As shown in Table 17, Judges, as per mean values, ranked the advantages in the following manner: 1. They allow appearance remotely thereby reducing potential threats to the safety of the court personnel, corrections staff, victims, witnesses and the public; 2. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices; 3. They save time or resources for litigants; 4. They save time or resources for lawyers; and 5. They save time or resources for the Court.

**Top Disadvantages of Videoconferencing Hearings for Judges**

**Table 18**
**Top Disadvantages of Videoconferencing Hearings (Judges)**

| DISADVANTAGES OF VIDEOCONFERENCING HEARINGS | MEAN |
|---|---|
| Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings | 4.09 |

| | |
|---|---|
| The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints) | 3.77 |
| Frequent technology malfunction negatively affects the fairness of the proceeding | 3.68 |
| The online setting increase the risk of illegal recording | 3.63 |
| The online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility | 3.55 |

It is shown in Table 17 that Judges, as per mean values, ranked the following as disadvantages, reflective of their concerns over the conduct of videoconferencing hearings, in the following manner: 1. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings; 2. The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints); 3. Frequent technology malfunction negatively affects the fairness of the proceeding; 4. The online setting increase the risk of illegal recording; and 5. The online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility.

## Top Advantages of Videoconferencing Hearings for Court Staff

**Table 19**
**Top Advantages of Videoconferencing Hearings (Court Staff)**

| ADVANTAGES OF VIDEOCONFERENCING HEARINGS | MEAN |
|---|---|
| They allow appearance remotely thereby reducing potential threats to the safety of court personnel, | 4.70 |

| | |
|---|---|
| corrections staff, victims, witnesses, and the public | |
| They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices | 4.53 |
| They save time or resources for litigants | 4.30 |
| They save time or resources for lawyers | 4.23 |
| They save time or resources for the Court | 4.14 |

As shown in Table 19, same with Judges as per mean values, Court Staff ranked the advantages in the following manner: 1. They allow appearance remotely thereby reducing potential threats to the safety of the court personnel, corrections staff, victims, witnesses and the public; 2. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices; 3. They save time or resources for litigants; 4. They save time or resources for lawyers; and 5. They save time or resources for the Court.

**Top Disadvantages of Videoconferencing Hearings for Court Staff**

**Table 20**
**Top Disadvantages of Videoconferencing Hearings**
**(Court Staff)**

| DISADVANTAGES OF VIDEOCONFERENCING HEARINGS | MEAN |
|---|---|
| Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings | 3.97 |

| | |
|---|---|
| The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints) | 3.91 |
| The online setting increase the risk of illegal recording | 3.77 |
| Frequent technology malfunction negatively affects the fairness of the proceeding | 3.55 |
| The online setting makes it more likely that sensitive information will be disclosed to the public | 3.53 |

As shown in Table 20, Court Staff, as per mean values, ranked and identified the following as disadvantages, reflective of their concerns over the conduct of videoconferencing hearings, in the following manner: 1. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings; 2. The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints); 3. The online setting increase the risk of illegal recording; 4. Frequent technology malfunction negatively affects the fairness of the proceeding; and 5. The online setting makes it more likely that sensitive information will be disclosed to the public.

## Top Advantages of Videoconferencing Hearings for Lawyers

**Table 21**
**Top Advantages of Videoconferencing Hearings (Lawyers)**

| ADVANTAGES OF VIDEOCONFERENCING HEARINGS | MEAN |
|---|---|
| They allow appearance remotely thereby reducing potential threats to the safety of court personnel, | 4.62 |

| | |
|---|---|
| corrections staff, victims, witnesses, and the public | |
| They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices | 4.51 |
| They save time or resources for lawyers | 4.15 |
| They save time or resources for litigants | 4.09 |
| They save time or resources for the Court | 4.95 |

As shown in Table 21, almost the same with Judges and Court Staff, as per mean values, Lawyers ranked the advantages in the following manner: 1. They allow appearance remotely thereby reducing potential threats to the safety of the court personnel, corrections staff, victims, witnesses and the public; 2. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices; 3. They save time or resources for lawyers; 4. They save time or resources for litigants; and 5. They save time or resources for the Court.

**<u>Top Disadvantages of Videoconferencing Hearings for Lawyers</u>**

**Table 22**
**Top Disadvantages of Videoconferencing Hearings (Lawyers)**

| DISADVANTAGES OF VIDEOCONFERENCING HEARINGS | MEAN |
|---|---|
| The online setting increases the potential of disregard to the integrity of the proceedings | 3.96 |

| | |
|---|---|
| Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings | 3.85 |
| The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints)The online setting increase the risk of illegal recording | 3.75 |
| The online setting increases the risk of illegal recording | 3.71 |
| Frequent technology malfunction negatively affects the fairness of the proceeding | 3.65 |

As shown in Table 22, Lawyers, as per mean values, ranked and identified the following as disadvantages, reflective of their concerns over the conduct of videoconferencing hearings, in the following manner: 1. The online setting increases the potential of disregard to the integrity of the proceedings; 2. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings; 3. The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints); 4. The online setting increases the risk of illegal recording; and 5. Frequent technology malfunction negatively affects the fairness of the proceeding.

## Top Advantages of Videoconferencing Hearings for Party Litigants

**Table 23**
**Top Advantages of Videoconferencing Hearings**
**(Party Litigants)**

| ADVANTAGES OF VIDEOCONFERENCING HEARINGS | MEAN |
|---|---|
| They allow appearance remotely thereby reducing potential threats to the safety of court personnel, | 4.50 |

| | |
|---|---|
| corrections staff, victims, witnesses, and the public | |
| They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices | 4.50 |
| They save time or resources for lawyers | 4.36 |
| They save time or resources for litigants | 4.30 |
| They save time or resources for the Court | 4.18 |

As shown in Table 23, same with Judges and Court Staff, as per mean values, Party Litigants ranked the advantages in the following manner: 1. They allow appearance remotely thereby reducing potential threats to the safety of the court personnel, corrections staff, victims, witnesses and the public; 2. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices; 3. They save time or resources for lawyers; 4. They save time or resources for litigants; and 5. They save time or resources for the Court.

**Top Disadvantages of Videoconferencing Hearings for Party Litigants**

**Table 24**
**Top Disadvantages of Videoconferencing Hearings**
**(Party Litigants)**

| DISADVANTAGES OF VIDEOCONFERENCING HEARINGS | MEAN |
|---|---|
| The online setting interferes with attorney-client relationship | 4.15 |
| Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings | 4.00 |

| | |
|---|---|
| The online setting increases the risk of illegal recording | 4.00 |
| Frequent technology malfunction negatively affects the fairness of the proceeding | 3.51 |
| The online setting makes it more likely that sensitive information will be disclosed to the public | 3.40 |

As shown in Table 24, Party Litigants, as per mean values, ranked and identified the following as disadvantages, reflective of their concerns over the conduct of videoconferencing hearings, in the following manner: 1. The online setting interferes with attorney-client relationship; 2. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings; 3. The online setting increases the risk of illegal recording; 4. Frequent technology malfunction negatively affects the fairness of the proceeding; and The online setting makes it more likely that sensitive information will be disclosed to the public.

## Determinants of Videoconferencing Hearings

A vital concern of the study was to identify the different determinants of videoconferencing hearings as it affects outcomes in terms of: Substantive Outcome, Perception on Credibility, Attorney-Client Communication and Relationship, Access to Justice and Consideration for Marginalized Communities.

## Substantive Outcome

**Table 25**
**Substantive Outcome**

| Indicator | Mean | Description |
|---|---|---|
| They save time or resources for litigants | 4.11 | Always True |
| They save time or resources for lawyers | 4.05 | Often |
| They save time or resources for the Court | 3.84 | Often |

| Indicator | Mean | Description |
|---|---|---|
| They help end cases more quickly | 3.59 | Often |
| **Substantive Outcome Advantages** | **3.90** | **Often** |
| The online setting makes it difficult for the parties to present the case effectively | 3.43 | Often |
| The online setting increases the potential of disregard to the integrity of the proceedings | 3.04 | Sometimes |
| The online setting increase the risk of illegal recording | 3.69 | Often |
| The online setting makes it more likely that sensitive information will be disclosed to the public | 3.36 | Sometimes |
| The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints) | 3.76 | Often |
| Frequent technology malfunction negatively affects the fairness of the proceeding | 3.62 | Often |
| **Substantive Outcome Disadvantages** | **3.48** | **Often** |

Table 25 shows that the Subjective Outcome Advantages of the conduct of videoconferencing hearings (with mean value of 3.90) can be interpreted that the respondents agree that the videoconferencing hearings have beneficial effects over the substantive outcome of the case. However, respondents likewise agree that there are issues to be addressed, which might affect the conduct of videoconferencing hearings with mean value of 3.48.

## Perception on Credibility

**Table 26**
**Perception on Credibility**

| Indicators | Mean | Description |
|---|---|---|
| They allow proper reception of documentary and object evidence. | 2.98 | Sometimes |

| Indicators | Mean | Description |
|---|---|---|
| They assure the credibility over video testimony | 3.20 | Sometimes |
| **Perceptions on Credibility Advantages** | **3.09** | **Sometimes** |
| The online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility | 3.47 | Often |
| **Perceptions on Credibility Disadvantage** | **3.47** | **Often** |

Insofar as Perception on Credibility, Table 26 shows that Perception on Credibility Advantages of the conduct of videoconferencing hearings (with mean value of 3.09) can be interpreted that the respondents are uncertain on any effects over perception on credibility. However, respondents likewise agree that there are issues to be addressed, which might affect the conduct of videoconferencing hearings with regards to perception on credibility with mean value of 3.47.

## Attorney-Client Communication and Relationship

**Table 27**
**Attorney-Client Communication and Relationship**

| Indicator | Mean | Description |
|---|---|---|
| They protect the attorney-client communication and relationship | 3.38 | Sometimes |
| **Attorney-Client Communication Advantage** | **3.38** | **Sometimes** |
| The online setting interferes with attorney-client confidentiality | 3.05 | Sometimes |
| **Attorney-Client Communication Disadvantage** | **3.05** | **Sometimes** |

Insofar as Attorney-Client Communication and Relationship, Table 27 shows that Attorney-Client Communication and Relationship Advantages of the conduct of videoconferencing hearings (with mean value of 3.38) can be

interpreted that the respondents are uncertain on any effects over Attorney-Client Communication and Relationship. Also, respondents likewise are uncertain over issues to be addressed, which might affect the conduct of videoconferencing hearings with regards to Attorney-Client Communication and Relationship with mean value of 3.05.

## Access to Justice

**Table 28**
**Access to Justice**

| Indicator | Mean | Description |
|---|---|---|
| They allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public | 4.53 | Always True |
| They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices | 4.39 | Always True |
| **Access to Justice Advantages** | **4.46** | **Always True** |
| The online setting makes it difficult for disabled defendants to participate in proceedings | 3.24 | Sometimes |
| **Access to Justice Disadvantage** | **3.24** | **Sometimes** |

As shown in, Table 28 shows that Access to Justice Advantages of the conduct of videoconferencing hearings (with mean value of 4.46) can be interpreted that the respondents strongly agree on the benefits of videoconferencing hearings insofar as Access to Justice. However, respondents are uncertain over issues to be addressed, which might affect the conduct of videoconferencing hearings with regards to Access to Justice with mean value of 3.24.

## Consideration for Marginalized Communities

**Table 29**
**Consideration for Marginalized Communities**

| Indicator | Mean | Description |
|---|---|---|
| They make proceedings more broadly and easily available to the public | 3.49 | Often |
| **Marginalized Communities Advantage** | **3.49** | **Often** |
| Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings | 3.96 | Often |
| **Marginalized Communities Disadvantage** | **3.96** | **Often** |

Table 29 shows that Consideration for Marginalized Communities Advantages of the conduct of videoconferencing hearings (with mean value of 3.49) can be interpreted that the respondents agree over benefits of videoconferencing hearings insofar as Marginalized Communities. However, respondents also agree that there are issues to be addressed, which might affect the conduct of videoconferencing hearings with regards to Marginalized Communities with mean value of 3.96.

## Summation of all Determinants for Advantages of Videoconferencing Hearings

**Table 30**
**Summation of all Determinants for Advantages of videoconferencing hearings**

| Variable | Mean | Description |
|---|---|---|
| Substantive Outcome Advantages | 3.90 | Often |
| Perceptions on Credibility Advantages | 3.09 | Sometimes |
| Attorney-Client Communication Advantage | 3.38 | Sometimes |
| Access to Justice Advantages | 4.46 | Always True |
| Marginalized Communities Advantage | 3.49 | Often |
| **Advantages to Videoconferencing Hearings Average** | **3.66** | **Often** |

Table 30 shows that, in reference to the different determinants which might affect the conduct of videoconferencing hearings, as per summation, the mean value of 3.66 can be interpreted that the respondents agree over the advantages of the conduct of videoconferencing hearings.

Amongst the determinants, the highest ranked determinant, in relation to the advantages, is the Access to Justice with a mean value of 4.46, followed by Substantive Outcome with 3.90, Consideration for Marginalized Communities with 3.49, Attorney-Client Communication and Relationship with 3.38, and the least is the Perceptions on Credibility with 3.09.

**Summation of all Determinants for Disadvantages of Videoconferencing Hearings**

**Table 31**
**Summation of all Determinants for Disadvantages of videoconferencing hearings**

| Variable | Mean | Description |
|---|---|---|
| Substantive Outcome Disadvantages | 3.48 | Often |
| Perceptions on Credibility Disadvantage | 3.47 | Often |
| Attorney-Client Communication Disadvantage | 3.05 | Sometimes |
| Access to Justice Disadvantage | 3.24 | Sometimes |
| Marginalized Communities Disadvantage | 3.96 | Often |
| **Disadvantages of Videoconferencing Hearings Average** | **3.44** | **Often** |

Table 31 shows that, in reference to the different determinants which might affect the conduct of videoconferencing hearings, as per summation, the mean value of 3.44 can be interpreted that the respondents agree that there are still disadvantages on the conduct of videoconferencing hearings.

Amongst the determinants, the highest ranked determinant, in relation to the disadvantages, is the Consideration for Marginalized Communities with 3.96, followed by Substantive

Outcome with 3.48, Perceptions on Credibility with 3.47, Access to Justice with 3.24, and the least is the Attorney-Client Communication and Relationship with 3.38.

## Summary

### Advantages and Disadvantages of Videoconferencing Hearings

#### For Judges:

Judges' assessment as regards the Advantages of Videoconferencing Hearings obtained mean values of 3.92 if they save time or resources for litigants, 3.82 if they save time or resources for lawyers, 3.49 if they save time or resources, 4.36 insofar as allowance for appearance remotely for safety, 4.20 for convenience to litigants, 2.72 for over allowance of proper reception of evidence, 2.85 in assuring the credibility over video testimony, 2.98 as regards protection of the attorney-client communication and relationship, 3.28 if they help end cases more quickly, and 3.25 if they make proceedings more broadly available to the public. When referred to the mean value interpretation in Chapter 2, the mean values obtained for remote appearance for litigants can be interpreted that it is Always True. For saving time or resources for litigants, lawyers, and courts, as well as convenience to litigants, it can be interpreted as Often Advantageous. Sometimes Advantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean values obtained over allowance for proper reception of evidence; assuring credibility over video testimony; protection of attorney-client communication and relationship; ending cases more quickly; and making proceedings more broadly and easily available to the public. Based on the perspective of the Judges, it can be gleaned that the top most advantage of videoconferencing hearings is that they allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public.

Judges' assessment as regards the Disadvantages of Videoconferencing Hearings obtained mean values of 3.14 if

videoconferencing hearings interferes with attorney-client confidentiality, 3.53 was obtained over difficulty for presentation of case effectively, 3.55 was garnered over difficulty for the parties to assess and challenge witness credibility, 3.18 insofar as the increase of potential disregard of the integrity of proceedings, 3.63 for risk of illegal recording, 3.31 for disclosure of sensitive information to the public, 3.77 for special challenges over preparation of paperwork, 3.68 if frequent technology malfunction negatively affects the fairness of the proceeding, 4.09 with regard to difficulty of access of technology by indigents, and 3.15 for participation of disabled defendants. When referred to the mean value interpretation in Chapter 2, the mean values for 1. Difficulty to present Case; 2. Difficulty to challenge witness credibility; 3. Increase of risk of illegal recording; 4. Special challenges in obtaining paperwork; 5. Frequent technology malfunction; and 6. Difficulty of access to technology of indigents, derived an interpretation of "Often" as disadvantageous in the conduct of videoconferencing hearings. Sometimes disadvantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean values obtained over: 1. Interference with attorney-client confidentiality; 2. Increase of disregard of integrity of the proceedings; 3. Likelihood of disclosure of sensitive information to the public; and 4. Making it difficult for the disabled to participate. The most concern of Judges, as a disadvantage over the conduct of videoconferencing hearings, is that indigent defendants have difficulty accessing the technology necessary to take part in online proceedings.

**For Court Staff:**

Court Staff's assessment as regards the Advantages of Videoconferencing Hearings acquired mean values of 4.30 if they save time or resources for litigants, 4.23 for lawyers, 4.14 for the Court, 4.70 insofar as allowance for appearance remotely for safety, 4.53 for convenience to litigants, 3.11 over allowance of proper reception of evidence, 3.55 with regard to assuring the credibility over video testimony, 3.68 as regards protection of

the attorney-client communication and relationship,3.86 if they help end cases more quickly, 3.82 if they make proceedings more broadly available to the public. When referred to the mean value interpretation in Chapter 2, the mean values obtained for remote appearance for litigants' convenience to litigants, saving time for litigants and lawyers can be interpreted that it is Always True. However, for saving time or resources for courts, credibility over video testimony, protection of attorney-client communication and relationship and making proceedings more broadly and easily available to the public, it can be interpreted as Often Advantageous. Sometimes Advantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean value obtained over allowance for proper reception of evidence. The top amongst the advantages of the conduct of videoconferencing is that they allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public.

Court Staff's assessment as regards the Disadvantages of Videoconferencing Hearings obtained mean values of 3.26 if videoconferencing hearings interferes with attorney-client confidentiality, 3.42 over difficulty for presentation of case effectively, 3.47 over difficulty for the parties to assess and challenge witness credibility, 2.98 insofar as the increase of potential disregard of the integrity of proceedings, 3.77 on risk of illegal recording, 3.53 for disclosure of sensitive information to the public, 3.91 for special challenges over preparation of paperwork, 3.55 if frequent technology malfunction negatively affects the fairness of the proceeding, 3.97 with regard to difficulty of access of technology by indigents, and 3.29 for participation of disabled defendants. When referred to the mean value interpretation in Chapter 2, the mean values for 1. Difficulty to present Case; 2. Difficulty to challenge witness credibility; 3. Increase of risk of illegal recording; 4. Likelihood of disclosure of sensitive information to the public; 5. Special challenges in obtaining paperwork; 6. Frequent technology malfunction; and 7. Difficulty of access to technology of indigents, derived an interpretation of "Often" as disadvantageous in the conduct of videoconferencing hearings.

Sometimes disadvantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean values obtained over: 1. Interference with attorney-client confidentiality; 2. Increase of disregard of integrity of the proceedings; and 3. Making it difficult for the disabled to participate. The most concern of Court Staff, as a disadvantage over the conduct of videoconferencing hearings, is that indigent defendants have difficulty accessing the technology necessary to take part in online proceedings.

**For Lawyers:**

Lawyer's assessment as regards the Advantages of Videoconferencing Hearings garnered mean values of 4.09 if they save time or resources for litigants, 4.15 for lawyers, 3.95 for the Court, 4.62 insofar as allowance for appearance remotely for safety, 4.51 for convenience to litigants, 3.05 over allowance of proper reception of evidence, 3.16 with regard to assuring the credibility over video testimony, 3.51 as regards protection of the attorney-client communication and relationship, 3.65 if they help end cases more quickly, and 3.40 if they make proceedings more broadly available to the public.

When referred to the mean value interpretation in Chapter 2, the mean values obtained for remote appearance for litigants and convenience to litigants can be interpreted that it is Always True. However, for saving time or resources for litigants, lawyers and courts, as well as protection of attorney-client communication and relationship, and ending cases quickly, it can be interpreted as Often Advantageous. Sometimes Advantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean value obtained over allowance for proper reception of evidence, assuring credibility over video testimony and making proceedings broadly available to the public. Lawyers believe that the topmost advantage of the conduct of videoconferencing hearings is that they allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public.

Lawyers' assessment as regards the Disadvantages of Videoconferencing Hearings obtained mean values of 2.73 if videoconferencing hearings interferes with attorney-client confidentiality, 3.47 over difficulty for presentation of case effectively, 3.47 over difficulty for the parties to assess and challenge witness credibility, 3.96 insofar as the increase of potential disregard of the integrity of proceedings, 3.71 for risk of illegal recording, 3.24 for disclosure of sensitive information to the public, 3.75 for special challenges over preparation of paperwork, 3.65 if frequent technology malfunction negatively affects the fairness of the proceeding, 3.85 with regard to difficulty of access of technology by indigents, and 3.36 for participation of disabled defendants. When referred to the mean value interpretation in Chapter 2, the mean values for 1. Difficulty to present Case; 2. Difficulty to challenge witness credibility; 3. Increase of risk of illegal recording; 4. Increase of disregard of integrity of the proceedings; 5. Special challenges in obtaining paperwork; 6. Frequent technology malfunction; and 7. Difficulty of access to technology of indigents, derived an interpretation of "Often" as disadvantageous in the conduct of videoconferencing hearings. Sometimes disadvantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean values obtained over: 1. Interference with attorney-client confidentiality; 2. Likelihood of disclosure of sensitive information to the public; and 3. Making it difficult for the disabled to participate. Lawyers are more concerned on the fact that online setting increases the potential of disregard to the integrity of the proceedings.

**For Party Litigants:**

Party Litigants' assessment as regards the Advantages of Videoconferencing Hearings obtained mean values of 4.36 if they save time or resources for litigants, 4.30 for lawyers, 4.18 for the Court, 4.50 insofar as allowance for appearance remotely for safety, 4.50 for convenience to litigants, 4.00 over allowance of proper reception of evidence, 3.78 with regard to assuring the credibility over video testimony, 3.98 as regards protection of the attorney-client communication and relationship, 3.90 if they help

end cases more quickly, and 3.78 if they make proceedings more broadly available to the public. When referred to the mean value interpretation in Chapter 2, the mean values obtained for remote appearance for litigants and convenience to litigants, as well as saving time or resources for the litigants and lawyers can be interpreted that it is Always True. However, for saving time or resources for courts, as well as protection of attorney-client communication and relationship, ending cases quickly, over allowance for proper reception of evidence, assuring credibility over video testimony and making proceedings broadly available to the public, it can be interpreted as Often Advantageous. The top most advantage of the conduct of videoconferencing hearings is that they allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public, and as well that they provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices.

Party Litigants' assessment as regards the Disadvantages of Videoconferencing Hearings garnered mean values of 4.15 if videoconferencing hearings interferes with attorney-client confidentiality, 2.90 over difficulty for presentation of case effectively, 3.10 over the disadvantage of making it difficult for the parties to assess and challenge witness credibility, 2.91 insofar as the increase of potential disregard of the integrity of proceedings, 4.00 over risk of illegal recording, 3.40 for disclosure of sensitive information to the public, 3.15 for special challenges over preparation of paperwork, 3.51 if frequent technology malfunction negatively affects the fairness of the proceeding, 4.01 with regard to difficulty of access of technology by indigents, and 3.20 over participation of disabled defendants. When referred to the mean value interpretation in Chapter 2, the mean values for 1. Interference with attorney-client confidentiality; 2. Increase of risk of illegal recording; 3. Frequent technology malfunction; and 4. Difficulty of access to technology of indigents, derived an interpretation of "Often" as disadvantageous in the conduct of videoconferencing hearings.

Sometimes disadvantageous for the conduct of videoconferencing hearing when it interpreted insofar as the mean values obtained over: 1. Difficulty to present Case; 2. Difficulty to challenge witness credibility; 3. Likelihood of disclosure of sensitive information to the public; 4. Increase of disregard of integrity of the proceedings; 5. Special challenges in obtaining paperwork; and 6. Making it difficult for the disabled to participate. For Party Litigants, they believe that online setting interferes with attorney-client confidentiality.

**Comparison of Assessment over Advantages and Disadvantages of Videoconferencing Hearings.**

All the respondents, as stakeholders of the judicial system, strongly agree that the conduct of videoconferencing hearings allow appearance remotely thereby reducing potential threats to the safety of court personnel, corrections staff, victims, witnesses, and the public. Also, except for judges, respondents likewise strongly agree that the videoconferencing hearings provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices. Insofar as saving time or resources for the litigants and lawyers, both Court Staff and Party Litigants strongly agree, while both Judges and Lawyers merely agree to such advantage. However, all respondents likewise agree that it likewise save time or resource for the courts. All respondents, except for Judges, agree that the attorney-client communication and relationship is still protected, and the fact that videoconferencing hearings help end cases more quickly. Both Judges and Lawyers are uncertain as to the advantage of videoconferencing hearings as regards assuring the credibility over video testimony and making more proceedings broadly and easily available to the public. All respondents, except party litigants, share the same sentiment as they neither agree nor disagree that videoconferencing hearings allows proper reception of documentary and object evidence.

Over the disadvantages, all the respondents agree that frequent technology malfunction and difficulty of indigent to

access technology are the disadvantages of videoconferencing hearings. All of the respondents are uncertain as to whether it is difficult for disabled defendants to appear during videoconferencing hearings. All respondents, except for Party Litigants, share the assessment that, with videoconferencing hearings, it is still difficult to present the case effectively, to assess and challenge the witness, and there are special challenges in obtaining and preparing the relevant paperwork. To the exclusion of Lawyer, all respondents are uncertain as to whether the online setting increases the potential of disregard to the integrity of the proceedings. On the other hand, only Lawyers expressed their view towards the uncertainty over the increase of risk of illegal recording, while the other respondents conveyed their concurrence that such risk exists. Only party litigants opined that the conduct of videoconferencing hearings interferes with the attorney-client relationship. Meanwhile, both Court Staff and Lawyers agree that online setting makes it more likely that sensitive information will be disclosed to the public, however, Judges and Party Litigants share their uncertainty over the matter.

## Issues and Concerns on the conduct of Videoconferencing Hearings

### For Judges:

Judges ranked the top advantages in the following manner: 1. They allow appearance remotely thereby reducing potential threats to the safety of the court personnel, corrections staff, victims, witnesses and the public; 2. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices; 3. They save time or resources for litigants; 4. They save time or resources for lawyers; and 5. They save time or resources for the Court. Meanwhile, Judges, ranked top disadvantages in the following manner: 1. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings; 2. The online proceedings

present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints); 3. Frequent technology malfunction negatively affects the fairness of the proceeding; 4. The online setting increase the risk of illegal recording; and 5. The online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility.

**For Court Staff:**

Same with Judges, Court Staff ranked the advantages in the following manner: 1. They allow appearance remotely thereby reducing potential threats to the safety of the court personnel, corrections staff, victims, witnesses and the public; 2. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices; 3. They save time or resources for litigants; 4. They save time or resources for lawyers; and 5. They save time or resources for the Court. Court Staff ranked and identified the disadvantages in the following manner: 1. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings; 2. The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints); 3. The online setting increase the risk of illegal recording; 4. Frequent technology malfunction negatively affects the fairness of the proceeding; and 5. The online setting makes it more likely that sensitive information will be disclosed to the public.

**For Lawyers:**

Almost the same with Judges and Court Staff, Lawyers ranked the advantages in the following manner: 1. They allow appearance remotely thereby reducing potential threats to the safety of the court personnel, corrections staff, victims, witnesses and the public; 2. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices; 3. They save time or resources for lawyers; 4. They save time or resources for litigants; and 5. They save time or resources

for the Court. Lawyers ranked and identified the disadvantages in the following manner: 1. The online setting increases the potential of disregard to the integrity of the proceedings; 2. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings; 3. The online proceedings present special challenges in obtaining or preparing the relevant paperwork (e.g. signatures, fingerprints); 4. The online setting increases the risk of illegal recording; and 5. Frequent technology malfunction negatively affects the fairness of the proceeding.

**For Party Litigants:**

Same with Judges and Court Staff, Party Litigants ranked the advantages in the following manner: 1. They allow appearance remotely thereby reducing potential threats to the safety of the court personnel, corrections staff, victims, witnesses and the public; 2. They provide convenience as Litigants do not need to deal with travel to court, parking or security lines, as they can attend the hearings from the comfort of their homes or offices; 3. They save time or resources for lawyers; 4. They save time or resources for litigants; and 5. They save time or resources for the Court. On the other hand, Party Litigants ranked and identified the disadvantages in the following manner: 1. The online setting interferes with attorney-client relationship; 2. Indigent defendants have difficulty accessing the technology necessary to take part in online proceedings; 3. The online setting increases the risk of illegal recording; 4. Frequent technology malfunction negatively affects the fairness of the proceeding; and 5. The online setting makes it more likely that sensitive information will be disclosed to the public.

## CONCLUSION AND RECOMMENDATIONS

Based on the foregoing findings, the following conclusions are drawn:

1. All Court users (Judges, Court Staff, Lawyers, and Party Litigants) primarily recognize that videoconferencing allows the appearance remotely in order to reduce potential threats to the safety of court personnel, corrections staff, victims, witness and the public. With such remote appearance, they also recognize that videoconferencing provides convenience to Party Litigants and need not to deal to travel to court, parking or security lines, as they can attend hearings from the comfort of their homes or offices.

2. All Court users (Judges, Court Staff, Lawyers, and Party Litigants) agree that videoconferencing hearings save time or resources for Party Litigants, Lawyers and for the Court.

3. All Court users, except Judges, agree that the attorney-client communication and relationship are protected in videoconferencing hearings.

4. All Court users, except Judges, agree that videoconferencing hearings help end cases more quickly.

5. All Court users, except Party Litigants, neither agree nor disagree that videoconferencing hearings allow the proper reception of documentary and object evidence.

6. Both Judges and Lawyers are not assured over the credibility over video testimony. Unlike Court Staff and Party Litigants who both confer that videoconferencing hearings still assure the credibility over video testimony.

7. Both Judges and Lawyers are not convinced that videoconferencing hearings make proceedings more broadly and easily available to the public.

8. All Court users primarily agree that indigent defendants have difficulty accessing the technology necessary to take part in online proceedings.

9. All Court users agree that frequent technology malfunction negatively affects the fairness of the proceedings.

10. All Court users, except Party Litigants, agree that online proceedings present special challenges in obtaining or preparing the relevant paper work *i.e.* signatures, fingerprints etc.

11. All Court users, except Party Litigants, agree that online setting makes it difficult for the parties to present the case effectively.

12. All Court users, except Party Litigants, agree that online setting makes it difficult for the parties to assess, and where necessary, challenge witness accounts or credibility.

13. All Court users, except Party Litigants, agree that online setting does not interfere with attorney-client confidentiality. Party Litigants convey that videoconferencing hearings interferes with their attorney-client relationship.

14. All Court users, except Lawyers, are uncertain on whether online setting increases the potential disregard to the integrity of the proceedings.

15. All Court users, except Lawyers, agree that online setting increase the risk of illegal recording.

16. All Court users are uncertain as to whether online setting makes it difficult for disabled defendants to participate in the proceedings.

17. Both Court Staff and Lawyers convey that online setting makes it more likely that sensitive information will be disclosed to the public. However, both Judges and Party Litigants are uncertain over the matter.

18. All Court users agree that there are advantages and disadvantages over the conduct of videoconferencing hearings insofar as substantive outcome as a determinant.

19. All Court users are uncertain as to whether videoconferencing hearings allows perception on credibility.

20. All Court users agree that, with videoconferencing hearing, there would be difficulty over perception on credibility as a determinant.

21. All Court users are uncertain as to any advantage or disadvantage over the conduct of videoconferencing hearings. They all agree that there would be neither any benefit nor damage over attorney-client relationship as a determinant.

22. All Court users strongly agree that video conferencing allows Access to Justice. However, they are all uncertain as to whether it would have impact over disabled participants to online proceedings.

23. All Courts users agree that there are considerations for marginalized communities in the conduct of videoconferencing hearings.

24. All Court users convey their conformity that there might be difficulty over indigent litigants in relation to consideration for marginalized communities.

25. It can be deduced that Judges, together with Court Staff, recognize the great effects of the conduct of videoconferencing hearings only insofar as the remote

appearance, convenience for the litigants, and saving time or resources for litigants, lawyers and courts, but as to technicalities and procedures like reception of evidence, credibility over video testimony, protection of attorney-client communication and relationship, helping end cases quickly, and availability to the public over the proceedings, Judges are uncertain over the matter, but Court Staff convey otherwise to still agree that such matters are best considered in videoconferencing hearings, with exception only to reception of documentary and object evidence. Lawyers likewise express the same sentiments with Judges.

26. Judges convey that online setting presented several downsides such as difficulty in presentation of case, challenging credibility of witness, risk of illegal recording, special challenge in obtaining relevant paperwork, frequent technology malfunction, and difficulty on access of technology by indigent litigants. However, Judges expressed their uncertainty over matters pertaining to attorney-client confidentiality, integrity of proceedings, disclosure of sensitive information to the public, and difficulty for participation by disabled defendants. Court Staff share the same sentiment with Judges, except only insofar as the disclosure of sensitive information to the public, wherein they express that there is a possibility. Lawyers agree also to the sentiments of the Judges.

27. Party Litigants agree that, amongst all determinants, videoconferencing hearings is advantageous.

28. It can be deduced that Party Litigants are primarily concern over interference with attorney-client relationship. Party Litigants also agree that there are concerns posited over frequent technology malfunction, access of technology indigents, and risk of illegal recordings.

29. But, for matters pertaining to technicalities and procedures, Party Litigants expressed no concern, although it might be disadvantageous for the proceedings.

**Recommendation #1: Adopt the Guideline on Videoconferencing in Judicial Proceedings as adopted by the European Commission for Efficiency of Justice**

While the pandemic kicked-off the necessity for resort to videoconferencing hearings, understanding the continuity, advantages and disadvantages of videoconferencing hearings should be relevant beyond the context of any public health emergency, within the ambits of the constitutional requirements, assuring no less fair, accurate or legitimate videoconferencing hearings same as in-court proceedings. One can only hope that the Covid-19 crisis has created the momentum for actual digitalization of the Philippine judiciary.

The pandemic has exposed outdated rules and practices in many countries, and the need to revise legislation and reimagine litigation practices. One of the main questions to be addressed after the pandemic will be which innovations should be kept, refined and proliferated across the justice system. Moreover, which innovations should be kept as part of the domain of court procedure for emergencies, and which of the adaptations are only disruptive, with no tangible advantages? Remote and hybrid hearing will be part of the new normal and we should consider the use of remote technologies in the long term.

To this end, the following principles should be considered in support of videoconferencing.

(1) It should be the intent of the Supreme Court that videoconferencing technology be available for use in all courts to the greatest extent possible consistent with the limitations of the technology, the rights of litigants and other participants in matters before the courts, and the need to preserve the fairness, dignity, solemnity, and decorum of court proceedings. Further, it should the intent of the Supreme Court that court judges be

vested with the discretion to determine the manner and extent of the use of videoconferencing technology.

(2) In declaring this intent, the Supreme Court should find that careful use of this evolving technology can make proceedings in the courts more efficient and less expensive to the public and the participants without compromising the fairness, dignity, solemnity, and decorum of these proceedings. The Supreme Court should further find that an open-ended approach to the incorporation of this technology into the court system under the supervision and control of judges, subject to limitations and guidelines, will most rapidly realize the benefits of videoconferencing for all concerned.

(3) In declaring this intent, the Supreme Court should further find that improper use of videoconferencing technology or use in situations in which the technical and operational standards are not met, can result in abridgement of fundamental rights of litigants, crime victims, and the public, unfair shifting of costs, and loss of the fairness, dignity, solemnity, and decorum of court proceedings that is essential to the proper administration of justice.

It is imperative that there must be strict parameters to assure that the legal requirements pertaining to substantive outcome, perception on credibility, attorney-client communication and relationship, access to justice, consideration for marginalized communities, are highly observed.

To realize this, the proponent of the study humbly suggests adopting the Guideline on Videoconferencing in Judicial Proceedings as adopted by the European Commission for Efficiency of Justice (CEPEJ) (June 2021) as well as the suggested "Checklist" for conducting videoconferences in judicial practice, insofar as it may be applicable in the Philippine Jurisdiction. The issues addressed in the CEPEJ guidelines are almost identical to the matters identified in the findings and conclusion of this study. Thus, in a nutshell, the judges, together with court staff

lawyers and litigants, recognize the great effects of the conduct of videoconferencing hearings insofar as remote appearance provides convenience for the litigants, and save time and resources for litigants, lawyers and courts, but uncertain as to technicalities and procedures in terms of reception of evidence, credibility over video testimony, protection of attorney-client communication and relationship, easy disposal of cases, and availability to the public of the videoconference proceeding.

The principles on the Guidelines on Videoconferencing in Judicial Proceedings by the European Commission for Efficiency of Justice (CEPEJ) as far as applicable in our judicial system, together with the findings and conclusions of this study should then be incorporated in the revision of Supreme Court Administrative Matter No. 20-12-01-SC (Proposed Guidelines on the Conduct of Videoconferencing) dated December 9, 2020, which took effect on January 16, 2021 and presently being followed in the use of videoconferencing hearings by the courts nationwide.

**Recommendation #2: Standardize the rules on Videoconferencing Hearings as a regular procedure**

Standardizing the rules on videoconferencing hearings, not as an alternative mode, but as a main mode of court proceedings alongside with in-court proceedings. Standardized rules would present a more regularized procedure and remove the ad hoc administration of the medium.

**In line with revising said A.M. No. 20-12-01 (Guidelines of Videoconferencing) the proposed standardized rules would have the following considerations:**

Modification of the extension of the applicability of A.M. No. 20-12-01-SC (Guidelines of Videoconferencing). As the said rules provide now, hearings may be conducted via videoconferencing in any of the following instances:

a. Acts of Gods and human-induced events which restrict the physical access to courts, and other instances posing threats to the security and safety of the court;
b. public emergencies as declared by the government;
c. the litigant, witness, or counsel is unable to physically appear in court due to security risks, serious health concerns, vulnerability of the witnesses, or the fact that he or she is a victim of sexual offense or domestic violence;
d. the litigant or witness is a high risk Person Deprived of Liberty (PDL);
e. the litigant of witness is a PDL or a Child in Conflict with the Law (CICL) held or committed in a facility;
f. a government agency witness or an expert witness whose presence is necessary cannot attend an in-court hearing due to justifiable grounds;
g. the litigant or witness is an Overseas Filipino Worker (OFW) or a Filipino residing abroad or temporarily outside the Philippines;
h. the litigant or witness is a non-resident foreign national who was involved in an action pending in court while he was in the Philippines and wants to appear and/or testify remotely from outside the Philippines;
i. existence of compelling reasons warranting the resort to videoconference; and
j. other circumstances or grounds that may hereafter be declared by the Supreme Court as sufficient to justify the conduct of videoconferencing.

It is herein submitted that Item I(3)(b)(i-x) of the Proposed Guidelines be removed and/or deleted, and that videoconferencing hearings shall be allowed even the absence of the enumerated circumstances as long as resorting to videoconferencing hearings will be beneficial to the fair, speedy and efficient administration of justice as a general ground or qualification subject to the approval

of the judge and subject to exceptions of court proceedings that may be balanced with a 'blended' type of hearings as may be required or whenever necessary.

Persons Deprived of Liberty (PDL) regardless of the nature of the crime charged shall be required to appear and testify remotely or by videoconferencing *motu propio* by the court unless he or she opts to appear or testify in person. Non-contentious hearings, such as motions, clarificatory or compliance hearings can be through videoconferencing as a general default.

The request to conduct hearings via videoconferencing shall be made by oral motion during the Pre-Trial. During Pre-Trial, one of the considerations to be discussed is the justification of the movant to resort to VCH. Movant must be able to present the grounds invoked for VCH, any evidence in support thereof, the proceedings proposed to be conducted through VCH, names of the witnesses who will testify remotely and their location, the e-mail addresses of the concerned litigants, their counsel, and the witnesses to be presented, special requirements necessary for the specific videoconferencing, if any, such as specialized software for the presentation of videos, and the like, technical readiness to participate to the videoconferencing and proof of the internet bandwidth of the location in which each witness will testify, which shall be sufficient enough to participate on videoconferencing. The Court shall resolve the motion immediately during the Pre-Trial proceedings with or without the comment or opposition from the adverse litigant.

Or in civil cases, a party or counsel may manifest before the court their intention to present a witness through videoconferencing hearing in their Pre-Trial Briefs, stating the grounds thereof as well as other items aforementioned mentioned to be the content of a motion which shall be resolved by the court during the Pre-Trial Proceedings.

Should the Court grant the motion for videoconferencing, it shall issue an order, to containing the following matters, which shall form part of the Pre-Trial Order:

i. The date and time of the videoconferencing;
ii. The proceedings covered;
iii. The names of the witnesses and the nature of their testimonies;
iv. The expected location of each participant;
v. The software or platform to be used for videoconferencing;
vi. The e-mail addresses of the participants as reflected in court records and to be used for the purpose of videoconferencing, with notice that said e-mail addresses are deemed valid unless the concerned participant informs the court of any change thereto at least three (3) calendar days before the scheduled videoconferencing hearing; and
vii. Such other matters as may be necessary to define the parameters of the videoconferencing.

Should the court deny the motion, in-court hearings shall proceed as scheduled. The order of the court granting or denying the motion for videoconferencing shall not be subject to a motion for reconsideration, appeal, or certiorari, except on constitutional grounds.

If the conduct of the videoconferencing is not taken up during the Pre-Trial or if there is a need to resort to videoconferencing at any stage of the trial, Oral Motions, for the conduct of videoconferencing, be allowed in open court and evidence in support for the application be presented in the same way as the written motion in the current guidelines provide, subject to the comment/opposition of the other party. This will save the counsels and litigants time in preparing and the courts in resolving motions. In short, the revisions on the guidelines should include oral motions for videoconference hearings.

For efficient scheduling, courts should avoid situations wherein they alternate between videoconference and in-court hearings in one session. Whenever possible, whole days, or just morning sessions or afternoon sessions of a day should be devoted to only one kind of hearing.

Pre-Trial shall always be in-court for the presentation and marking of documentary/object evidence and judicial affidavits including attachments thereto. Unless there is a reservation for marking any other evidence, only the documentary/object evidence and judicial affidavits or attachments thereto marked during the pre-trial maybe presented and identified by a witness testifying remotely or during a videoconferencing hearing. Subject to the provisions of the Rules on Evidence and of the Rules of Civil Procedure, for purposes of the guidelines, Colored and legible PDF copies of marked documentary evidence and judicial affidavits, including attachments thereto, unless already part of the records of the case, shall be filed, served or made available through email or the shared document repository of the court at least five (5) calendar days prior to the scheduled videoconferencing hearing to ensure that all concerned participants received the exact copies, uneditable by any of them.

During the videoconferencing, when a witness testifying remotely needs to identify documentary evidence it will be mandatory for the court to direct the counsel to share the documentary evidence on-screen. Means shall be provided for sharing and viewing of these documents for purposes of marking, authenticating, and presenting them, such as through document cameras, digital screen-sharing function of the videoconferencing software or platform and other electronic means.

Should the exhibition, examination or viewing of the documentary evidence be rendered impossible, insufficient or difficult by the limitations of the platform or for some other compelling reasons, in-court hearings may instead be ordered by the court for the purpose of presenting or completing the testimony of a witness.

On the other hand, object evidence presented during pre-trial shall be officially photographed by the court which shall also be marked as the object evidence itself. Colored and legible PDF copies of marked photograph of the object evidence shall be filed, served or made available through email or the shared document repository of the court at least five (5) calendar days prior to the

scheduled videoconferencing hearing to ensure that all concerned participants received the exact copies, uneditable by any of them. Object evidence or its marked official photograph shall be presented during videoconferencing if the same can be exhibited to, examined, or viewed by all participants, by displaying the object on screen, or physically showing it to the witness testifying thereto at his or her location within the full view of the participants.

Should the marking of exhibits or the examination of the object evidence or its marked official photograph be rendered impossible, insufficient, or difficult by the limitations of the platform or some other reasons, the court may direct that in-court hearings be held instead for the purpose of presenting the same for marking or identification, presenting or completing the testimony of the witness.

Is recommended that a shared electronic document repository be made, under the control of the Clerk of Court or other court staff, to be made available to the parties and counsel at least three (3) days before the scheduled hearing. Parties should have uploaded their documents to the shared repository also at least three (3) days before the scheduled hearing.

Improve hardware equipment/ facilities, especially audio equipment. Courts should be provided with additional equipment such as separate laptops and microphones for each of the usual court participants: the public attorney, the trial prosecutor, the witness, and the stenographer. Multiple camera set-up is needed for partial remote hearings: one camera for the judge, witness and each counsel. While there is a feature to switch camera views in Microsoft Teams, this feature is insufficient to address the need for broadcasting simultaneity of court proceedings to participants who appear remotely.

The internet connection of the court should be regularly tested by the Office of the Court Administrator (OCA) as some courts have complained that they are unable to conduct

videoconferencing due to slow internet connection. A separate budget from the Judiciary may be allotted for purposes of videoconferencing hearings, specifically for high-capacity internet connection and required hardware and software, including accessories such as audio equipment.

AII courts must have a designated e-mail address, landline contact number, and an assigned IT expert. Courts are recommended to strictly use their designated email address for correspondence with lawyers/litigants.

Require users to support minimum bandwidth (Mbps) for download and upload considerations. Include in the guidelines the bandwidth requirement so that the video and sounds will be clear. An instruction to determine the signal strength in an area prior to the time of hearing will also help so that interruptions of the proceedings due to poor data will be lessened.

Conduct trainings for court staff and litigants on basic internet connectivity set-up, the use of hardware and software, as well as basic troubleshooting, and videoconferencing hearing etiquette. Conduct training for judges on the proper conduct of online hearings and proceedings, such as information dissemination of videoconferencing hearing guidelines, and how judges can thoroughly ensure the authenticity of documents presented or witnesses' credibility especially in criminal cases, among others. Training on the uploading of files, preserving integrity of uploaded documents, allowing the courts to make electronic marking on uploaded documents thru Adobe software, screen-sharing marked documents, etc. are necessary to utilize the court's videoconferencing hearing capability. Video instructions for this purpose may be provided by the Office of the Court Administrator (OCA).

Additional guidelines should be provided for mediation and conciliation proceedings, and judicial dispute resolution proceedings.

If not taken up during pre-trial and there is a necessity for a witness to testify remotely, the conduct of electronic testimony should be allowed upon prior motion duly served on opposing party in order to giver the latter an opportunity to consent or oppose the motion.

Counsels of the parties of a case should be actually notified of the adoption of virtual hearings and/or taking of testimonies electronically. The invitation or link to the video conference hearing be sent out to all participants' respective e-mail addresses at least twenty-four (24) hours before the scheduled hearing. While this is part of the Pre-Hearing Preparation under section 3(a), some courts fail to comply with it. Under section A(5) of the guidelines, the invitation or link sent by the court before the scheduled hearing "must be treated with strict confidentiality and shall not be shared by its recipient with any other person." In this regard, it is recommended that lawyers be required to inform the court of the email address of their witness at least three (3) days prior to the scheduled hearing. In the alternative, the guidelines be amended to include the authority of the lawyers to share the invitation or hearing link to their witnesses for presentation in court.

The rule allowing private communications should be limited to the separate meeting room within the videoconferencing platform or should contain effective safeguards to guarantee that counsels are not able to coach their witnesses, especially during cross-examination.

It is suggested that there be strict penalties and consequences for witnesses found to be actually coached or in any way improperly assisted by counsel or third persons during their testimony in the hearing, such as contempt of court, disciplinary actions for counsel, and total exclusion of that particular witnesses' testimony from the case records.

It must be recognized, however, that there may be situations where a participant is lacking in resources and would not be able

to participate remotely on his or her own. Such participant may be allowed by the court to attend physically with other parties attending via videoconferencing, adopting a hybrid virtual hearing. If the court deems it proper to conduct the hearing fully by videoconferencing, a participant's dependence on counsel that they may be allowed to join the hearing using a single device may be acknowledged. While this may be considered an extreme situation, it may be a necessary accommodation to consider the efficient and speedy disposition of cases.

The presence of the technical personnel should be indicated in the guidelines as an exception to the requirement under Item II(B)(5) that the participants at remote locations should be alone in the room.

The location of counsel and/or parties vis-a-vis the location of the court should be considered as one of the grounds in allowing the conduct for videoconferencing. It is suggested that Item (3)(bxiii) of the Guidelines should be amended to include a provision on the distance of the counsel/party to the location of the court as one of the grounds in allowing videoconferencing. Government offices, such the Office of the Solicitor General (OSG), the Public Attorney's Office (PAO) and other client government agencies, should be required/encouraged to provide an audio-visual room (AVR) or any other dedicated room or venue exclusively for the purpose of conducting videoconference hearings in order to keep the privacy, sanctity and solemnity of said proceedings.

The presence of technical personnel to assist parties in remote locations may not always be practicable, especially to those who attend videoconferencing from their homes. The rule may be simplified by requiring litigants to ensure that the technical specifications of their devices and their internet connection are sufficient to handle the requirements of videoconferencing. Despite the foregoing, litigants should still assure the court of their capability of addressing technical issues that may arise during the conduct of the videoconference.

More than the general statement of readiness to participate under Item II(2)(aXviii), the litigant should provide the court with information showing that such internet connection at the location where the participant is to remotely join the videoconference is adequate and will not cause such disruption, or that the technical issue is not likely to happen. Although there can be no foolproof technical readiness, the information given is relevant and enough for the court to rule on the matter of proceeding to videoconferencing. By imposing this duty upon the participant, the court would be ensuring the viability of a successful videoconferencing the movant or litigant will be subject to some form of disciplinary action. This may be consolidated with Item VI (Gross Misconduct in Videoconferencing).

It is suggested that requirement that videoconferencing involving participants outside the Philippines may be conducted only from an embassy or consulate of the Philippines needs to be reexamined, given the constraints posed by different time zones between the Philippines and other countries. It should be noted that OCA Circular No. 133-2021 maintains that videoconferencing hearings must be scheduled during the working hours of the Philippine courts. This certainly presents great difficulty for such participants whose relevant Philippine embassy or consulate operates outside of Philippine court's working hours. This problem can be addressed by allowing the litigant or witness to participate from a location outside the embassy or consulate. In the alternative, it is suggested that the Honorable Court coordinate with the DFA to make a room or other suitable venue in the embassy or consulate or in another government agency in the location to satisfy the requirements of territoriality.

Paragraph I(1)(d) of the Guidelines states the policy that the confrontational rights of the accused are deemed observed when the accused's or the witnesses' appearance or testimony are done remotely through videoconferencing under the Guidelines "with [the accused's] consent". It is respectfully recommended that this latter proviso be deleted, mirroring instead the wording

of a similar provision in A.M. No. 19-05-05-SC or the Guidelines on the use of Videoconferencing Technology for the Remote Appearance and Testimony of Certain Persons Deprived of Liberty in Jails and National Penitentiaries. Both guidelines contemplate the conduct of videoconference hearings in situations without the accused's consent - i.e., in cases of high-risk PDLs, PDLs in detention centers, and children in conflict with the law. However, the express policy requiring an accused's consent in the Guidelines appears to create conflict with the foregoing non-consensual situations. Furthermore, said policy, as currently worded, could precipitate due process objections from supposed lack of consent to videoconference hearings.

Paragraph VI of the Guidelines provides that "[a]ny intentional disruption of digital communications intended to deny participation by any party, coaching of any witness presented for examination, and knowingly presenting falsified digital images or evidence shall be considered as gross misconduct and shall be dealt with severely." It is respectfully recommended that the acts stated above should be considered as direct contempt of court and not just gross t6 misconduct. Since the videoconference hearing shall closely resemble in-court hearings, with remote locations viewed as extensions of the courtroom, willful disruption thereof constitutes direct contempt of court.

The guidelines must include the specific time when the case would be called (i.e., 8:30 am, 10am, 1:30, 3pm) instead of asking the participants to wait 20 minutes at the waiting lobby at 8:30 am or 1:30 pm. This would save time and unnecessary internet charges on the part of the litigants. Uniform rule must also be included whether all participants would be admitted simultaneously in the hearing at the start of the videoconferencing hearing or only when their cases are called.

Presently, there is no definition of the term "electronic testimony" under the Rules on Electronic Evidence. As such, it is suggested that the Supreme Court provide a definition of said term considering that testimonies may be transmitted through

different digital media platforms, such as electronic mail (e-mail), messenger, or cellphone. Also, parties should be required to sign a waiver of physical appearance in case they opt to appear or testify in court via videoconferencing.

**Recommendation #3: Propose a Bill on the Substantive Rights of the Parties during Videoconferencing Hearings**

In furtherance to the standardized Rules of Procedure for the Supreme Court to adopt, the researcher deemed it imperative to propose a Bill on the Substantive Rights of the Parties during Videoconferencing Hearings in all cases before Appellate Collegiate, First and Second Level Courts. The foregoing will primarily address all concerns pertaining to the constitutional rights of the accused.

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# FORENSIC EVIDENCE AND EXPERT TESTIMONY: THE PHILIPPINE CONTEXT

*Judge Teresita A. Lacandula-Rodriguez*[*]

**Abstract**

This article examines the use of forensic evidence in the Philippine courts through expert testimony. The presentation of such evidence is still limited but different kinds of forensic evidence can be found in Philippine laws and rules, and there is developing jurisprudence on their admissibility and weight in various cases. There is presently no right to forensic evidence or to expert assistance recognized in the Philippines but the paper explores persuasive jurisprudence in the United States and basis in international law and in other well-established constitutional rights for recognition of such right. The article also looks at the fallibility of forensic evidence despite its many benefits and how it can be abused.

## I. WHAT IS FORENSIC EVIDENCE

Forensic Science is the application of scientific knowledge to the legal process in support of legal proceedings, particularly criminal proceedings.[1] Science is used to gather evidence for use in court cases and other investigations. Physical or object, also known as real or tangible evidence, is defined as that which is "addressed to the senses of the court,"[2] like fingerprints, bloodstained objects

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[1] Commission on Higher Education, *available at* https://ched.gov.ph/wp-content/uploads/2017/10/Sample-Curricula-Bachelor-of-Forensic-Science.pdf (last accessed Aug. 5, 2019).

[2] RULES OF COURT, rule 130, § 1.

and weapons. Physical evidence is not synonymous with forensic evidence but when scientific knowledge is applied to it, it is also considered as forensic evidence.

Forensic evidence is tested for various purposes in relation to a crime: 1) to identify the perpetrator or exonerate a suspect; 2) establish its elements; and 3) reconstruct what happened in the crime scene.[3] Such evidence is said to be more accurate and reliable than eyewitness testimony or even confessions,[4] in order to determine judicial truth, *i.e.* of guilt or innocence.

Under the Rules of Court, evidence is defined as the means allowed by the Rules of ascertaining in a judicial proceeding the truth respecting a matter of fact.[5] Considering that forensic evidence involves scientific findings, its presentation in court is usually in the form of expert testimony. Expert testimony may be received in evidence on matters requiring the expert's special knowledge, skill, experience or training.[6] Such expert usually testifies on a report which he/she prepared and interprets the scientific results of testing or examination done.

## II. WHEN LAW AND SCIENCE MEET

The law is not regarded as a science. In the Philippine jurisdiction, courts, which interpret the law, preside over an adversarial system wherein the judge determines judicial truth from the evidence presented and applies the law to the findings of fact. Thus, the same is not exact but the judge is expected to be guided by the quantum of evidence required, which in criminal cases is proof beyond a reasonable doubt. On the other hand, the rigor associated with science gives an expectation that results are precise, replicable and objective, *i.e.* not affected by the subjective

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[3] Joseph L. Peterson, *Use of Forensic Evidence by the Police and Courts (A Research in Brief for the National Institute of Justice, U.S. Department of Justice)* (October 1987), *available at* https://www.ncjrs.gov/pdffiles1/pr/107206.pdf (last accessed Aug. 5, 2019).

[4] Boaz Sangero, *Safety from Flawed Forensic Sciences Evidence,* 34 Ga. St. U. L. Rev. 1129, 1136 (2018).

[5] RULES OF COURT, rule 128, § 1.

[6] *Id.*, rule 130, § 49.

feelings of the expert. However, although employing different approaches, scientific knowledge, when it satisfies legal requirements, can be used to serve the quest for justice in the application of the law. It is therefore important for an expert to be able to testify using plain language that non-scientists will understand.

## III. USE OF FORENSIC EVIDENCE IN THE PHILIPPINES

In the Philippines, forensic evidence is very seldom used in criminal investigations and judicial proceedings. From the gathering of evidence in the crime scene until judgment, resort to forensic evidence is standard only for rape cases or when a victim had died. In fact, there is heavy reliance on testimonial evidence in around 90% of the cases.[7] Testimonial evidence is direct evidence that could be enough to convict. But the Supreme Court had also declared that "courts should apply the results of science when competently obtained in aid of situations presented, since to reject said result is to deny progress."[8] In fact, in many cases where the evidence is uncertain, forensic evidence gives more weight to the case of the prosecution to prove guilt beyond reasonable doubt. Physical evidence can be used to ascertain the truth by substantiating or refuting the contentions of the parties. It can belie the testimonial evidence even of numerous defense witnesses.[9] When there are no eyewitnesses, the Court had stated:

> Physical evidence is a mute but eloquent manifestation of truth, and it ranks high in the hierarchy of our trustworthy evidence. For this reason, it is regarded as evidence of the highest order. It speaks more eloquently than a hundred witnesses. While it may be true that there was no eyewitness to the death of [the victim], the confluence of the testimonial and physical evidence against accused-appellant creates an unbroken chain of circumstantial evidence that naturally leads to the fair and

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7 Matthew C. Go, Maria Corazon A. De Ungria, *Forensic sciences and the Philippines' war on drugs*, Forensic Science International: Synergy (2019), *available at* https://doi.org/10.1016/j.fsisyn.2019.05.003 (last accessed Aug. 27, 2019).

8 Tijing v. Court of Appeals, G.R. No. 125901, March 8, 2001.

9 People v. Candare, G.R. Nos. 108280-83, November 16, 1995.

> reasonable conclusion that accused-appellant was the author of the crime, to the exclusion of all others.[10]

Physical evidence can also be used by the accused to strengthen his defense. When there is a contradiction between the physical evidence and the testimonial evidence of the prosecution witnesses, the physical evidence should prevail.[11] Even after conviction, forensic evidence, particularly DNA evidence, can be used to exculpate the accused.[12] On the other hand, if the defense of accused is contradicted by the expert opinion of the doctor who conducted the autopsy, the same would be deemed incredible.[13]

However, just like any evidence, physical evidence should have been gathered without any violation of the accused's constitutional rights, *e.g.* right to counsel under custodial investigation.[14]

### A. Limitations in the Philippine Setting

There are only a few forensic laboratories and these lack resources, facilities, equipment, and trained scientists in different fields of forensic sciences. Moreover, there is no national policy to coordinate the work of the laboratories to ensure that collaboration is maximized and the data collected and analyzed are efficiently used. For example, there is no DNA database as there is no enabling law for the same.[15] Access is likewise limited by the cost of testing the evidence and having an expert testify.

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[10] People v. Whisenhunt, G.R. No. 123819, November 14, 2001.

[11] People v. Vasquez, G.R. No. 102366, October 3, 1997.

[12] RULE ON DNA EVIDENCE, A.M. No. 06-11-5-SC, Oct. 2, 2007, § 16 states:

> "Sec. 6. *Post-conviction DNA Testing.* – Post-conviction DNA testing may be available, without need of prior court order, to the prosecution or any person convicted by final and executory judgment provided that (a) a biological sample exists, (b) such sample is relevant to the case, and (c) the testing would probably result in the reversal or modification of the judgment of conviction."

[13] Senoja v. People, G.R. No. 160341, October 19, 2004.

[14] People v. Alicando, G.R. No. 117487, December 12, 1995.

[15] Stephanie Tumampos, *Forensic science, DNA applications, vital for Philippine development,* BUSINESS MIRROR, May 23, 2016, *available at* https://businessmirror.com.ph/2016/05/23/forensic-science-dna-applications-vital-for-philippine-development/ (last accessed Aug. 28, 2019).

An illustration of the lack of priority for funding forensic evidence is the non-use of breath alcohol analyzer by law enforcers. This is a device to measure alcohol in the breath quantitatively in order to detect drunk drivers on the road. The result is scientific evidence based on chemistry. Under the Anti-Drunk and Drugged Driving Act of 2013, there are statutory limits for blood alcohol concentration level in order to determine the offense of "driving under the influence of alcohol" had been committed.[16] However, presently, law enforcers do not have this analyzer and the current practice is merely to smell the breath wherein the finding/diagnosis in the medico-legal slip would be stated as "positive for alcoholic breath." This results in the dismissal of the case or acquittal of accused.[17]

B. Physical Evidence vs. Testimonial Evidence

It has been said that physical evidence is mute because it cannot talk unlike witnesses. But as compared to testimonial

[16] Rep. Act No. 10586 (2013), § 3(e). An Act Penalizing Persons Driving Under the Influence Of Alcohol, Dangerous Drugs, and Similar Substances, and For Other Purposes ["Anti-Drunk and Drugged Driving Act].

[17] *See* Sydeco v. People, G.R. No. 202692, November 12, 2014, which held:

> "[T]he legal situation has of course changed with the approval in May 2013 of the Anti-Drunk and Drugged Driving Act of 2013 (RA 10586) which also penalizes driving under the influence of alcohol (DUIA), a term defined under its Sec. 3(e) as the "act of operating a motor vehicle while the driver's blood alcohol concentration level has, after being subjected to a breath analyzer test reached the level of intoxication as established jointly by the [DOH], the NAPOLCOM] and the [DOTC]. And under Sec. 3(g) of the IRR of RA 10586, a driver of a private motor vehicle with gross vehicle weight not exceeding 4,500 kilograms who has BAC [blood alcohol concentration] of 0.05% or higher shall be conclusive proof that said driver isdriving under the influence of alcohol. Viewed from the prism of RA 10586, petitioner cannot plausibly be convicted of driving under the influence of alcohol for this obvious reason: he had not been tested beyond reasonable doubt, let alone conclusively, for reaching during the period material the threshold level of intoxication set under the law for DUIA, *i.e.,* a BAC of 0.05% or over."

evidence, it has certain advantages. Witnesses rely on their memory to give a credible testimony. Physical evidence, as long as it exists, is found and interpreted correctly, is credible as it is not affected by the fallibility of human memory, a reality which the court has recognized to be a scientific fact.[18] Witnesses can be misled, can perjure themselves or their testimony muddled by emotions whereas physical evidence is objective and cannot lie. A well-established standard for courts in ascertaining credibility is this test:

> For evidence to be believed, it must not only proceed from the mouth of a credible witness but must be credible in itself such as the common experience and observation of mankind can approve as probable under the circumstances. The test to determine the value of the testimony of a witness is whether such is in conformity with knowledge and consistent with the experience of mankind. Whatever is repugnant to these standards becomes incredible and lies outside of judicial cognizance.[19]

This standard of "common experience and observation" is subjective and judges can benefit from evidence with scientific underpinnings. It has been held that pure eyewitness testimony of witnesses, who initially could not identify accused but years after could do so after a highly suggestive process of presenting suspects, is not credible and cannot prove guilt beyond reasonable doubt.[20]

### C. Appreciation of Forensic Evidence

Judges, although only expected to be knowledgeable about legal matters, would still need to decide the admissibility and weight of scientific evidence relevant to the issues presented to them. The Supreme Court stated that "[where] the evidence to aid [the] investigation is obtainable through the facilities of modern science and technology, such evidence should be considered

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18 People v. Nunez, G.R. No. 209342, October 4, 2017.
19 People v. San Juan, G.R. No. 130969, February 29, 2000.
20 People v. Nunez, *supra* note 18.

subject to the limits established by the law, rules, and jurisprudence."[21]

1. Test of Admissibility

In determining whether the scientific technique used by the expert is reliable, Philippine courts would normally be faced with forensic evidence which are of first impression in the country but had already been tested in other more scientifically or technologically advanced jurisdictions. Such foreign precedents had been used as persuasive jurisprudence. This was what happened in the Supreme Court cases involving DNA evidence. To illustrate, the United States admitted DNA evidence in the 1980s.[22] In the Philippines, however, DNA evidence was mentioned by the Supreme Court as early as 1995,[23] but promulgated a decision *People v. Vallejo*[24] about its admissibility only in 2002 and passed the Rule on DNA Evidence in 2007.[25]

In providing for guidelines in the use of forensic evidence, the American case of *Daubert v. Merrell Dow*[26] was used by the Philippine Supreme Court in *People v. Yatar*[27] which dealt with the issue of DNA evidence. It was ruled that the tests for admissibility of forensic evidence are its relevance and reliability, based on the discretion of the trial court judge. Under the Philippine Rules of Court, evidence is relevant when it relates directly to a fact in issue as to induce belief in its existence or non-existence.[28] It is reliable if reasonably based on scientifically valid reasoning and robust methodology. Evidence is admissible when it is relevant to the fact in issue and competent, *i.e.*, it is not otherwise excluded by statute or the Rules of Court. In *Herrera v. Alba*,[29] the Supreme Court ruled that *Daubert* is persuasive jurisprudence in our jurisdiction.

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21 Herrera v. Alba, G.R. No. 148220, June 15, 2005.

22 Ma. Nina C. Araneta, *People v. Vallejo: Setting the Precedent for the Admission of DNA Evidence*, 48 ATENEO L.J. 32, 33 (2003).

23 People v. Teehankee, 249 SCRA 54 (1995).

24 G.R. No. 144656, May 9, 2002.

25 RULES ON DNA EVIDENCE, *supra* note 12.

26 509 U.S. 579 (1993); 125 L.Ed. 2d 469.

27 G.R. No. 150224, May 19, 2004.

28 RULES OF COURT, rule 128, § 4.

29 G.R. No. 148220, June 15, 2005.

2. Weight of Forensic Evidence

In determining the weight of forensic evidence as presented through expert testimonies, the judge can exercise discretion. According to *Ilao-Quianay v. Mapile*:[30]

> They may place whatever weight they choose upon such testimonies in accordance with the facts of the case. The relative weight and sufficiency of expert testimony is peculiarly within the province of the trial court to decide, considering the ability and character of the witness, his actions upon the witness stand, the weight and process of the reasoning by which he has supported his opinion, his possible bias in favor of the side for whom he testifies, and any other matters which serve to illuminate his statements. The opinion of an expert should be considered by the court in view of all the facts and circumstances of the case. The problem of the evaluation of expert testimony is left to the discretion of the trial court whose ruling thereupon is not reviewable in the absence of an abuse of that discretion.

It follows that even if there is nothing wrong with the expert's testimony, the court can still choose to disregard it because of other direct evidence it gives weight to. Judges are given wide latitude of discretion in assigning weight to the testimony. Nevertheless, even when the scientific technique is not in question as to its reliability, the expert testimony is not binding on the court, but it cannot also be arbitrarily disregarded.[31] When there are conflicting expert testimonies, the court can choose to disregard both and make its own determination by doing its own research on established scientific authorities.[32]

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[30] G.R. No. 154087, October 25, 2005.

[31] Tortona v. Gregorio, G.R. No. 202612, January 17, 2018.

[32] In Casumpang v. Cortejo, G.R. Nos. 171127 etc., March 11, 2015 , the Supreme Court stated:

> A determination of whether or not the petitioning doctors met the required standard of care involves a question of mixed fact and law; it is factual as medical negligence cases are highly technical in nature, requiring the presentation of expert witnesses to provide guidance to the court on matters clearly falling within the domain of medical science, and legal, insofar as the Court, after evaluating the expert testimonies,

If both experts are both using good science and interpreted results in good faith, there can still be genuine disagreement due to the different decisions and actions of the scientists during the examination. This could mean that there is probably an impasse and more research, *e.g.* replication, is necessary. The court could resort to assistance by a neutral if the experts of both parties have conflicting findings and are not credible.

However, even if the prosecution decides not to utilize scientific evidence, the same would not normally weaken its case as long as there is other evidence. The prosecution has discretion in choosing how to present its case since under Section 5, Rule 110 of the Rules of Court, the public prosecutor has control over the same. The presentation of scientific evidence by the prosecution will usually not be mandated by the court.[33]

3. Expert's Learned Treatise

As previously stated, the court may be guided by its own research. An expert's learned treatise is an exception to the hearsay rule under Section 46, Rule 130 of the Rules of Court:

> Sec. 46. Learned treatises. - A published treatise, periodical or pamphlet on a subject of history, law, **science**, or art is admissible as tending to prove the truth of a matter stated therein if the court takes judicial notice, or a **witness expert** in the subject testifies, that the writer of the statement in the treatise, periodical or pamphlet is recognized in his profession or calling as **expert** in the subject. (Emphasis supplied)

4. Education of Judges in Understanding Forensic Evidence

Being tasked with understanding and appreciating forensic evidence, judges will only be confident if they are equipped to do so by being given education and training in the basics of forensic

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and guided by medical literature, learned treatises, and its fund of common knowledge, ultimately determines whether breach of duty took place.

[33] People v. Lucero, G.R. No. 188705, March 2, 2011.

science and its scope and limitations, including its possibility of error and how the evidence should be received in terms of validity.

5. Training in Effective Communication of Experts

Judges should be trained to understand the evidence, but the experts should also be professionally educated to present their findings in such language and form that would be understandable to lay people without scientific background.

D. Qualifications of Expert Witness

In *Avelino v. People*,[34] the Court declared that "[expert] evidence is admissible only if: (a) the matter to be testified to is one that requires expertise, and (b) the witness has been qualified as an expert."[35]

To qualify as an expert witness, one must have acquired special knowledge, education or training of the subject matter.[36] There are no specific guidelines regarding the degree of knowledge, skill or experience that a witness must have to qualify as an expert. This determination is left to the discretion of the trial court.[37]

It has been suggested that instead of trainings and experience, the qualifications of the expert should be based on whether the testimony is based on rigorous research.[38] For example, fire investigators may have many years of experience with arson incidents, but have no scientific educational background.

Even if the expert is qualified and his/testimony is allowed, the court is not bound by such testimony.[39]

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[34] G.R. No. 181444, July 17, 2013.

[35] *Id.*, citing F.D. Regalado, II REMEDIAL LAW COMPENDIUM 760 (2004).

[36] Cayao-Lasam v. Spouses Ramolete, G.R. No. 159132, December 18, 2008.

[37] People v. Abriol, G.R. No. 123137, October 17, 2001.

[38] Sangero, *supra* note 4, at 1212.

[39] Tabao v. People, G.R. No. 187246, July 20, 2011.

E. Statutory Provisions for Expert Assistance

In certain instances, the law or rule itself states the need for expert assistance in view of the technical or specialized nature of the subject matter. Here are some examples in both criminal and civil cases:

1. DNA Evidence

Eyewitness identification when credible is given full weight by the court. But the Supreme Court had recognized its shortcomings and acknowledged that it is "not as accurate and authoritative as the scientific forms of identification evidence like by fingerprint[40] or by DNA testing."[41] DNA evidence can be used either to prove guilt or innocence of accused. This does not violate accused's rights since the right against self-incrimination involves testimonial compulsion and does not cover physical examination and other mechanical acts like fingerprinting, photographing, and testing for/of paraffin, blood, and DNA to determine his/her involvement in an offense of which he/she is charged.[42] As previously cited, in *Vallejo*, the Supreme Court ruled that DNA evidence is admissible as evidence to identify accused and prove his connection to the crime. In the case of *People v. Umanito*[43] the Supreme Court ordered the trial court to receive evidence from DNA testing on accused, after the latter raised the matter as relevant to his defense under Section 4 of the Rule on DNA Evidence:

> Sec. 4. *Application for DNA Testing Order.* – The appropriate court may, at any time, either *motu proprio* or on application of any person who has a legal interest in the matter in litigation, order a DNA testing

When accused moved for DNA testing as to paternity of the child of the rape victim, the Court stated that he is estopped to question the adverse result.[44] It has also been held that DNA testing

40 Also known as dactylascopic examination.
41 People v. Faustino, G.R. No. 129220, September 6, 2000, 339 SCRA 718, 739.
42 People v. Yatar, *supra* note 27.
43 G.R. No. 172607, October 26, 2007.
44 People v. Corpuz, G.R. No. 208013, July 3, 2017.

is not issued as a matter of right and during the hearing on the motion for DNA testing, the movant "must present prima facie evidence or establish a reasonable possibility of paternity."[45] The court may, in its discretion, disallow DNA testing if it would merely be corroborative.[46] In civil cases, DNA evidence had been allowed in Supreme Court decisions to prove filiation in cases for support.[47]

2. Psychological Incapacity under the Article 36 of the Family Code

As ground for nullification of a marriage, expert evidence on the psychological incapacity of the spouse may be given by qualified psychiatrists and clinical psychologists.[48] But the medical expert's determination, although important, is not required because the court can look at the totality of evidence to establish the ground.[49]

Aside from the choice of the parties to present their expert witnesses, the Rule on Declaration of Absolute Nullity of Void Marriages and Annulment of Voidable Marriages,[50] provides for theoption of the trial judge to refer the case to a court-appointed psychologist/expert to give an independent examination and evaluation of the psychological condition/capacity or incapacity of the parties.

3. Environmental Matters

The Rules of Procedure for Environmental Cases[51] encourages the court to gather sufficient information, including expert studies, for the judge to understand the environmental matter at issue. During pre-trial conference, when there is a failure to settle, the judge shall, among others, determine the

45 Lucas v. Lucas, G.R. No. 190710, June 6, 2011.
46 *Id.*
47 Ong v. Minor Diaz, G.R. No. 171713, December 17, 2007; Herrera v. Alba, *supra* note 29; Agustin v. Court of Appeals, G.R. No. 162571, June 15, 2005.
48 Azcueta v. Republic of the Philippines, G.R. No. 180668, May 26, 2009, citing Republic of the Philippines v. Court of Appeals and Molina, G.R. No. 108763, February 13, 1997, 268 SCRA 198.
49 Ngo Te v. Ong, G.R. No. 161793, February 13, 2009.
50 A.M. No. 02-11-10-SC, Mar. 15, 2003.
51 A.M. No. 09-6-8-SC, April 13, 2010.

necessity of engaging the services of a qualified expert as *amicus curiae* (literally, friend of the court).[52]

4. Intellectual Property Rights

In patent infringement cases, experts can "provide advice on the technical aspects of the patent in dispute."[53]

5. Cybercrime

In the Cybercrime Prevention Act of 2012, law enforcement authorities can secure a search and seizure warrant from the court "[to] conduct forensic analysis or examination of the computer data storage medium."[54] Computers under this law include mobile phones.[55]

6. Code of Commerce

Under Article 364 of the Code of Commerce, an expert can determine the value in case of damage, for example in a case for damages because of loss of cargo by an unseaworthy vessel:[56]

> Article 364. If the effect of the damage referred to in Article 361 is merely a diminution in the value of the goods, the obligation of the carrier shall be reduced to the payment of the amount which, in the judgment of experts, constitutes such difference in value.

7. Administrative Body's Expertise

Under the doctrine of primary jurisdiction, statutes may confer upon an administrative or quasi-judicial agency jurisdiction for matters within its specialized competence.[57] Before recourse to courts, the agency should first resolve matters which need its

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52 A.M. No. 09-6-8-SC, rule 3, § 6 (l).

53 RULES OF PROCEDURE FOR INTELLECTUAL PROPERTY RIGHTS CASES, A.M. No. 10-3-10-SC, Oct. 18, 2011,§ 4.

54 Rep. Act No. 10175 (2012), § 15(d). An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes ["Cyber Crime Prevention Act of 2012"].

55 *Id.* at § 3 (d) & (g).

56 Loadstar Shipping Company, Inc. v. Malayan Insurance Company, Inc., G.R. No. 185565, November 26, 2014.

57 Alfonso v. Land Bank of the Philippines, G.R. No. 181912, November 29, 2016.

technical knowledge and experience, investigate the facts and make its recommendation.[58] Therefore, their findings of facts are conclusive on the court and accorded finality if they are supported by substantial evidence.[59] Such quasi-judicial agencies include the National Labor and Relations Commission, Department of Energy, Energy Regulatory Commission, and the Securities and Exchange Commission, to name a few.

8. Construction

In arbitration in the Construction Industry Arbitration Commission (CIAC), experts may be utilized in the settlement of disputes.[60]

9. Interpretation of Writings

Under Rule 130, Section 16 of the Rules of Court, experts like interpreters can be utilized to explain writings. It provides:

> Section 16. *Experts and interpreters to be used in explaining certain writings.* — When the characters in which an instrument is written are difficult to be deciphered, or the language is not understood by the court, the evidence of persons skilled in deciphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language.

F. Jurisprudence on the Use of Forensic Evidence

There are several kinds of forensic evidence based on different kinds of sciences, *e.g.* natural and social sciences. Some

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[58] West Tower Condominium Corporation v. First Philippine Industrial Corporation, G.R. No. 194239, June 16, 2015.

[59] Miro v. Mendoza, G.R. No. 172532, November 20, 2013.

[60] Exec. Order No. 1008 (1985), § 15. Entitled "Creating An Arbitration Machinery in the Construction Industry of the Philippines."

> Sec. 15. Appointment of Experts. The services of technical or legal experts may be utilized in the settlement of disputes if requested by any of the parties or by the Arbitral Tribunal. If the request for an expert is done by either or by both of the parties, it is necessary that the appointment of the expert be confirmed by the Arbitral Tribunal. xxxx

of the forensic evidence that had been discussed by the Supreme Court are the following:

1. Paraffin Test

Paraffin tests to determine if a person had fired a gun had been rendered inconclusive by the Supreme Court because the nitrates being tested can also found in substances other than gunpowder.[61] However, it can be used as corroborative evidence when there are other pieces of credible evidence.[62]

2. Fingerprint Analysis

Fingerprint lifted from scene of the crime or those which match the prints of accused may place him/her there and make him/her a possible perpetrator. But the court had also stated that the absence of accused's fingerprints does not automatically lead to the conclusion that he/she was not there as he/she may had been there but did not leave prints.[63]

3. Handwriting Evidence (Forensic Document Examination)

Handwriting experts are not necessary to prove genuineness of the handwriting under the Rules of Court. Section 22, Rule 132 of the Rules of Court states:

> Section. 22. *How genuineness of handwriting proved.* - The handwriting of a person may be proved by any witness who believes it to be the handwriting of such person because he has seen the person write, or has seen writing purporting to be his upon which the witness has acted or been charged, and has thus acquired knowledge of the handwriting of such person. Evidence respecting the handwriting may also be given by a comparison, made by the witness or the court, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge.

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[61] People v. Cajumocan, G.R. No. 155023, May 28, 2004.
[62] People v. Cachola, G.R. No. 148712, January 21, 2004.
[63] People v. Buenafe, G.R. No. 212930, August 3, 2016.

Handwriting experts have a technical procedure to analyze documents and can help the court in examining and comparing signatures. When unrebutted, the testimony is given credence.[64] Just like other expert evidence, the handwriting expert's opinion cannot disregarded arbitrarily.[65] However, the opinion of handwriting experts are not binding upon the court, as the court can do an independent examination and reach its own conclusion about a signature's authenticity.[66] For example, in *Libres v. Spouses Delos Santos*[67] the positive testimonies of notaries public that the document was signed in their presence prevailed over the expert's testimony. The Supreme Court also stated that where the expert's testimony would be the sole basis for conviction and "there is equally convincing expert testimony to the contrary, the constitutional presumption of innocence must prevail."[68]

For a holographic will, Article 811 of the Civil Code states that expert testimony on the handwriting of the testator may be resorted to if the court deems it necessary, whether the will is contested or not.[69]

4. Thumbmark Examination

A thumbmark can be examined to determine if it is authentic and impressed by the person purported to be its owner. In an action for recovery of real property with damages, the thumbmark of an illiterate woman in a Deed of Absolute Sale was examined for genuineness which resulted to a ruling that the Deed was a forgery.

5. Photographs

Photographs can be identified either by the photographer or by any other competent witness who can testify as to its exactness and accuracy of depicting what it is supposed to depict.[70] When

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[64] BA Finance Corp. v. Court of Appeals, G.R. No. 61464, May 28, 1988.
[65] Varias v. COMELEC, G.R. No. 189078, February 11, 2010.
[66] Gepulle-Garbo v. Spouses Garabato, G.R. No. 200013, January 14, 2015.
[67] G.R. No. 176358, June 17, 2008.
[68] Bayot v. Sandiganbayan, G.R. No. L-54645-76, December 18, 1986, *citing* Cesar v. Sandiganbayan, G.R. No. 54719, January 17, 1985.
[69] RULES OF COURT, rule 76, §§ 5 & 11.
[70] Sison v. People, G.R. No. November 16, 1995.

photographs run counter to testimony of a biased witness, the former shall have more weight.[71]

6. Ballistic Examination

A ballistic report on whether bullets extracted from the body of the victim or slugs and cartridges found in the scene were fired from a certain firearm has been considered merely as guide for the courts in determining the ultimate facts of the case.[72] It is inconclusive and will not prevail over positive identification of eyewitnesses.[73]

7. Explosives Analysis

In *People v. Barde*,[74] the forensic chemist examined the pieces of shrapnel from the crime scene and determined that they were part of a hand grenade. An examination of the device or powder can establish whether an illegal explosive was involved.[75]

8. Medico-legal Diagnosis

Medical findings used for legal purposes are contained in a medico-legal report which would be identified in court by the expert who prepared the same. In case of death or physical Injuries, expert opinion of doctors with the relevant training and experience as to causation of the death/injury is accorded great respect.[76] When it contradicts the eyewitness testimony of the lone prosecution witness, the accused may be acquitted.[77]

Expert testimony is preferred with respect to facts relevant to cause of death and physical injuries, as well as description thereof. However, it is not the exclusive proof and ordinary witnesses can also testify on such matters; the probative value of such testimony is not diminished by the lack of forensic evidence.[78]

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[71] Jose v. Court of Appeals, G.R. No. 118441, January 18, 2000.
[72] People v. Macoy, G.R. No. 96649, July 1, 1997.
[73] Lumanog v. People, G.R. No. 182555, September 7, 2010.
[74] G.R. No. 183094, September 22, 2010.
[75] Dizon v. Court of Appeals, G.R. No. 111762, July 22, 1999.
[76] People v. Tolentino, G.R. No. 70836, October 18, 1988.
[77] People v. Hassan, G.R. No. 68969, January 22, 1988.
[78] People v. Baybayon, G.R. No. 49856, April 3, 1990.

9. Insanity/Mental Health or Condition of Parties

Medical opinion of doctors is used to determine the mental capacity of the victim (*e.g.* mental retardation of rape victim[79] or the sanity of accused at the time of commission of offense or during trial). It could substantiate testimonial evidence of ordinary witnesses so as to prove the guilt of accused beyond a reasonable doubt.[80] Still, when credible, the testimony of a lone prosecution witness can lead to conviction, and expert opinion is merely corroborative.[81]

10. Battered Woman Syndrome as Self-Defense

In *People v. Genosa,*[82] the Battered Woman Syndrome was considered as a mitigating circumstance in favor of a woman accused of parricide using the expert testimonies of a clinical psychologist and psychiatrist. But after the decision, the Anti-Violence Against Women and Their Children Act of 2004[83] was enacted which provided under Section 26 that victims of this syndrome will not be criminally and civilly liable even if not all the elements for justifying circumstances of self-defense are proven.

11. Toxicology Report in Drug Cases

Toxicology is the science dealing with the analysis of poisons and other banned substances like drugs, which are harmful to humans and the environment.[84] Toxicology reports showing results of laboratory examination presented as evidence are usually prepared by forensic chemists, stating whether a substance tested positive as a dangerous drug.[85]

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79 People v. Orbita, G.R. No. 136591, July 11, 2002.

80 People v. Cartuano, Jr., G.R. Nos. 112457-58, March 29, 1996.

81 People v. Cuaycong, G.R. No. 196051, October 2, 2013.

82 G.R. No. 135981, January 15, 2004.

83 Rep. Act No. 9262(2004). An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefore, and for Other Purposes [Anti-Violence Against Women and Their Children Act of 2004].

84 National Institute of Environmental Health Sciences, *Toxicology*, *available at* https://www.niehs.nih.gov/health/topics/science/toxicology/index.cfm (last accessed Aug. 18, 2019).

85 People v. Gani, G.R. No. 198318, November 27, 2013.

12. Bloodstains Analysis

Aside from being a source of DNA, bloodstains from the clothes of both accused and rape victim could be analyzed by forensic biologists to determine the blood type and consequently, the participation of accused in the crime.[86]

13. Capacity of Witness

In *People v. Golidan*,[87] a child with cerebral palsy was considered competent to testify based on her personal knowledge, as certified by a neurologist who testified as expert witness.

14. Physics Expert in Collision

Testimony by a physics expert was accepted on the effects of a collision based of the body type of the vehicles in an action for damages for injuries resulting from vehicular accident.[88]

15. Medical Malpractice in Torts Cases

In general, expert testimony of medical practitioners is relied upon in malpractice suits to prove that a physician has committed a negligent act in his/her medical duties, but when the doctrine of *res ipsa loquitur* (literally meaning "the thing or the transaction speaks for itself") is raised by the plaintiff, expert testimony is not indispensable. The doctrine relies on common knowledge and experience without need for expert medical testimony.[89]

When expert testimony is presented, the expert is qualified even though he/she is not a specialist in a particular subject of inquiry as long as he/she is familiar with or knowledgeable of the standards of the specialty and can explain the medical facts in issue.[90]

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[86] People v. Vallejo, G.R. No. 144656, May 9, 2002.

[87] G.R. No. 205307, January 11, 2018.

[88] Mercury Drug Corp. v. Spouses Huang, G.R. No. 172122, June 22, 2007.

[89] Ramos v. Court of Appeals, G.R. No. 124354, December 29, 1999, 321 SCRA 584, 600-603.

[90] Casumpang v. Cortejo, *supra* note 32.

16. Fire Experts in Insurance Claims

Fire experts were presented in a case for damages caused by fire which gutted a vessel under repair and aided the court in deciding the case.[91] However, in another case for damages because of fire, the doctrine of *res ipsa loquitur* in the determination of negligence was relied upon such that expert testimony was dispensed with.[92]

17. Expropriation

Real estate appraisers are utilized to testify on valuation of expropriated properties.[93]

## IV. OTHER KINDS OF FORENSIC EVIDENCE

In other jurisdictions, a wide variety of forensic sciences had already been introduced. For example, since shoe prints are commonly left by suspects at the scene of the crime, some scientists have been studying this as evidence to identify the perpetrator by matching them with other prints found in a database or from other crime scenes.[94] The same methodology is used for tire track impressions.[95] Likewise, voice comparison refers to the comparison of a recording of the criminal's voice taken during the incident and a recording of a suspect's voice.[96] However, scholars have regarded these as "junk science"[97] without any solid scientific underpinnings.

91 Keppel Cebu Shipyard, Inc. v. Pioneer Insurance & Surety Corp., G.R. No. 180880, September 25, 2009.

92 College Assurance Plan and Comprehensive Annuity Plan and Pension Corporation v. Belfranlt Development Inc., G.R. No. 155604, November 22, 2007.

93 Republic v. C.C. Unson Company, Inc., G.R. No. 215107, February 24, 2016.

94 Imad Rida, et.al., *Forensic shoe-print identification: a brief survey, available at* https://arxiv.org/pdf/1901.01431.pdf (last accessed Aug. 18, 2019).

95 *National Forensic Science Technology Center, A Simplified Guide To Footwear & Tire Track Examination, available at* http://www.forensicsciencesimplified.org/fwtt/FootwearTireTracks.pdf (last accessed Aug. 19, 2019).

96 Moez Ajili, *Reliability of voice comparison for forensic applications,* ARTIFICIAL INT. 18, *available at* https://tel.archives-ouvertes.fr/tel-01774394/document (last accessed Aug. 18, 2019).

97 Sangero, *supra* note 4, at 1192.

Other interesting areas are the following:

- Although document examination is already an accepted forensic science expertise in the Philippines, forensic ink analysis to determine the age of the document or whether it has been altered[98] has not yet been explored.

- Forensic linguistics is concerned with application of linguistics to legal issues, *e.g.*, to determine authorship or interpretation of a written text.[99]

- Forensic anthropology refers the analysis of bones or human remains in relation to medico-legal issues.[100]

- Forensic entomology is the study of the life cycle of insects and other arthropods to determine matters related to the decomposition of human bodies or corpses.[101]

- Forensic botany uses plant evidence in criminal investigations, for example, pollen to determine the presence of a suspect in a crime scene or to locate hidden graves or to establish time of death.[102]

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[98] Hu-Sheng Chen, et al., *A survey of methods used for the identification and characterization of inks,* 1 FORENSIC SCIENCE JOURNAL 1 (2002), *available at* https://pdfs.semanticscholar.org/024d/37582d049e235ce009dfd42ea438acd09aa1.pdf (last accessed Aug. 18, 2019).

[99] John Olsson, *What is Forensic Linguistics?, available at* https://www.thetext.co.uk/what_is.pdf (last accessed Aug. 18, 2019).

[100] Douglas H. Ubelaker, *A history of forensic anthropology,* 165 AM. J PHYS. ANTHROPOL. 915 (2018), *available at* https://onlinelibrary.wiley.com/doi/pdf/10.1002/ajpa.23306 (last accessed Aug. 18, 2019).

[101] Mark Benecke, *A brief survey of the history of forensic entomology,* 14 ACTA BIOLOGICA BENRODIS 15, 15-16 (2008), *available at* https://pdfs.semanticscholar.org/044e/31ac421c0ff706ab9f329ea5e1c6e4f89d98.pdf (last accessed Aug. 13, 2019).

[102] Simon Fraser University, *Forensic Botany or the Uses of Plants in Criminal Investigations, available at* http://www.sfu.museum/forensics/eng/pg_media-media_pg/botanique-botany/ (last accessed Aug. 21, 2019).

- Criminal profiling is part of forensic psychology which is used as an investigative tool to narrow down the search of an unknown offender and making predictions based on the behavior and personality observed.[103]

- Forensic photography of the crime scene provides visual documentation for analysis and presentation during trial.[104]

- Trace evidence involves the analysis of small sized materials that transfer from one location to another during the commission of the crime and stay there for some period of time. Examples include textile fibers, hairs, glass fragments, paint chips, soil, botanical traces, gunshot residues, and building materials.[105]

- Bloodstain pattern analysis is a forensic study of the trajectory and shape of blood spatter which could provide a story about what occurred.[106]

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[103] Asha Bolton, *Media Effects and Criminal Profiling: How Fiction Influences Perception and Profile Accuracy (Doctoral Dissertation Submitted to Nova Southeastern University*) 18, *available at* https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1205&context=fse_etd (last accessed Aug. 18, 2019).

[104] National Forensic Science Technology Center, *A Simplified Guide To Crime Scene Photography, available at* http://www.forensicsciencesimplified.org/photo/Photography.pdf (last accessed Aug. 19, 2019).

[105] Claude Roux, et al., *The end of the (forensic science) world as we know it? The example of trace evidence (A Research Article for Phil. Trans. R. Soc. B of The Royal Society Publishing* (2015), *available at* http://dx.doi.org/10.1098/rstb.2014.0260 (last accessed Aug. 19, 2019).

[106] Dana Dryzal, *Bloodstain Pattern Analysis: Applications and Challenges,* D.U.QUARK, 2 (2) (2018), *available at* https://dsc.duq.edu/cgi/viewcontent.cgi?article=1020&context=duquark (last accessed Aug. 19, 2019).

- In forensic art, investigative information, *e.g.* from witnesses, is presented through visual presentations.[107]

Although some of these forensic techniques are not new, they are not very common even in other countries, but they are used and continuously being developed.

## V. RIGHT TO FORENSIC EVIDENCE

As earlier discussed, expert assistance in the presentation of forensic evidence is rarely considered as indispensable by the courts. Thus, such constitutional right to the same is not even discussed. However, there are persuasive jurisprudence, international law and related well-established constitutional rights which could lead to the recognition of such specific right.

### A. *Ake v. Oklahoma*: Constitutional Right to Expert Assistance

Considering the slow pace of growth in use of forensic evidence in the Philippines, the courts can look at persuasive foreign jurisprudence in dealing with future challenges. In the landmark American case of *Ake v. Oklahoma*,[108] the Supreme Court recognized the constitutional right to state-paid competent mental health professional for the indigent accused whose sanity is in issue during trial.

Presently, Section 49, Rule 130 of the Rules of Court states that the expert's opinion *may* be received in evidence, signifying that such opinion may or may not be presented and can be received or rejected by the court. Even if it is allowed, it may not be given weight.[109] In other words, the court is not mandated to require it.

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[107] Elizabeth C. Ambs, *The Relationship Between Forensic Art and Criminal Investigations (An Honors Thesis, Ball State University Muncie, Indiana)* 8 (April 2015), *available at* https://core.ac.uk/download/pdf/41980160.pdf (last accessed Aug. 19, 2019).

[108] 470 U.S. 68 (1985).

[109] Tabao v. People, G.R. No. 187246, July 20, 2011.

However, it has also been held that considering sanity is presumed, when mental illness is raised by the defense, the court should order the examination of an accused to determine the latter's mental state and produce proof of insanity.[110]

B. Right to Scientific Evidence

Article 15 (1) (b) of the International Covenant on Economic, Social and Cultural Rights states recognizes "the right of everyone "to enjoy the benefits of scientific progress and its applications"[111] This instrument is binding upon the Philippines as international law, being a member of the United Nations.[112] Furthermore, the Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind[113] states that:

> All States shall take measures to extend the benefits of science and technology to all strata of the population and to protect them, both socially and materially, from possible harmful effects of the misuse of scientific and technological developments, including their misuse to infringe upon the rights of the individual or of the group, particularly with regard to respect for privacy and the protection of the human personality and its physical and intellectual integrity.

C. Right to Fair Trial

The Due Process clause enshrined in the Constitution states that "no person shall be deprived of life, liberty or property without due process of law." Consequently, the accused has the right to a fair and impartial trial.[114] Article III, Section 14 of the Constitution states:

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110 People v. Genosa, G.R. No. 135981, September 29, 2000.

111 International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2 . 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force ]an. J, 1976.

112 Republic v. Sandiganbayan, G.R. No. 104768, July 21, 2003.

113 UN General Assembly, *Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind,* 10 November 1975, *available at* https://www.ohchr.org/EN/ProfessionalInterest/Pages/ScientificAndTechnologicalProgress.aspx..

114 Lai v. People, G.R. No. 175999, July 1, 2015.

> Section 14. (1) No person shall be held to answer for a criminal offense without due process of law.
>
> (2) In all criminal prosecutions, the accused shall […] shall enjoy the right […] to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf.

In *Marquez v. Sandiganbayan*,[115] the Supreme Court ruled that accused was deprived of these rights when his motion to refer documentary evidence of the prosecution to a handwriting expert was denied. Since forgery was relevant to his defense, the Court ruled that he should be allowed to prove the same so that his defense would not consist of mere denial and considering he raised this defense at the earliest possible time. Otherwise, accused could just present his expert during the presentation of his own evidence.[116]

Equality of justice demands that if the prosecution is allowed to present expert evidence, the defense should be in the same position. Both parties should of course have full opportunity to confront the witness through cross examination. If the court appoints an expert, he/she is deemed neutral.

D. Right to Counsel

Under Art. III, Sec. 14 (2) of the Constitution, the accused shall enjoy the right to be heard by himself/herself and counsel. This is a due process right of the accused which is a fundamental right that cannot be dispensed with for the trial to be fair. In *People v. Liwanag*,[117] it was held that the right to counsel is the "right to effective assistance of counsel." Nonetheless, the lack or shortness of cross examination by defense counsel did not make the latter ineffective. The Supreme Court noted the following observation with approval:

> That said counsel opted not to cross-examine the prosecution expert witness, Dr. Louella Nario, is of no moment because said witness merely explained in court her

[115] G.R. Nos. 187912-14, January 31, 2011.
[116] Lee v. People, G.R. No. 192274, February 8, 2012.
[117] G.R. No. 120468, August 15, 2001.

> findings and conclusions that she had arrived at after conducting the medical examination on the private complainant[…]

As long as the adversarial process, which ensures fairness, proceeded, defense counsel is presumed to have done his/her duty to the client regularly.

In relation to the right to expert assistance, the right to competent counsel would involve having a competent counsel who knows the critical forensic evidence that would assist the defense and can effectively cross examine the experts of the prosecution.

E. Duty of Court to Appoint Experts

The Supreme Court held that there are points of inquiry wherein experts are necessary, and it would be serious flaw if the court, by its own initiative, did not require their assistance and compel the parties to pay the required fees. The court declared that this was court practice in cases of overlapping titles.[118]

But in criminal cases, the Court had maintained that it is not the court's prerogative as to how the prosecutor will present its case as it is the latter who has discretion who will be called as witnesses,[119] including the decision as to whether an expert is necessary.

If an expert is appointed by the court, an issue arises regarding compensation, particularly when the accused is indigent.

F. Neutrality of Expert

All witnesses, whether lay/ordinary or expert, have an oath and duty towards the court to tell the truth and not mislead it. Scientists have their own professional code of ethics and best practices that would ensure that their findings are solely based on their science and not on other considerations.

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118 Cambridge Realty and Resources Corp. v. Eridanus Dev't, Inc., G.R. No. 152445, July 4, 2008.

119 People v. Jumamoy, G.R. No. 101584. April 7, 1993.

This raises the issue of whether forensic experts should have their own code of conduct or whether the forensic laboratories, in terms of process, personnel, equipment, machines and devices, should be regulated to ensure they are autonomous and not under the authority of any party as well as assure the quality of their service. It would be ideal if there was an accreditation system for forensic scientists. There are no steps to ensure that the expert's work is impartial and independent. Consequently, it can result to the "shopping" of the party with more resources of the "right" expert who will support its case.[120]

It is argued that a partisan expert would ensure that the adversarial system is optimized for both parties and accused is accorded due process.[121] On the other hand, a neutral expert would aid the court in truth-seeking, without any loyalty to any party. According to the Philippine Supreme Court:

> The testimony of an expert witness must be construed to have been presented not to sway the court in favor of any of the parties, but to assist the court in the determination of the issue before it […][122]

By its nature, the work of forensic scientists has a public function as it is inherently connected to the administration of justice. It follows that their obligation is not to the one who hired and paid them but to the public.

But the question raised is whether an expert can be completely neutral? According to the Supreme Court, in giving weight to an expert's testimony, the judge must look into such

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[120] Paul C. Giannelli, *AKE v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World,* 89 CORNELL L.REV. 1305, 1308 (2004), *available at* http://scholarship.law.cornell.edu/clr/vol89/iss6/1 (last accessed Aug. 7, 2019).

[121] *See* Alexandra Marinucci, *Achieving Ake: Defendants Deserve The Constitutional Right To Independent Mental Health Professionals,* 79 PITT. LAW REV. 729 (2018), *available at* https://lawreview.law.pitt.edu/ojs/index.php/lawreview/article/view/577/379 (last accessed Aug. 7, 2019).

[122] Tabao v. People, *supra* note 122.

expert's possible bias in favor of the side for whom he/she testifies and the fact that he/she is a paid witness.[123]

## VI. ABUSE OF FORENSIC EVIDENCE

Forensic evidence is undoubtedly useful under the proper circumstances. However, it is not perfect evidence as it can also be arrived at and used improperly for various reasons. The access to use may also be unequal for the parties. The causes and reasons for misuse and limitations to access pinpointed in foreign studies include the following:

### A. Expert's Bias

There could be pressure, whether consciously or unconsciously, internally or externally, towards reaching a particular result. Experts could have "cognitive," "confirmation" or "contextual" bias towards a preconceived or desired outcome which is an unconscious influence on him/her. They develop cognitive or contextual bias when exposed to extraneous information that influence their conclusions. There is confirmation bias when the expert subconsciously interprets the evidence based on the known opinions of a particular side.[124]

To guard against this, examinations could be done blindly, *i.e.* without any information regarding the details of the case. Objectivity is preserved if the experts are not themselves the investigators who interview the parties or witnesses.

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123 Tortona v. Gregorio, G.R. No. 202612, January 17, 2018.

124 John Rafael Pena Perez, *Confronting the Forensic Confirmation Bias,* 33 YALE L. & POL'Y REV. 457, 459 (2014), *available at* https://digitalcommons.law.yale.edu/ylpr/vol33/iss2/7. It was stated in p. 460 thereof:

> "Kassin, Dror, and Kukucka coined the specific term "forensic confirmation bias" to refer to the class of effects through which an individual's preexisting beliefs, expectations, motives, and situational context influence the collection, perception, and interpretation of evidence during the course of a criminal case. This bias, they explain, results in "a rigid focus on one suspect that leads investigators to seek out and favor inculpatory evidence, while overlooking or discounting any exculpatory evidence that might exist."

Deliberate or malicious abuse of forensic evidence because of bias that may be committed by experts consist of faking credentials; fabricating their testimony; misrepresenting findings in their report by exaggerating the same; loosely stating fallacious, inaccurate or incomplete findings; manipulating results; failing to report relevant matters which amounts to concealing or suppressing exculpatory matters; and making misleading conclusions.[125]

B. Lack of Rigor in Method

If the focus is to give an answer at the soonest possible time, or to give the appropriate result according to the needs of the requesting party, there is less regard for assuring accurate conclusions and instead, the expert rushes and relies on methodology that is expedient.

Judges are not learned in the sciences and when the unreliable scientific method misleads the court, is accepted and becomes precedent, the effect of the error widens and is perpetuated. The defense, on the other hand, may also have no capability to controvert the same.

C. Laboratory and Interpretation Error

Even if the expert has no malicious intent to deceive, negligence, *e.g.* sample mix-ups, mislabeling and cross contamination leading to error, is possible even in science. Likewise, although the result is unquestionable, the expert's subjective interpretation that is communicated to the court can also produce error.[126] The court can safeguard against this by not relying on forensic evidence alone in its conviction. Errors can also be corrected through retesting.

D. Lack of Transparency in Reporting Methodology

Laboratories may lack transparency in the methodology used to examine the evidence and may also not be upfront if mistakes are made. The science can be trusted if there is full disclosure about the examination procedure which can aid not just the court

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125 *See* Sangero, *supra* 4.

126 *Id.* at 1137.

in receiving evidence but also the counsels in offering and challenging the evidence.

E. Imbalance of Power Between Prosecution and Defense

Because the power of the state is on the side of the prosecution, forensic experts are available to the investigators, law enforcers and public prosecutor and already know what the latter are seeking. The prosecution has access to government scientists and laboratories without any charge or at minimal cost for the expert's examination of evidence and appearance in court. Hence they tend to generate outcomes that favor the prosecution but on the other hand, few experts are trained to assist the defense.

F. Imbalance of Resources

The imbalance of power and access in favor of the prosecution and pitted against the defense is exacerbated by the fact that most accused are indigents who lack financial resources to hire their own experts. Accused are given public defenders or counsels *de oficio* as part of their right to counsel. But the assistance of the state ends there as, unlike in *Ake*, there is no right to state-paid defense expert. Therefore, the ability of accused to intelligently challenge the prosecution's expert's findings would depend on his/her resources to do so considering the cost. Considering that denial and alibi are always held to be weak defenses, the inability to get expert opinion could prevent the accused from adequately presenting a meaningful defense and supplying exculpatory evidence. The need becomes more pressing when the expert's testimony is crucial to the defense, *e.g.* on the sanity of accused or handwriting expert in forgery. This inequality should not be countenanced, and accused's position should be made the same as a non-indigent accused in line with the equal protection of the law clause of the Constitution.

G. Planting of Evidence by Law Enforcers

The presentation of experts is rendered meaningless if the evidence examined was planted. Planting of evidence by unscrupulous law enforcers is illegal and steps have been taken to guard against it. In drug cases, chain of custody is strictly

followed, not only to preserve the integrity of the seized evidence and to identify the same, but also to ensure that custodians are officially recognized and made accountable. However, the courts follow the presumption of regularity in the performance of official functions and if no improper motive is proved to substantiate irregularity, the defense of planting of evidence is considered as easy to concoct and therefore self-serving.[127]

### H. Junk Science

As earlier stated, the Philippines, being a third world country, is usually behind more technologically advanced countries in using physical evidence in law enforcement and court trial. Thus, only well-established forensic techniques would be used by the parties and courts would not normally be faced with evidence obtained from junk science *i.e.*, not real science and therefore, unreliable. In the United States, the following had been determined to be junk science: microscopical hair comparison,[128] voice and shoeprint comparisons,[129] bitemark evidence[130] and testimony based on repressed memory.[131]

## VII. CONCLUSION

Undoubtedly, forensic evidence should be resorted to whenever possible. The benefits it brings to the quest for truth in a court proceeding is valuable for the administration of justice. The over-reliance of Philippine courts in eyewitness testimony had been criticized because of its weaknesses leading to possibility of wrong convictions.

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[127] People v. Zaragosa, G.R. No. 223142, January 17, 2018.

[128] Sangero, *supra* note 4, at 1201.

[129] *Id.* at 1206.

[130] U.S. Exec. Office of the President President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (A Report to the President), (Sep. 2016), *available at* https://www.pitt.edu/~jdnorton/teaching/2682_confirmation/slides/pcast_forensic_science_fragments.pdf (last accessed Aug. 20, 2019).

[131] Mark L. Howe & Lauren M. Knott, *The fallibility of memory in judicial processes: Lessons from the past and their modern consequences,* 23 MEMORY 633, 647, *available at* https://pdfs.semanticscholar.org/a406/78dace013dcbbd69004028973793846202f1.pdf (last accessed Aug. 18, 2019).

However, forensic evidence is far from being infallible too, as shown by studies in jurisdictions having extensive use of the same. In the Philippines, many times, eyewitness testimony is the only evidence available and it would be unfair if it is viewed as flawed when often enough, it is also accurate and can stand the test of credibility through cross-examination and discernment of the judge. Trial judges can greatly benefit from more training in assigning weight to eyewitness testimony, especially when conviction depends on it. Such training would suffice and there would be no need to introduce expert testimony on eyewitness evidence[132]considering that the science going into expert testimony on eyewitness identification is not yet generally accepted even in American jurisdiction.[133]

It is repeatedly said that the trial court's factual findings based on the credibility of witnesses is given respect because it had the first-hand opportunity to observe the witness' demeanor, attitude and behavior at the stand. From these, the judge makes an assessment of the witness' honesty and not depend on the latter's mere narration and words spoken. Certainly now, judges are not regarded as a passive listener to testimony. They can ask questions when proper and necessary to draw out relevant facts and uncover the truth,[134] as long as it does not appear as favoring a party or in violation of the witness' rights.

At present, there is nothing in the law and rules that would obligate courts to require the presentation of forensic evidence for either side during trial. Therefore, the failure to procure the same at the crime scene has no negative consequence: for the

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[132] John C. Brigham, et al., *Disputed Eyewitness Identification Evidence: Important Legal and Scientific Issues,* (Summer 1999), 19, *available at* https://digitalcommons.utep.edu/cgi/viewcontent.cgi?referer=https://www.google.com.ph/&httpsredir=1&article=1000&context=christian_meissner (last accessed Aug. 26, 2019).

[133] Christopher B. Mueller, et al., §7.7 *Reliability Standard (Daubert, Frye) (A GWU Law School Public Law Research Paper No. 2018-71), available at* https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2652&context=faculty_publications (last accessed Aug. 26, 2019).

[134] People v. Basquez, G.R. No. 144035, September 27, 2001.

prosecution, the accused may still be convicted based on credible eyewitness testimony and for the defense, accused may be acquitted because of the weakness of eyewitness testimony and lack of corroborating physical evidence. Despite the benefits of forensic evidence, law enforcers do not, as a matter of course, gather the same as part of investigation in preparation for filing charges because of limitations on resources.

Although there has not been any extensive study of wrongful convictions in the country, the reversal of convictions in the Supreme Court even in high profile cases paints a worrisome picture of a system that is unacceptably error prone. Hence, all measures that will help ensure that only the truth will prevail in court trials should be studied and implemented.

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# THE INFLUENCE OF EU COMPETITION LAW AND BEYOND: INTERACTIONS BETWEEN THE EU & OTHER JURISDICTIONS' COMPETITION LAWS AND THE PHILIPPINE COMPETITION ACT

*Jedrek José Lotilla*[*]

## 1. INTRODUCTION

In 2015, the Philippines enacted the Philippine Competition Act or PCA.[1] This landmark legislation paved the way for more concrete antitrust and competition rules for the country. Prior to its codification, these rules were scattered across various legal statutes ranging from the Revised Penal Code[2] to the 1987 Constitution[3] to sector-specific legislation and various consumer protection laws such as the Price Act.[4] The PCA consolidates Philippine antitrust legislation under one roof. A quasi-judicial body, the Philippine Competition Commission (PCC), has primary jurisdiction over implementation and enforcement.[5]

Competition law serves to regulate anti-competitive behavior as a means to promote fair competition in the market.[6] In the PCA, the PCC's mandate revolves around its three pillars of competition law: (i) anti-competitive agreements, (ii) the abuse of a dominant position, and (iii) anti-competitive M&As. With regard to formulating a competition policy regime, the socio-economic

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[1] Rep. Act No. 10667 [hereinafter "PCA"] (2015). This is the Philippine Competition Act.

[2] REV. PEN. CODE, art. 186

[3] CONST. art. XII, § 19.

[4] Rep. Act. No. 7581.

[5] To distinguish it separately from the (EU) Commission, the Philippine Competition Commission will be referred to as PCC.

[6] SIMON BISHOP & MIKE WALKER, THE ECONOMICS OF EC COMPETITION LAW 5 (3rd ed., 2010).

milieu of a country needs to be taken into account. According to various sources, the PCA came into fruition as an amalgamation of various competition rules drawing inspiration from different jurisdictions, *inter alia* the EU, US, Australia, and Canada.[7] Why and to what extent?

This thesis aims to show the influence of EU Competition Rules on the PCA. For the methodology, specific sections of the PCA such as Sections 14 and 15 will be compared with elements of Articles 101 & 102 TFEU along with its soft law guidelines. Merger Review will be compared in conjunction with the Merger Guidelines of both PCC and the EUMR. Relevant EU case law and PCC decisions will also be examined to try and support the analysis. Further, the thesis shall focus on substantive elements of Competition Law. It shall not delve into procedural matters or other components such as, *inter alia*, leniency programs, private enforcement, or economic methods. A transcript of an official interview with one of the founding commissioners and an active attorney will be used for all three pillars to determine the extent of other jurisdictions' influence. Additionally, official excerpts from the congressional deliberations regarding the original bill of the PCA prior to its passage will be used to see whether the lawmakers did take inspiration from different jurisdictions such as the EU.

The juxtaposition of EU Competition Law and the PCA in this thesis will tackle the research question: "To what extent has EU Competition Law influenced the Philippine Competition Act, particularly its three pillars?" This investigation will be conducted as follows: first, a description on the legal history of competition law in the Philippines prior to the PCA will be established. Second, the PCA and its other soft law guidelines will be examined in light of EU Competition Law. This is where the analysis will be conducted using the selected cases, Philippine Congress' deliberations, and interviews to try and answer the research question. Third, a discussion of the main findings and research

[7] NICHOLAS FELIX I. TY, ET AL., HANDBOOK ON PHILIPPINE COMPETITION ACT. AN INTRODUCTION TO REPUBLIC ACT NO. 10667 (2018); Personal Communication with PCC Founding Commissioner Johannes R. Bernabe [hereinafter "Correspondence with PCC Comm. Bernabe"].

limitations will be included. The final section will conclude the thesis.

## 2. LEGAL CONTEXT OF COMPETITION LAW IN THE PHILIPPINES

Prior to the PCA, there was no comprehensive competition policy statute. Nevertheless, this does not mean that laws dealing with aspects of competition were non-existent.[8] In fact, the legal foundations can be traced back to the Spanish and American Antitrust Laws.[9] A rationale for competition policy can also be seen in the 1987 Philippine Constitution and legal jurisprudence from the Philippine Supreme Court.[10] Further, Article 186 of the Revised Penal Code was the main competition statute before it would be repealed by the PCA.[11] During this 'legal limbo' period, the government and various agencies collaborated with other governments and international agencies to devise proposals for a competition agency and statute.[12] The Philippines' original

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8 TRISTAN A. CATINDIG, THE ASEAN COMPETITION LAW PROJECT: THE PHILIPPINES REPORT 1 (2001); GERONIMO SY, ASEAN COMPETITION LAW: THE PHILIPPINES. CPI ANTITRUST CHRONICLE 2 (2015).

9 Such legal provisions existed during the Spanish Era, codified in the [Old] Penal Code of Spain which was applied in the Philippines in 1887 and manifested in articles 543, 544, & 545. Upon the transfer of colonial reigns to the Americans, these statutes were retained but also altered and supplemented by Act No. 3247 or "An Act to Prohibit Monopolies and Combinations in Restraint of Trade" and §20 of Act 3518 or "An Act Amending the Corporation Law Act" of the Philippine Legislature. The former was primarily based on the 1890 Sherman Antitrust Act of the US, while the latter was based on the 1914 Clayton Act. The primary essence of the former would later be embodied in art. 186 of the 1932 Revised Penal Code of the Philippines until it was repealed by the Philippine Competition Act of 2015. *See* Act No. 3247, Act No. 3518, and the old commercial codes of the Philippines. *See* LUIS B. REYES, II REVISED PENAL CODE, arts. 114-367, 284-290 (19th Ed., 2017).

10 CONST. art. XII, § 19. The provision states "[t]he State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed." *See also* Tatad vs. Secretary of the Department of Energy, G.R. No. 124360, November 5, 1997; Lagman vs. Torres, G.R. No. 127867, ; Gokongwei vs. Securities and Exchange Commission, G.R. No. 45911. *Nota bene*: this very much mimics the language of American antitrust statutes, notably the Sherman Act and the Clayton Act. *See also* JOAQUIN G. BERNAS S.J. THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1233 (2009 Ed., 2009).

11 *See* CATINDIG, supra note 8.

12 *See e.g.* Kenyon et al. A Policy Framework for Competition Policy in the Philippines. *The Institute for Research into International Competitiveness*

approach to competition law was sectoral in nature.[13] Prior to 2015, the nation had a range of industry specific and consumer related competition laws that revolved around its criminal, civil, and corporation codes.[14] These would then be enforced by various sector regulators. Examples of this include Republic Act No. 9136 or EPIRA[15] and Republic Act No. 7925 or the Public Telecommunications Act.[16] These laws empowered the Energy Regulatory Commission (ERC) and the National Telecommunications Commission (NTC), respectively, in maintaining a level playing field of fair competition in the specific industry falling within its jurisdiction.[17]

Indeed, there were existing competition law statutes, albeit these laws patterned after US Antitrust were scattered all over the Philippine legal landscape and contained outdated provisions and penalties that were hardly ever enforced.[18] Moreover, while it is true that sector regulators and competition authorities share the same goals, their mandates are slightly different.[19] This is particularly important for competition authorities such as PCC that are primarily concerned with competition enforcement under the PCA. Competition enforcement revolves around competition law's three pillars: anti-competitive agreements, abuse of dominant position, and anti-competitive mergers and acquisitions. Sector regulators

(1999), Commissioned by the Philippine Tariff Commission in conjunction with the Australian Government.

13 *See e.g.* Rep. Act No. 9136 (2001). Electric Power Industry Reform Act of 2001 ("EPIRA"). This law was also responsible for the market liberalization of the energy sector.

14 Kenyon, *supra* note 12.

15 *Id.*

16 Rep. Act No. 7925 (1995). Public Telecommunications Act.

17 Kenyon, *supra* note 12.

18 *See* CATINDIG, supra note 8; Mel Marquis, *Competition Law in the Philippines: economic, legal, and institutional context*, 6 ANTITRUST ENFORCEMENT, J. 2018, 79-122.

19 PCC also concludes Memorandums of Agreements with various sector regulators to facilitate information sharing and cooperate on initiatives to improve competition in a particular sector. Ultimately, PCC is the sole competition agency responsible for the three pillars of competition law of the PCA. *See also* PCA, § 32 on relationship with sector regulators.

are therefore mainly concerned with fostering a culture of competition inline with their mandate.[20]

2.1 ASEAN Integration and Effects of Regionalism

While there were initiatives in codifying a competition law statute internally, there were external geo-political factors that have been influential towards its development in the Philippines. Regionalism was a driving factor for the Philippines to break the impasse and adopt a comprehensive competition law statute.[21] As one of the founding members of the ASEAN, it is surprising that the Philippines was one of the last member state to adopt a legal regime for competition.[22] In 2007, ASEAN sought the establishment of the AEC. Its main objective is accelerating regional integration by fostering the accessible movement of skilled persons, capital, and goods; decreasing the barriers to trade, and increasing the institutional mechanisms of the ASEAN.[23] The overall objective entails a desire to make ASEAN more competitive by establishing a single market that is accessible by the global market.[24] Thus, competition policy is not only necessary but is a fundamental requirement for a fully functional regional market. It increases competitiveness at a regional level as well as enhancing the business landscape. This can be achieved by ensuring a level playing field via intra and inter businesses as well as by fostering

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[20] In practice, other jurisdictions tend to integrate competition enforcement and sector regulation under a specific agency or department. Examples include the Australian Competition and Consumer Commission, which handle competition enforcement matters as well as sector regulation. In the US, the Bureau of Competition is structured within the Federal Trade Commission. In the EU, the Commission has primary jurisdiction on competition matters. Notwithstanding, NCAs of member states are also involved.

[21] *See* S. Journal No. 2. 16th Cong., 2nd Sess., 25-28 (2014). Sponsorship Speech of Senator Benigno Aquino IV on what was then coined the "Fair Competition Act of 2014", forerunner to what would become the PCA.

[22] By 2015, the ASEAN Economic Community Blueprint ["AEC Blueprint"] was to establish a competition policy framework for all member states. At that time only the Philippines, Myanmar, and Cambodia had no competition regime. To date, Cambodia is the only MS of ASEAN that is still in the process of ratifying a competition policy.

[23] AEC Blueprint, *at https://asean.org/book/asean-economic-community-blueprint-2025/* ; Marquis, *supra* note 18.

[24] Marquis, *supra* note 18.

a culture of fair competition. By 2015, the Philippines, along with all the other ASEAM MS, was given a deadline to adopt a competition law regime.[25]

While it is true that this endeavor is nowhere near the comprehensiveness of EU Competition Law and the national antitrust laws of member states, it is nonetheless an essential first step towards a possible ASEAN competition policy in the future. The divergent rationales for the different ASEAN member states are hurdles for this project. Therefore, a coherent regional competition policy that is comparable to the EU will take years for it to come into complete fruition.

### 2.2 The Road to PCA and PCC

During the drafting of the PCA, liaison with other jurisdictions' competition law experts and personnel was made available.[26] In fact, some of these consultants were present during the drafting of the PCA, its IRR, and the Merger Rules.[27] Among these assistance projects, the EU-TRTA 3 was vital. EU-TRTA 3 was a technical assistance project that had 6 components.[28] The second component was primarily for Competition. The roadmap of the project set to establish the OFC under the Philippine DOJ. Initially, the DOJ-OFC was to function as the sole enforcer of the country's various competition laws.[29] Ultimately, it was decided that a new statute would be codified purely for competition policy and the creation of a quasi-judicial independent agency. Through the PCA, these powers were transferred to the PCC as the primary quasi-judicial agency responsible for competition enforcement. Nonetheless, under PCA Sections 5 and 13, the DOJ-OFC would be retained with its initial tasks modified. Under Section 13, DOJ-OFC

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[25] AEC Blueprint; *See* Marquis, *supra* note 18.

[26] US DOJ/FTC personnel as well experts from Australia due to the ASEAN-Australia-New Zealand Free Trade ("AANZFTA"). *See also* AANZFTA Economic Cooperation Support Program.

[27] Correspondence with PCC Comm. Bernabe.

[28] ASEAN Regional Support by the EU; EU-Trade Related Technical Assistance Project 3 Inception Report, 2013

[29] *See* Exec. Ord. No. 45 (2015). This order was issued designating the Department of Justice as the Competition Authority; DOJ Circ. No. 005 (2005); and other related issuances as amended by the PCA, § 55(e). Repealing Clause.

would only be able to conduct preliminary investigation and undertake prosecution of all criminal offenses arising under the PCA and other competition related laws in accordance with Section 31.

2.3 Objectives of Competition Law

Under Section 2 of the PCA, the Declaration of Policy sets out its threefold goals:[30]

(a) **Enhance economic efficiency** and **promote free and fair competition** in trade, industry and all commercial economic activities;
(b) Prevent economic concentration; and
(c) Penalize all forms of anti-competitive agreements, abuse of dominant position and anti-competitive mergers and acquisitions, with the objective of protecting consumer welfare and advancing domestic and international trade and economic development.[31]

These are the Philippine national policy rationales for the development of a competition policy. ASEAN's AEC served as the principal catalyst for the speedier adoption of policy. It is also therefore essential to compare both transnational organizational perspectives. In the EU, various goals have been promoted.[32] The most accepted views encompass a triad: (i) enhancing economic efficiency, (ii) ordoliberalism – protecting smaller firms and consumers from larger players with undue aggregations of power, and (iii) creating a single European market.[33] In the early years of the Commission's practice, it was criticized for applying the second goal. Given the modernization reforms made by the EU, it has been accepted that the second goal has eroded in importance. Nevertheless, this paradigm is still manifested on a case-by-case basis and often times is reflected in decisions and ECJ case law.[34]

30 TY, *supra* note 7, at 5.
31 PCA, § 2. (Emphasis supplied.)
32 BISHOP & WALKER, *supra* note 6, at 109-111.
33 *See* PAUL CRAIG & GRÁINNE DE BÚRCA, *Chapter 26, in* EU LAW. TEXT, CASES, AND MATERIALS 1001-1002 (6th Ed., 2015); *See also* Alison Jones & Christopher Townley, *Chapter 17. Competition Law, in* EUROPEAN UNION LAW 510-511 (Catherine Barnard & Steve Peers, 2nd ed., 2017).
34 *Id.*

One insight here is that transnational and national objectives tend to overlap due to supranational or intergovernmental organizations. Indeed, one of the main goals of the EU's competition policy relates to market integration. While the PCA was also triggered by a desire for regionalism through the AEC, for ASEAN to feasibly establish an internal market that is comparable to the EU can only be hypothesized at this point in time. Presumably, this is the goal ASEAN is striving towards. Further, under 2(a) PCA the essence of the paragraph states that the scope is not limited to enhancing economic efficiency but also to promoting of free and fair competition. This is a European concept with the two objectives on economic efficiency and creating a single internal market as opposed to the American concept of enhancing economic efficiency only.[35] Additionally, the paradigm on Ordoliberalism seems to be reflected in the promotion of free and fair competition.

The succeeding section will now begin the analysis and investigate the research question. A brief outline and rundown of the PCA will be provided. It will then tackle anti-competitive agreements and the substantive elements necessary for determining anti-competitive conduct.

## 3. REPUBLIC ACT NO. 10667 – THE PHILIPPINE COMPETITION ACT

The PCA is the main instrument for the Philippines' Competition Law. It contains 9 chapters with 56 sections. It is supplemented by other documents such as its IRR and other soft

[35] *See* Marquis, *supra* note 18; *See also* Kaiser. H (2009) *A Primer in Antitrust Law and Policy.* A distinction is made between the purpose of Antitrust Laws being to protect "Competition and not Competitors." Kaiser classifies these two camps as antitrust conservatives and antitrust progressives. Antitrust conservatives concern themselves primarily with economic efficiency. In simple terms, antitrust progressives desire protection for the weak from the strong, while antitrust conservatives desire protection of the strong from governmental intervention protecting the weak.

law guidelines in determining both substantive and procedural elements.[36]

Chapter I General Provisions
Chapter II PCC
Chapter III Prohibited Acts
Chapter IV M&As
Chapter V Disposition of Cases
Chapter VI Fines and Penalties
Chapter VII Enforcement
Chapter VIII Other Provisions
Chapter IX Final Provisions

The PCA established PCC as the sole enforcer of Competition Law in the Philippines. Chapter I contains the general provisions such as the declaration of policy, scope, and definition of terms i.e. relevant market, agreement, entity, control, and dominant position. These terms are further elaborated upon in Chapter V, the IRR, and the Guidelines. Chapter II describes the powers and functions of PCC. Chapters III and IV contain the three pillars of Philippine Competition Law. Chapters VI and VII contain matters of procedure such as appropriation of fines, the confidentiality of information, leniency program, etc. The final two chapters are supplementary and contain, *inter alia,* the statute of limitations, other clauses, etc.

A significant departure from the repealed provision of Article 186 RPC is manifested in Chapter I in the declaration of policy. Under Section 3 PCA on its scope and application, the PCA is enforceable against any person or entity engaged in any trade, industry and commerce in the Philippines, as well as being "applicable to international trade having direct, substantial and

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[36] PCA Rules & Reg. [hereinafter "PCA IRR"] (2016), § 50. This refers to the Implementing Rules and Regulations of R.A. No. 10667 or PCA; *See also* PCC Rules on Merger Procedure [hereinafter "PCC Merger Rules"] (2017); Erlinda M. Medalla, Philippine Institute for Development Studies, *Understanding the New Philippine Competition Act,* Discussion Paper Series No. 2017-14 (2017). *available at* https://pidswebs.pids.gov.ph/CDN/PUBLICATIONS/pidsdps1714.pdf.

reasonably foreseeable effects in trade, industry, or commerce in the Republic of the Philippines, including those that result from acts done outside of the Republic…"[37] The PCA contains an international outlook regarding its scope as opposed to the limited jurisdiction of its predecessor – the Article 186 of the RPC.[38] This point shall be revisited in the discussion in Chapter 4.1.

### 3.1 Anti-Competitive Agreements: Section 14 PCA Related to Article 101 TFEU?

The prohibited acts – the anti-competitive agreements – contained in Section 14 PCA are conspiratory and collusive in nature amongst firms. These are divided into three distinct categories: (a) agreements which are *per se* prohibited, (b) agreements which have the object or effect of substantially preventing, restricting or lessening competition, and (c) agreements which have the object or effect of substantially, preventing restricting or lessening competition other than those specified in (a) or (b), "provided those which contribute to improving the production or distribution of goods and services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, may not necessarily be deemed a violation of this act."

Under Section 14(a) of the PCA, the *per se prohibition* includes two types: (i) price-fixing and (ii) bid-rigging. Under Section 14(b), object or effect restrictions also include two types: "(i) setting, limiting, or controlling production, markets, technical development or investment; and (ii) dividing or sharing the market, whether by volume of sales or purchases, territory, type of goods or services, buyers or sellers or any other means." However, Section 14(c) explicitly provides possible exemptions for agreements other than those mentioned in Sections 14(a) and 14(b) PCA. Upon closer

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[37] PCA, § 3.

[38] Article 2 of the RPC states that the application of its provisions shall only be enforced within the Philippine Archipelago, thus presenting a limited field of application. This is a necessary consequence of the fact that the RPC is a penal statute hence generally territorial in application. *See also* REYES, supra note 9, at 24-25.

inspection, this mimics the logic contained in Article 101(3) of the TFEU, the "third line of defense" for firms to prove possible efficiency gains that are inherently inseparable from the agreement concerned.[39] However, unlike Article 101(3) of the TFEU, Section 14(c) the PCA does not require the absence of two more succeeding factors to complete the justification.[40] Additionally, the terms *per se,* object and effect, substantially preventing, restricting or lessening competition, seem to be terms taken from other jurisdictions, particularly, the US, EU, and Australia.

Consequently, it is necessary to discuss the substantive elements for determining the applicability of Competition Law. Generally, applying Section 14 requires four elements: (1) there are two or more entities in the relevant market; (2) the entities entered into an agreement, expressly or implied; (3) the agreement has the object or effect of substantially preventing, restricting or lessening competition; and if possible under 14(c); and (4) an efficiency defense.[41] The elements – relevant market, entity (or undertaking), agreement/conduct, restrictions by object or effect/SLC (or distortion), and efficiency defense – will be outlined below.

#### *3.1.1 Relevant Market*

Like most jurisdictions, defining the relevant market (product and geographic) is a necessary step in applying competition rules as it systematically demarcates the competitive

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[39] Treaty on the Functioning of the European Union ["TFEU"], December 13, 2007, art. 101 (3). The full text of 101(3) TFEU states: "The provisions of paragraph 1 may, however, be declared inapplicable in the case of: any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

[40] *See* TFEU, art. 101(3)(a)&(b).

[41] Except for 14(a), *per se* restrictions just like the hardcore restrictions in EU Competition Law, cannot be justified or exempted, since they are inherently deemed illegal; *See General Block Exemption Regulation on Vertical Agreements.*

constraints the entities face and identifies the particular industry (or industries) concerned.[42]

Section 4(k)(i) of the PCA states: "a relevant product market comprises all those goods and/or services which are regarded as interchangeable or substitutable by the consumer or the customer, by reason of the goods and/or services' characteristics, their prices, and their intended use."[43]

Section 4(k)(ii) of the PCA states: "The relevant geographic market comprises the area in which the entity concerned is involved in the supply and demand of goods and services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring areas because the conditions of competition are different in those area."[44]

These definitions reflect the language of the Commission Notice on the relevant market, albeit with minor adjustments, due to a slight difference in terminology.[45] Following this logic on product characteristics, the PCA therefore also takes the definition from the landmark case of *United Brands,*[46] the applicability of this shall be discussed more in detail in the section on the abuse of dominance. Clearly, EU jurisprudence was adopted as a statutory definition in the PCA.

*3.1.2 Entity v Undertaking*

Like other jurisdictions, the PCA distinguishes its applicability with entities, bearing some resemblance with the American "firm" and European "undertaking".[47] The term entity in

42 *See* RICHARD WHISH & DAVID BAILEY, COMPETITION LAW (8th Ed., 2015); *See also* BISHOP & WALKER, *supra* note 6, at 109-111; *See also* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (6th Ed., 2016); *and* Par. 7 of European Commission Notice on the definition of relevant market for the purposes of Community Competition law, OJ C 372/5, 9.12.1997.

43 *See also* PCA IRR, rule 2(l)(1).

44 *See also* PCA IRR rule 2(l)(2).

45 For example, "undertaking" is replaced with "entity", the word "customer" is added next to "consumer", and the term "appreciably" is deleted entirely.

46 United Brands v Commission, Case 2676, ECR 207 (1978).

47 *See Höfner and Elser*, Case C-41/90 ECR I-1979, par. 21 (1991).

Section 4(h) of the PCA encompasses "any person, natural or juridical, sole proprietorship, partnership, combination or association in any form, whether incorporated or not, domestic or foreign, including those owned or controlled by the government, engaged directly or indirectly in any economic activity." Based on the PCC's Merger Guidelines, the final clause on economic activity is not only limited to "activities that generate profits or dividends for shareholders, it may also include activities conducted on a not-for-profit basis."[48]

The coverage for an entity under Section 14 of the PCA is also seen under the penultimate proviso: "an entity that controls, is controlled by, or is under common control with another entity or entities, have common economic interests, and are not otherwise able to decide or act independently of each other, shall not be considered competitors for the purposes of this Section." While the concept of control is explicitly defined in the PCA[49], it is a contested and broad topic altogether. However, the existence of the proviso acknowledges decisions from other jurisdictions that have tackled this topic, namely the EU and the US[50] it also delineates the classification of what constitutes competitors. The ECJ originally tackled the single economic entity doctrine in the *ICI Case.*[51] Although, this mainly concerned "piercing the corporate veil" between a parent and its subsidiaries, it would later be cited in *Viho Parker Pen*[52] to establish that two independent entities are

48 PCC Merger Rules, ¶ 3.4.

49 *See* PCA, §S 4(f), 25 on Control of an Entity; *See also* PCC Merger Rules, ¶¶ 3.5-3.6. The Concept of Control of an Entity is explicitly tackled in Section 25 of the PCA. If examined profusely, one could also draw conclusions that the provisos emanate ECJ Case law i.e. Section 25(a) on presumption of control existing when "the UPE owns directly or indirectly, through subsidiaries, more than one half (1/2) of the voting power of an entity" and that parent entity may be held liable for the subsidiary's anticompetitive actions; *See* Elf Aquitane SA v. European Commission, Joined Cases T-299/08 and T-343/08, EU:T:2011:217 (2011); Akzo Nobel NV v. Commission, Case C-97/08 P, ECR I-08237 (2009).

50 Also known as the single economic entity doctrine in specific jurisdictions, but this is particularly concerned with establishing parent company liability or 'piercing the corporate veil.'

51 Imperial Chemical Industries v Commission (Dyestuffs), Case C-48/69, ECLI:EU:C:1972:70 (1972).

52 Viho Europe v. Commission, Case C-73/95 P, ECLI:EU:C:1996:405 (1996).

required for an Article 101 TFEU infringement. Similarly, the US Supreme Court Case equivalent is evidenced in *Copperweld.*[53]

*3.1.3 Agreements*

Agreements in the PCA stem from the traditional notion of a meeting of the minds in the Philippine Civil Code on contracts.[54] As a rule, the perfection of a contract requires the meeting of the minds of two parties.[55] Section 4(b) PCA's definition of an agreement is "any type or form of contract, arrangement, understanding, collective recommendation or concerted action, whether formal or informal, explicit or tacit, written or oral."

Nevertheless, while this concept traces its evolution along Philippine civil law tradition, a parallelism can be found with established EU cases which defines agreements of such nature. For example, CJEU and ECJ jurisprudence for such terms are established. Landmark EU cases such as *ICI/Dyestuffs* tackled the notion of a concerted practice.[56] Cases such as *Woodpulp II,*[57] and *Polypropylene*[58] were concerned with oral agreements. However, for a concurrence of wills, further study and development needs to be taken into account.[59]

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[53] Copperweld Corp. v Independence Tube Corp., 467 U.S. 752 (1984). Similar to *Viho Parker Pen,* the US Supreme Court concluded that for the purposes of Section 1 of the Sherman Act, the existence of two independent firms is necessary for there to be a conspiracy in restraint of trade or commerce; *See* Carsten Koenig, *Comparing Parent Company Liability in EU and US Competition Law*, 41(1) WORLD COMP.: LAW & ECON. REV. 69-100 (2018).

[54] TY, *supra* note 7, at 24.

[55] CIVIL CODE, art. 1305.

[56] *See* Imperial Chemical Industries v Commission (Dyestuffs), Case C-48/69, ECLI:EU:C:1972:70 (1972).

[57] Osakeyhtiö v Commission of the European Communities, joined cases C-89/85, C,104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 (1993).

[58] Hercules Chemicals NV v Commission of the European Communities, Case C-51/92, ECR I-4235 (1999); Enichem Anic SpA v Commission of the European Communities, Case T-6/89, ECLI:EU:T:1991:74 (1991).

[59] Bayer v Commission, Case C-T-41/96, ECR II-3383 (2000).; *See* ARIEL EZRACHI, EU COMPETITION LAW: AN ANALYTICAL GUIDE TO THE LEADING CASES. (4th Ed., 2014) p. 63-64

*3.1.4 SLC v Distortion: Per Se, Object & Effect*

The PCA uses the language "substantially preventing, restricting or lessening competition" to denote a constraint to competition. In retrospect, this is an amalgamation of the phrase used in the EU, US, and Australia.[60] The syntax, albeit slightly altered, is borrowed from Article 101 of the TFEU wording where "distortion" is replaced with "lessening." Based on the transcript of the Bicameral Committee Deliberations for what would become the PCA, the drafters of the law sought to include the term "distorting" directly after "preventing" and "restricting".[61] Doing so, would have transposed the term from the TFEU, manifesting the PCA's drafters intent to incorporate EU Competition Law.

The decision to replace the term "distortion" with "lessening" was met with feelings that the former evoked vagueness vis-à-vis the conciseness of the latter.[62] In the Congressional Deliberations, the debate on including "distortion" went so far as tracing the very word to the original European Community Treaty.[63] Conversely, market distortion is a specific term in Neoclassical economics that relates to price ceilings, price floors, tax subsidies and other forms of government interventions or schemes[64] Perhaps this is another reason for the drafters to settle with "lessening" as opposed to "distorting" because unlike

[60] TFEU, art. 101 states "The following shall be prohibited as incompatible with the internal market: all agreements…which have as their object or effect the prevention, restriction or distortion of competition within the internal market…"; § 7 Clayton Act, 15 U.S.C. §§12-27, as amended, makes reference to "substantially lessen competition" or SLC. This is also the standard SLC test used in M&As; 45DA, 46 and 50 of the Competition and Consumer Act 2010 ("CCA") of Australia iterate a "substantial lessening competition" or "substantially lessening competition."

[61] Deliberations of the Bicameral Conference Committee on the Disagreeing Provisions of Senate Bill No. 2282 and House Bill No. 5286 (The Fair Competition Act which would eventually become the PCA) [hereinafter "Bicameral Conference Deliberations"], Day 2: 4 June 2015, p. 6; 203

[62] *Id.* Day 2: June 5, 2015, p. 23

[63] *Id.* Day 1: June 4, 2015, p. 198; *See* EC Treaty, provision 3(g).

[64] *See* ALDEN F. ABBOTT & SHANKER SINGHAM, 2016 INDEX OF ECONOMIC FREEDOM, ch. 5 (2016); Alden F. Abbot, ANTICOMPETITIVE MARKET DISTORTIONS AS AN UNGOVERNED SPACE, AND PROSPECTS FOR REFORM, 36 (2) SAIS Rev. of Int. Affairs, 87–102 (2016). https://www.jstor.org/stable/27001436 (Accessed October 27, 2023), where the authors coin the term anti-competitive market distortions ("ACMDs") primarily wrought about by the action or inaction of governments, laws, regulations, and practices.

in the EU, the Philippines does not have a fourth branch of Competition Law – State Aid[65] – which seeks to mitigate intervention made by national governments.[66] A more practical reason is that the legislators opted for the former so it could be easily understood amongst lawyers, businesses, and laymen without a competition law or economics background.[67] One senator adds, "the Philippines is still starting with Competition Law," and that "some of these terms are too deep to comprehend."[68] If judges and consumers have no basic grasp of economics, let alone the specifics of the economic term, then that would defeat the very purpose of the PCA. Hence, the need to adapt the law for the Philippine setting. On the contrary, as one senator rebuts, directly copying from the EU would mean that the Philippines would also be able to apply and follow EU jurisprudence on the matter, as subsidiary sources of the law.[69] In times of doubt, one could simply turn to the EU as an example

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65 As opposed to most jurisdictions, the EU has five pillars for Competition Law – the other two branches being Services of General Economic Interest and State Aid – Articles 106, 107, and 108 on the Treaty of the Functioning of the European Union. *See* CRAIG & DE BÚRCA, *supra* note 33, ch. 29. One of the definitions of EU State Aid is that the aid "distorts or threatens to distort competition."

66 However, this does not mean that market distortion is purely caused by government intervention. In reality, market distortion may also arise due to the presence of a monopoly and thereby reducing efficiency.

67 One must consider that the Philippines is still a developing country. The terms the international community, let alone the EU, use could be too complex for the average joe or jane. Arguably though, lawyers, judges, and the managers or board of directors of big companies or conglomerates should understand and familiarize themselves with these terms.

68 Bicameral Conference Deliberations, *supra* note 61. Comment of Senator Cynthia Villar. Arguably, Competition Law is a a technical subject that needs to be grasped by companies, judges, economists, and lawyers. Perhaps what the Senator was referring here is that since the Philippines is still a developing country introducing Competition Law, and that therefore these people need to be informed of the basics before utilizing comprehensive terminology. Additionally, the comment that the general populace needing to know the law could be hinting that fostering a culture of competition among the mindset of cosumers could be beneficial in the long-run, hence the need for average consumers to understand the PCA.

*See* Bicameral Conference Deliberations, *supra* note 61. Comment of Senator Benigno Aquino IV, the principal sponsor of the PCA in the Upper House; At this stage, the Philippines has no court cases relating to the PCA,

given the concluded cases on competition law.[70] Nonetheless, in terms of application, it shall be seen in the succeeding sections that the Philippines opted for both. In the final discussion, the hierarchy of Philippine legislation and jurisprudence plays a pivotal role regarding this decision.[71]

The word "substantially" in the Philippine version of SLC implies that the prohibited conduct has more than a minimal effect on competition. One possible explanation for the drafters' decision is because in EU Competition Law another substantive element exists in the stipulation for "appreciable effect on trade."[72] This is a concept that revolves around the EU jurisdiction as a whole that evokes transboundary consequences.[73] Hence, the drafters decided to opt for the term "substantially" as it denotes a less transnational or transboundary effect.[74] Secondly, the term "appreciable effect on trade" seems more befitting for the AEC vis-à-vis a national competition law.[75] The provisions referred to above appear to show the PCA to be an amalgamation of competition law from various jurisdictions. The term "substantially preventing, restricting, or lessening competition" is a hybrid that takes the original syntax from the EU, and fusing the standard SLC term from the US and Australia. The Philippines is taking this "directly from the EU" says one Filipino legislator during the Bicameral Deliberations, yet it appears to be rooted in American Antitrust Law.[76]

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70 As shall be seen in the discussion, the hierarchy of Philippine legal jurisprudence was a factor with this decision.

71 *See supra* Part 4.3.

72 Commission Notice on the application of Art. 81 and 82 and the concept of appreciable effect on trade [2004] OJ C101/81; *See also* Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) (de minimis) [2014] OJ C291/01.

73 *See* Völk v SPRL Est J Vervaecke, Case 5/69, ECR 295[1969], as seen in EZRACHI, *supra* note 59, at 115.

74 The EU also uses the term "substantial" for mergers and in TFEU, art. 102. *See supra* Part 3.2.2.

75 In EU Competition Law, the term appreciable effect is also a substantive element for its application. *See* Commission Notice Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty. (2004/C 101/07).

76 *See* Bicameral Conference Deliberations, *supra* note 61, comment of Senator Benigno Aquino IV, the principal sponsor of the PCA in the Upper House.

Section 14 contains three possible violations: *per se,* object, and effect violations. Upon closer inspection, the former seems to be influenced by US Antitrust Law and the latter two are terms taken from the TFEU. Object and effect restrictions are carried over unto the abuse of dominant position which will be discussed more in detail in Section 15 PCA. While it is true that the PCA contains a third violation in the form of the '*per se'* category, arguably though, the EU also has its own *per se* category as manifested by the 'hardcore restrictions' contained in the vertical agreement GBER.[77] Conversely, the GBER practically exempts vertical agreements from the scope of 101 TFEU. As will be further discussed, vertical agreements are subject to a 'rule of reason' test in the PCA.

*3.1.5. Efficiencies or Rule of Reason?*

As evinced above, Section 14(c) of the PCA is similar to Art. 101(3) of the TFEU except that it does not require the absence of two other factors. Moreover, the efficiency gains are taken into account for object and effect violations as opposed to *per se* violations where defenses are not permitted. The question now arises whether a rule of reason analysis or efficiency defense exists in the PCA.

In EU Law, the rule of reason is a term used for internal market law and is distanced from competition law.[78] In the former, the rule of reason is a test that weighs the interests of free movement, with other non-economic interests for a justification. In the latter, it is a test that weighs the pro-competitive against the anti-competitive to demarcate its field of application.[79] However, throughout the years there have been debates on whether the EU should adopt a rule of reason test for Competition Law.[80] Besides, it has been argued that EU Courts have subconsciously adopted a

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77 *See* Vertical Agreement GBER Art. 4. Commission Regulation No. 330/2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices.

78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, Case C-120/78, ECR 649 [1979]; *See also* CRAIG & DE BÚRCA, *supra* note 33, at 674.

79 *See* CRAIG & DE BÚRCA, *supra* note 33, at 1013; WHISH & BAILEY, *supra* note 42, at 142-143.

80 *Id.*

rule of reason analysis akin to the US in a number of cases.[81] Officially, there is no rule of reason in EU Competition Law, albeit some cases create the impression that EU Courts believe otherwise.[82] Besides, Art. 101(3) of the TFEU already exists and establishes the feeling of weighing the pro-competitive vis-à-vis the anti-competitive effects, but is done to exempt agreements and not denote the applicability of the law. Thus, since Section 14(c) is similar to Art. 101(3) of the TFEU, what is relevant are actual or potential efficiency gains generated by the agreement which without it, are indispensable in achieving the efficiencies, and are objective and not only for the benefit of the parties.[83] While there is no explicit definition in the PCA, this definition is taken from EU guidance on the application of Art. 101(3).[84]

In US Antitrust, the rule of reason developed from *per se* rules to determine whether a restraint to trade or commerce encompassed the Sherman Act.[85] The Supreme Court, in *Continental TV Inc.*[86] clarified the need for a case-by-base evaluation to determine anticompetitive conduct. This is dissimilar to 101(3) as the efficiency defense is an exemption to the rule and not to determine the applicability of "101(1)TFEU." Since the efficiency defense of the EU exists in the catchall proviso that is 14(c) PCA, other agreements, whether horizontal or vertical[87], and provided they are not mentioned in 14(a) and (b) PCA, which have "the object and effect of substantially preventing, restricting or

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81 *See* Wouters A.O. v. Algemene Raad van de Nederlandse Orde van Advocaten, Case C-309/99, ECLI:EU:C:2002:98 [2002]; Lundbeck v Commission, Case T-472/13, ECLI:EU:T:2016:449 [2016]; Metropole Telivision (M6), Suez-Lyonnaise Des Eaux, France Telecom, and Telivision Française 1 SA (TF1) v. Commission, Case T-112/99, ECLI:EU:T:2001:215 [2001]. *See also* CRAIG & DE BÚRCA, *supra* note 33, at 1014; WHISH & BAILEY, *supra* note 42, at 144.

82 *Id.*

83 *See* Communication from the Commission Notice Guidelines on application of Article 81(3) of the Treaty OJ C 27.4.2004; Personal Communication with Michael Kris Ben T. Herrera, Attorney IV, PCC [hereinafter "Correspondence with Atty. Herrera"].

84 *Id. See also* TY, *supra* note 7.

85 *Standard Oil v US,* 221 US 1 (1911).

86 Continental TV Inc. v. GTE Sylvania, 433 US 36, 49 (1977).

87 In the EU, vertical agreements are exempted from 101 TFEU provided that the practices are not part of the 'hardcore restrictions' of the vertical agreement GBER.

lessening competition" are subject to a "balancing test" with the four cumulative criteria for actual or potential efficiency gains.

It is evident that EU Competition Law has its imprint on the PCA (to an extent also the US and Australia) from the analysis of a single section alone. But why did the legislators choose this trajectory? Truly, the EU is an experienced jurisdiction on Competition Law with a long-history of cases concluded. Arguably though, the US has practiced Antitrust for over a century – far longer than the EU. Further, the forerunners of the PCA were rooted in American Antitrust Law. Was this mere coincidence or was there another reason? This question will be reflected upon in the discussion. Based on the interview with a founding PCC Commissioner and the Bicameral Deliberations, the PCA drafters had the EU in mind while devising Section 14 PCA.

### 3.2 Abuse of Dominant Position: PCA, Section 15 Related to TFEU, Article 102?

Unlike PCA, Section 14(c) which has one catchall proviso, PCA, Section 15 lists nine abuses of dominance. Based on the interview and bicameral transcript, this was rooted in a contested legal impediment in Philippine Administrative and Criminal Law, which will not be elaborated in detail.[88] This is in contrast to 102 TFEU which contains a more or less, non-exhaustive list of abuses.[89] In all, it seems that the PCC opted for the non-exhaustive manner employed in the EU as evidenced in its IRR.[90]

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88 Correspondence with PCC Comm. Bernabe. The impediment being whether the list of nine abuses should be exhaustive or not.

89 *British Airways PLC v Commission,* Case C-95/04 P,, ECR I02331 [2007], ¶ 64; Text of TFEU, art. 102 reads: "Any abuse by one or more undertakings of a dominant position within the internal market or a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States." *See also* CRAIG & DE BÚRCA, *supra* note 33, at 1068; WHISH & BAILEY, *supra* note 42, at 208.

90 PCA IRR, rule 3, § 2. "It shall be prohibited for one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict, or lessen competition, including…". The addition of "including" signifies that other violations may fall under its ambit and that the nine abuses enumerated in PCA, Section 15 are possible examples. The final paragraph of the penultimate proviso also hints at this possibility stating that "Provided finally, that the foregoing

PCA, Section 15 states that: "[i]t shall be prohibited for one or more entities to abuse their dominant position by engaging in conduct that would substantially prevent, restrict or lessen competition:" It contains nine abuses summarized below.

(a) Below cost pricing i.e. predatory pricing
(b) Imposing barriers to entry or expansion
(c) Imposing irrelevant conditions i.e. tying
(d) Price Discrimination (with four permissible price differentials)[91]
(e) Imposing restrictions on contracts for sale i.e. dictating to distributors and or retailers prices, customers or exclusive territories. (with two exemptions)[92]
(f) Dependent supply of particular goods or services upon purchase of other goods or services which have no direct connection with the main goods or services to be supplied; i.e. tying arrangement.
(g) Unfairly low input prices i.e. an abuse of a superior bargaining position, established by paying too little for inputs, especially for MSMEs
(h) Unfair pricing i.e. excessive prices
(i) Limiting production, markets or technical development to the prejudice of consumers i.e. an impediment to production or innovation. [93]

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shall not constrain the Commission or the relevant regulator from pursuing measures that would promote fair competition or more competition as provided in this Act."

91 (1) socialized pricing for the less fortunate sector of the economy; price differential which reasonably or approximately reflect differences in the cost of manufacture, sale, or delivery resulting from differing methods, technical conditions, or quantities in which the goods or services are sold or delivered to the buyers or sellers; (3) price differential or terms of sale offered in response to the competitive price of payments, services or changes in the facilities furnished by a competitor; and (4) price changes in response to changing market conditions, marketability of goods or services, or volume.

92 (1) Permissible franchising, licensing, exclusive merchandising or exclusive distributorship agreements such as those which give each party the right to unilaterally terminate the agreement; or (2) agreements protecting intellectual property rights, confidential information, or trade secrets.

93 PCA, § 15. *See also* PCA IRR, rule 3, § 2.

Moreover, the second subparagraph of the penultimate proviso states:

> Provided further, That any conduct which contributes to improving production or distribution of goods or services within the relevant market, or promoting technical and economic progress while allowing consumers a fair share of the resulting benefit may not necessarily be considered an abuse of dominant position.

Taking these into account, several substantive terms are lifted from TFEU, Art. 102, particularly on the abuse of dominant position and the concept that one or more entities can be dominant in a market – collective dominance. Further, successfully invoking PCA, Section 15 requires three elements. These elements include: (1) identification of the relevant market, (2) the entity or entities possess significant market power (market dominance or collective/joint dominance) in said market, and (3) based on the IRR, a non-exclusive list of abusive conduct that would substantially prevent, restrict, or lessen competition. These elements shall be discussed below.

*3.2.1 Relevant Market*

Similar to PCA, Section 14, determining the relevant market (product and geographic) is an essential prerequisite in applying the law. The definition of the relevant market in Section 4(k) of the PCA, the PCA IRR, and the PCC Merger Rules was taken from the EU's soft law and case law definitions. Further, the *United Brands* Case, which tackled the distinction between the fruit market as a whole and the banana market, went on to ascertain demand-side and supply-side substitutability /interchangeability, and product characteristics.[94] The SSNIP test narrows down each case as well as determining cross-elasticities of products. Using this Hypothetical Monopolist Test would ascertain if a 5% increase or mark up in price would be profitable for the entity in the long run.[95] While the

[94] Case 26/76 *United Brands v Commission* [1978] ECR 207, par. 22, 31.
[95] *See* BISHOP & WALKER, *supra* note 6, at 112, 123.

American model and European model differ slightly, this economic test will not be examined further.

*3.2.2 Market Power/Dominant Position: Single Entity Dominance*

According to PCA, Section 4(g), a dominant position "refers to a position of economic strength that an entity or entities hold which makes it capable of controlling the relevant market independently from any or a combination of the following: competitors, customers, suppliers, or consumers." This resembles the definition in *United Brands*, although slightly altered.[96] Nevertheless, the main essence of *United Brands* is quite evident in the PCA definition and is the PCC's point of assessment. EU case law was yet again adopted as a statutory definition in the PCA provision.

The threshold for the presumption of dominance is when an entity has approximately 50% of the relevant market.[97] The PCC may alter this threshold depending on the sector concerned. Based on this observation, the Philippine standard seems to be more lenient compared to other jurisdictions. For example, the EU presumption for market dominance is set at 40%. Additionally, PCC also takes into consideration a non-exclusive list of other factors, as seen in Rule 8, Section 2 of the PCA IRR, in its assessment. Some of these considerations are summarized below:

(a) market share of the entity and its ability to fix prices unilaterally or
(b) market share of other entities within the relevant market
(c) existence of barriers to entry
(d) existence and power of competitors
(e) expansion and entry considerations
(f) countervailing buyer power

96 Case 26/76, *United Brands v Commission* [1978] ECR 207, par. 65. The Court states that dominance is "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

97 PCA, § 27.

(g) technological superiority
(h) vertical integration
(i) recent [abusive] conduct
(j) privileged access to capital or financial markets and resources
(k) existence of a highly developed distribution and sales network

Even in the EU, such factors are taken into account, but not without controversy.[98]

*3.2.3 Collective Dominance*

Another point of interest is that the PCA acknowledges that "one or more entities" can be dominant in a relevant market – that is, collective dominance can exist. Rule 8, Section 1 of the PCA IRR distinguishes between single dominance and collective dominance. The idea is that more than one entity (or undertaking in EU terminology) can exercise a dominant position within a market. Indeed, more and more developing jurisdictions are pivoting towards this paradigm.[99] This is a novel concept originating from the EU.[100] Initially, the question regarding collective dominance was tackled by the CFI in *Alsatel.*[101] However, it was not until *Flat Glass* that the CFI tried to define collective dominance via the existence of "economic links."[102] The definitive EU cases that had an imprint on this concept were the maritime cases – *CEWAL* and *Compagnie Maritime Belgie.*[103]

Further, the legal language stresses the need for "one or more entities" for there to be an abuse. These terms raise the concept of joint or collective dominance. This notion of joint

[98] *Id.*; WHISH & BAILEY, *supra* note 42, at 190-191.
[99] For example, developing countries such as China, India, and Russia have incorporated the concept of joint/collective dominance.
[100] *See also* CRAIG & DE BÚRCA, *supra* note 33, at 1066; TFEU, art. 102 speaks of an abuse of dominant position by "one or more undertakings."
[101] *Società Italiana Vetro SpA and others v Commission (Italian Flat Glass),* Cases T-68, 77, 78/89, ECR II-1403, 5 CMLR 302 [1992]. *See also* EZRACHI, *supra* note 59.
[102] *Id.*
[103] Compagnie Maritime Belge Transports v Commission, Cases C-395/96P and C-396/96P , ECR I-1365, 4 CMLR 1076 [2000].

dominance was a European concept developed in the EU.[104] Consequently, it is therefore necessary to prove the existence of an abuse for there to be an infringement. The CJEU established specific criteria in the *Airtours* judgement; these criteria would later be applied to the case of *Laurent Piau* where FIFA was an exact emanation of the concept of joint dominance, although, there was the absence of an actual manifestation of an abuse.[105]

Article 102 of the TFEU therefore has its imprint on Section 15 of the PCA. The drafters of the PCA had the EU in mind while crafting not just the wording of the legislation, but also its merits.[106] Indeed, the legal language manifested in the text borrowed – if not directly lifted – from the EU. Nevertheless, with regards to the application of EU jurisprudence as seen from *Airtours* and *Laurent Piau*, whether or not these same criteria shall be used in Philippine legal jurisprudence for joint dominance is yet to be seen.

*3.2.4 Abuse: Object or Effect?*

Like most competition law statutes, the PCA strongly emphasizes that a dominant position or significant market power is not penalized.[107] What is penalized is the abuse of said dominant position within the market, through examples of practices enumerated, that would "substantially prevent, restrict or lessen competition."[108] Thus, abusive conduct is a *condicio sine qua non* for a violation. Additionally, the statute defines that acquiring, maintaining, and increasing market share via legitimate methods that are not deemed to contribute to SLC shall not be prohibited. Notably, the terms relating to "abuse" and "dominant position" are directly lifted from Article 102 of the TFEU.[109]

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104 *See* Airtours v Commission, Case T-342/99, ECR II-2585 [2002]. Laurent Piau v Commission, Case T-193/02, ECR II-209 [2005].

105 Laurent Piau v Commission, Case T-193/02, ECR II-209 [2005].

106 Bicameral Conference Deliberations, *supra* note 61, at 25.

107 TY, *supra* note 7, at 1068.

108 PCA, § 15.

109 TFEU, art.102; Bicameral Conference Deliberations, *supra* note 61, at 25 ; Other jurisdictions use the language of "misuse of market power"; Sherman Act, ACCA.

To that end, similar to PCA, Section 14, object and effect violations are included in PCA, Section 15, reiterating a parallelism with the EU.[110] Like most jurisdictions, there is a distinction between exclusionary and exploitative forms of abuse.[111] When it comes to the meaning of an abuse, the kind of acts deemed to fall under its ambit are however also unclear or differ in experienced jurisdictions such as the EU. The distinction between the two will be discussed below and also applies to the Section 14's object and effect restrictions.

*3.2.4.1 Object Restrictions*

Object (also referred to as form-based) restrictions can be likened to *per se* violations. But a more meaningful analogy would be strict liability in torts.[112] Under this distinction of strict liability, a dominant entity may be deemed liable for an abuse of dominance if it satisfies any conduct under any of the listed practices which are prohibited, without considering its likely effects on competition or consumer welfare. Where it is shown that the object of the abuse (or agreement in Section 14 PCA) is to substantially prevent, restrict or lessen competition, an *ipso facto* violation is proved without the need to examine anti-competitive economic effects, unless demonstrated that it satisfies the four cumulative criteria for actual or potential efficiency gains.[113]

For example, the object approach to determining abuse manifested in the EU's *Intel* judgment, through its Competition on the Merits Test.[114] This Test, which is contained in the Commission's Guidelines on Enforcement of TFEU, Art. 102

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110 Bicameral Conference Deliberations, *supra* note 61.

111 Check enforcement priorities Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings. OJ C 54 24.2.2009.

112 COOTER & ULEN, *supra* note 42, at 184; TY, *supra* note 7, at 37.

113 For a PCA, Section 14 and TFEU, Article 101 comparison, *see e.g.* SIA 'Maxima Latvija' v. Konkurences Padome, Case C-345/14, ECLI:EU:C:2015:784 [2015], ¶ 20. Once the agreement reveals, in itself, to a sufficient degree of harm to competition, then the consideration for of appropriateness for an assessment of its effects to competition is nullified. This is an objective concept that may require a review from the Courts.

114 Intel Corp. v. Commission, Case T- 286/09, ECLI: EU:T:2014:547 [2022].

establishes a list of acts which may fall under a "competition of the merits test" that may prove to aid with the distinction to forms of behavior or object restrictions. Intel Corp. initially provided exclusivity rebates to computer manufacturers which was deemed as an abuse of dominant position by the Commission in the relevant market for central processing units. The GC further sided with the Commission stating that the act of granting such exclusivity rebates, by itself, was an abuse which did not need an analysis of the circumstances of the case (AEC Test) to determine potential foreclosure effects.[115]

*3.2.4.2 Effects-based Restrictions*

Economic-effects-based analysis can be ascertained by checking on the effects of the behavior of the dominant entity on competition as well as the consumers. This test which applies economic analysis is an accepted procedure in experienced jurisdictions such as the US and the EU. Moreover, this method follows the logic that competition must protect the competitive processes within the market, as opposed to individual competitors. In the EU, the landmark case of *Hoffman-LaRoche*[116] sheds light on the subject of an abuse. The Court ruled that "an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."

Following this logic, an abuse exists when the following elements exist: (1) availability of methods which differ from normal competition and (2) that these methods have the effect of either hindering the maintenance of the existing degree of competition or hindering the growth of competition. Further, this

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115 *Id.* ¶¶ 143-150.

116 Hoffman-LaRoche & Co. v Commission, Case 85/76, ECR 00461 [1979], ¶ 91.

economic effects analysis can also be tailored to justify aggressive commercial behaviour of dominant entities, which in turn can lead to a lessening or restriction of competition, because of the efficiency gains that are established and eventually benefit the consumers. In the EU case of *Post Danmark I,*[117] the CJEU stated that not "every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of view of among other things, price, choice, quality or innovation."

*3.2.5. Efficiency Defenses: Objective Justification & Proportionality?*

The second paragraph of the penultimate proviso of Section 15 PCA, seems to take after Section 14(c). To reiterate, this provision is based on 101(3) TFEU. However, unlike Section 15 PCA, there is no "102(3) TFEU."[118] Section 15 PCA therefore has both: the efficiency defense carried over from 14(c) PCA that has its roots in 101(3) TFEU; and objective justifications based on proportionality as manifested in practice for 102 TFEU.

In the EU, 102 TFEU has no equivalent to 101(3) TFEU. However, the Courts and the Commission have applied concepts such as objective justification and proportionality to break the impasse of rigidity of 102 TFEU.[119] Prior to this, Article 102 TFEU gave the impression of a draconian rule that provided no room for possible justifications. While the introduction of objective justification and proportionality manifest some semblance of flexibility, it is often difficult for the Courts to accept the justifications raised by the parties.[120]

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117 Post Danmark AS v Konkurrencãdet, Case C-209/10, ECLI: EU:C:C2012:172 (2012), ¶ 43.
118 *See* CRAIG & DE BÚRCA, *supra* note 33, at 1085.
119 *Id.*
120 *Id. See also* WHISH & BAILEY, *supra* note 42, at 221-223; *See also* Jones & Townley, *supra* note 33, at 539.

3.3 M&As: EUMR & Guidelines Related to PCA & Merger Guidelines?

Unlike the first two pillars of the PCA, the third pillar on merger review differs due to its *ex-ante* investigation. Understandably, the consolidation of companies and/or assets via M&As is crucial for companies. It is a fundamental process in the business world that arises from calculated or impulsive business decisions. Further, some of these transactions may also aid in efficiencies, in the form of synergy, economies of scale and scope. Therefore, merger review is a forward-looking exercise to ascertain possible anti-competitive effects post-transaction. Similar to the first two pillars, an efficiency defense is available since it is recognized that M&As may actually contribute to efficiencies and consumer welfare. The PCC for one, recognizes this fact as it takes precedence from the EU Commission.[121] PCA Chapter IV is devoted solely for merger review and is supplemented by its IRR and PCC Guidelines. Moreover, Chapter IV is outlined below:

Section 16: Review of M&As
Section 17: Compulsory Notification
Section 18: Effect of Notification
Section 19: Notification Thresholds
Section 20: Prohibited Mergers and Acquisitions
Section 21: Exemptions from Prohibited M&As
Section 22: Burden of Proof

Through the PCA, the PCC is empowered to ascertain possible anti-competitive M&As, and whether such transaction "substantially prevents, restricts, or lessens competition in the relevant market or in the market for goods or services." These are stipulated in Sections 16 and 20 PCA, respectively. If during its investigation PCC believes that there will be this substantial impairment of competition, the PCC will consequently prohibit the transaction. Further, Section 21 PCA provides two possible exemptions: (a) actual or potential efficiency gains; and (b) a failing

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121 *See* EUMR Council Regulation, EC No. 139/2004 ["EC Merger Regulation"] (2004). This is a resolution on the control of concentrations between undertakings.

firm defense. Procedurally, a transaction can be reviewed by PCC either: (1) *motu proprio* or (2) upon compulsory notification. Once triggered, the PCC looks into the following substantive elements in determining anti-competitive M&As: (1) a transaction – M&A or JV (2) an assessment for the transaction if it is likely to substantially prevent, restrict, or lessen competition in the relevant market; and (3) account for any substantiated efficiencies presented by the parties. Nonetheless, for comparative purposes, the notification threshold will be included as a substantive element.

*3.3.1 M&As in PCA*

A merger as defined by PCA, Section 4(j) "refers to the joining of two (2) or more entities into an existing entity or to form a new entity." An acquisition defined by 4(a) PCA refers "to the purchase of securities or assets, through contract or other means, for the purpose of obtaining control by: (1) One (1) entity of the whole or part of another; (2) Two (2) or more entities over another; or (3) One (1) or more entities over one (1) or more entities." The IRR also defines what constitutes a JV under Rule 2(i); a stand-alone PCC Guidelines on Notification of Joint Ventures is also available.[122]

*3.3.2 Notification Threshold*

The EUMR differs from the PCA's regulation on anti-competitive M&As, in that the former is a transnational check on anti-competitive M&As, whereas the latter is applied nationally. Moreover, the EUMR is a "one-stop-shop" for merger control in the EU.[123] This "one-stop-shop" entails that any transaction that falls under the set 1 or set 2 aggregate turnovers shall be subject to the EUMR.[124] These aggregate turnovers are transnational and transboundary in application. Therefore comparatively, the PCA's scope is only based on the national territory. Indeed, the EUMR, has specifications for MS's NCAs to request the application of national law for certain transactions. However, the "German Clause" is yet

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122 *See* PCC Guidelines on Notification of Joint Ventures, *available at https://www.phcc.gov.ph/guidelines-on-notification-of-joint-ventures/.*

123 *See* WHISH & BAILEY, *supra* note 42, at 889; CRAIG & DE BÚRCA, *supra* note 33, at 1096; EUMR, art. 21.

124 EUMR arts. 1(2)-(3); *See* CRAIG & DE BÚRCA, *supra* note 33, at 1095-1096.

again limited to a European field of application, and is subject to the request of a MS with legitimate interests.[125]

Just as the EUMR and PCA differ in regulating M&As, certain thresholds have to be met for each set of laws to be triggered. Naturally, the thresholds differ significantly due to the magnitude of the EU. As a result, this substantive criteria seems to be more appropriate for a transboundary organization such as the AEC, as opposed to the PCA. Consequently, the PCA's substantive requirement for the applicability of the PCA's merger rules is a two-pronged test that includes: (1) Size of Party and (2) Size of Transaction.[126] This is stipulated in PCA, Section 17 PCA and the PCA IRR, Rule 3, Section 4. From time to time, this threshold is automatically adjusted every March 1st of every succeeding year to reflect its appropriateness based on nominal GDP growth. Upon closer inspection, this two-pronged test is more akin to a specific jurisdiction, particularly Canada.[127] Under the Canadian Federal Competition Act, notifiable transactions follow a two-pronged structure: (a) 'Size of Parties' and (b) 'Size of Target'.[128]

*3.2.3 M&A Assessment*

Similar to the first two pillars, "substantially prevent, restrict or lessen competition" is the term used as a benchmark for anti-competitiveness. While the syntax resembles the language of the TFEU, it bears similarities with the SLC test in other jurisdictions such as the US and Australia. In the EU, the old Community Regulation used the standard "to create or strengthen

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125 EUMR, art. 9.

126 PCA, § 17.; PCA IRR, rule 4, §3 specifies the exact amount wherein originally, 1,000,000,000 PhP and 2,000,000,000 PhP were set as the benchmark for the size of party and size of transaction threshold. These thresholds have since been updated thrice *See* [PCC] Memorandum Circular 18-001, [PCC] Commission Resolution No. 03-2019, and [PCC] Commission Resolution No. 02-2020. The latest adjustment to these figures includes: (a) The Size of Party exceeds Six Billion Pesos (PhP 6,000,000,000.00); and (b) The Size of Transaction exceeds Two Billion Four Hundred Million Pesos (PhP 2,400,000,000.00). The adjusted Size of Transaction shall also apply to JV transactions under Rule 4, Section 3(d) of IRR).

127 Susan M. Hutton & Megan MacDonald, *Chapter 5: Canada*, *in* MERGER CONTROL JURISDICTIONAL COMPARISONS 117 (Jean-François Bellis and Porter Elliott, 2nd Eds., 2014).

128 *Id.*

a dominant position as a result of which effective competition would be significantly impeded."[129] The SIEC test came into fruition as a result of the EU's modernization efforts in order to bring the standard closer to the SLC test recognized internationally. As already discussed in the first two pillars, identifying the relevant market is a vital step for any case. This definition from the first two pillars carries over to M&As.

*3.2.4 Exemptions from Prohibited M&As*

Based on PCA Section 21, M&As that may be considered anti-competitive due to a finding of "substantially preventing, restricting, or lessening of competition" may be exempt from an outright prohibition in the event that the parties establish any of the following: (1) overriding gains in efficiencies; (2) failing firm defense; (3) previously acquired share capital or assets; (4) acquisition or maintenance of market share; or (5) acquisition for sole purpose of investment. For the purposes of this thesis, the first exemption will be examined more closely while the latter four (three contained in penultimate provisos) are reserved for future study.

*3.2.4.1 Overriding Gains in Efficiencies*

PCA Section 21(a) and PCA IRR Rule 4, Section 10(a) state that if the parties are able to establish that "the concentration has brought about or is likely to bring about gains in efficiencies that are greater than the effects of any limitation on competition that result or likely to result from the merger or acquisition agreement" shall be exempted. Particularly, this burden of proof rests upon the parties to demonstrate that "if the agreement were not implemented, significant efficiency gains would not be realized."[130] Further, PCC's Merger Guidelines clarifies the extent to which efficiency gains are assessed.

## 4. Discussion & Analysis: PCA, A Hybrid Model?

It is evident that the Philippines drew inspiration from various jurisdictions in drafting its national competition law, but

[129] EC Merger Regulation.
[130] PCA, § 22; PCA IRR, rule 4, § 11.

what this study is primarily concerned with is the EU's influence on the PCA. This is concretely manifested in the first two pillars: anti-competitive agreements and the abuse of dominant position, and in the third line of defense or efficiency exemptions. The EU's influence is also showcased in the substantive statutory definitions of the PCA that were based on ECJ jurisprudence. There also exists input from other jurisdictions, such as Australia, Canada, and the US. Why and to what extent? Was this an intended outcome rooted in a specific motive or was it based on the random availability of sources? The precursors of the PCA were deeply rooted in American Antitrust. Therefore, the legislators could have simply revisited this specific model and applied it solely while developing the PCA. This section is a mix of confirmed notions from firsthand sources and the author's own presumptions regarding this subject.

### 4.1. "Failure" of Previous Sectoral & National Legislation

First, the previously scattered sectoral competition statutes of the Philippines were outdated or obsolete. In fact, the primary competition statute prior to the PCA, the now repealed Art. 186 RPC, was primarily based on the American Sherman Antitrust Act.[131] The other predecessors to the PCA were also based on the Sherman and Clayton Acts.[132] In effect, the legislators could have drafted the PCA purely on these acts, as well as utilizing the HSR Act for merger review. Despite this, the legislators decided to opt for a different route of compiling various competition laws from the EU, US, Canada, and Australia and incorporating these into the PCA. Given that these laws were hardly ever enforced and failed to even yield jurisprudence, perhaps the legislators sought to start anew, compiling what they must have thought were the best aspects that would fit the legal landscape of the Philippines.

Next, the field of application of Article 186, the main competition law statute in the Philippines prior to the PCA, was limited due to RPC Article 2 regarding the enforceability of the provisions of the Revised Penal Code.[133] As seen from PCA Section

131 *See* Catindig, *supra* note 8.
132 *Id.*
133 REV. PEN. CODE, art. 2.

3, the declaration of policy is a significant departure from this concept denoting a more globalized and international mindset as opposed to the more local territorial paradigm exacerbated by the RPC.[134] This limited field of application of the law may have contributed to the lack of enforcement and cases filed under this statute.

Further, even though the original syntax of "substantially preventing, restricting, or lessening" competition was inspired by the EU, it also bears much semblance with "SLC." Perhaps another reason why "lessening" was preferred over "distorting" was not only due to the lack of familiarity with the latter term, but also because doing so would bring the standard close to the terminology used in the US. This would retain some familiarity and not stray too far away from the American model.[135] Nevertheless, the bulk of the PCA is still based on the EU, particularly the first two pillars, suggesting a desire to shift from the "outdated" models and 'dissatisfaction' with the obsolete Philippine Competition Statutes based on American Antitrust.

4.2 Liaison with Other Jurisdictions: Availability of Experts & Personnel

During the gestation period and drafting timeline of the PCA, liaisons with other jurisdictions were made available. Apart from personnel from practicing competition agencies, technical assistance from experts of different jurisdictions were brought in to provide technical assistance to the PCA drafters. The type and degree of technical assistance from these experts varied considerably, which could have borne upon the balance among the three pillars.[136] In the first two pillars, the influence of the EU is manifested considerably, whereas in the third pillar the EU model was lessened to a certain degree.[137]

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[134] *See* Medalla, *supra* note 36.

[135] In the old sectoral regulation, regulation on M&As was patterned after the Clayton Act, which used the language of "SLC." *See fn* 5, 6.

[136] Correspondence with PCC Comm. Bernabe.

[137] Partially also because the EUMR is transnational and trans-boundary in nature and would be less befitting for national competition policy and

On one hand, the technical assistance project running at that time, EU TRTA 3 was a considerable asset in devising the draft for the PCA.[138] As it progressed towards the IRR and Mergers, the consultants were not nearly as available as the others (given the fast-approaching expiration of the EU TRTA 3 then and the uncertainty of its renewal).[139] On the other hand, the consultants from the US DOJ/FTC were more flexible compared to those of the EU. Simultaneously, these consultants from the US after reviewing the HSR suggested an alternative: the Canadian model, which was similar to the HSR, yet also slightly different with its two-pronged test. In a way, this was one reason why the EU influence is less evident in the PCA's third pillar.

### 4.3 Hierarchy of Philippine Legal Sources

In practice, the PCC uses the EU as a point of reference in its decisions.[140] Not only were substantive elements from EU Case Law incorporated as statutory definitions in the PCA, but EU case law also plays a vital role in deciding PCC's decisions.[141] As stated by the principal sponsor of the PCA, directly basing substantive elements from the EU would imply the applicability of EU jurisprudence.[142] The hierarchy of legal sources in the Philippines allows drawing of foreign jurisprudence in the event that Philippine legal sources are unavailing.

Citing EU jurisprudence in times of doubt was a point raised in the congressional deliberations. Legal research in the Philippines allows a certain hierarchy of references from other jurisdictions, especially if the law is heavily influenced from that specific jurisdiction if there is no available national jurisprudence. Philippine legal research and citation is based on the classification

more befitting for the AEC. Part 4.4 of this paper delves into this topic more thoroughly.

138 *See* TRTA 3 Inception Report; Correspondence with PCC Comm. Bernabe.

139 Correspondence with PCC Comm. Bernabe.

140 *Id.* Correspondence with Atty. Herrera; *See also In re Urban Deca Homes,* Decision No. 01-E-001/2019, 3,5 (Philippine Competition Commission September 30, 2019).

141 *Id.*

142 Bicameral Conference Deliberations, *supra* note 61.

of legal sources, particularly by legal authority.[143] Such authority may be "cited in support of an action, theory, or hypothesis." This distinction on primary authority stems from those that contains actual law or those that contain a law created by government. Furthermore, primary authority can be subdivided into (a) mandatory primary authority, and (b) persuasive mandatory authority. The former relates to i.e. the jurisdiction of the Philippines where its own laws operate. The latter concerns law that is created by other jurisdictions which nonetheless have a persuasive and significant value to Philippine courts, i.e. Spanish jurisprudence and or American law. These are utilized in the event that (1) there are no Philippine authorities that have ruled on the matter or when (2) the Philippine statute and or jurisprudence under interpretation stems from Spanish or American law. In this case, interpretation would encompass EU law since a significant degree of elements of the PCA were taken from the EU.

This practice of referencing EU cases is common in PCC's SOCs, SOs, and Decisions.[144] For example, in its SOC for *Urban-Deca Homes* – an entity charged with the abuse of dominant position – for tying its condominiums to a sole ISP and thus limiting markets. In its official Decision, PCC cited five EU cases on the abuse of dominant position, namely *RTE & ITP*, *CBEM v CLT*, *Microsoft (Windows Media Player), Sealink & Holyhead BMI*, and *United Brands* to highlight the meaning of an abuse of dominant position.[145] Since this was the first case on Section 15 PCA, there was a need to follow jurisprudence from the EU. In M&As, PCC also references EU cases. This is evidenced in the *Grab-Uber Case*[146] where even though the issue was case-specific for Philippine Transportation Network Vehicle Services, the PCC was able reference EU cases.[147] This was because e-businesses that use mobile apps such as Grab and Uber were a new phenomenon in the Philippine economy. Hence, the PCC felt that there were not enough resources and experience

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143 MILAGROS SANTOS-ONG, PHILIPPINE LEGAL RESEARCH (2005).
144 Correspondence with Atty. Herrera.
145 *In re* Urban Deca Homes.
146 *In re* Grab, Case-No.-M-2018-001-Grab-Uber (Philippine Competition Commission, October 11, 2018).
147 *Id.*

nationally to tackle the issue and required guidance from the EU. However, there are also instances such as in the case decided by the PCC on the proposed acquisition by Universal Robina Corporation (URC) of the assets of Central Azucarera Don Pedro Inc. (CADPI) and Roxas Holdings Inc. (RHI) where EU citations were unnecessary and that the statutory definitions of the PCA taken from the EU were sufficient.[148] This was also due to the peculiarity of the transaction to the Philippines as well as the structure of the specific industry concerned.[149] For the first pillar, PCC's Enforcement Office recently released its SO on a pool of insurance companies for an infringement of Section 14 PCA.[150] Since this is the first public case on anti-competitive agreements, it is most likely that much guidance from other jurisdictions will be taken. This has yet to be seen once the final decision is given.

Based on Chapter 3 of this study, the PCA is an amalgamation of various jurisdictions' competition laws. Thus, should a distinction between legal authority from the EU and US, for example, be considered for certain decisions? For example, under 15(a) PCA on predatory pricing, European jurisprudence would suggest that pricing below AVC (and also to an extent ATC) would lead to the existence of an abuse.[151] In the US, this is slightly different, where the antitrust authorities specifically require that for there to be an abuse, recoupment is a necessary precondition.[152] Therefore one can only speculate as to the trajectory of the Philippines for ascertaining a violation for certain infringements. The same can be speculated for other infringements i.e. on collective dominance. Will the EU's cumulative criteria in *Airtours* regarding collective dominance be applied in the Philippines once a case is filed? This has yet to be seen.

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148 *In re* URC, Decision No. 03-M-021/2019 (Philippine Competition Commission, February 12, 2019).

149 *Id.* The relevant product market involved the sugar industry as a whole (the main products and byproducts of raw sugar cane). In the Philippines, this is case specific since it is regulated by specific government bodies i.e. the Sugar Regulatory Administration.

150 *In re* Just Solar Corporation, Decision No. 05-M-008/2021 (Philippine Competition Commission, September 16, 2021).

151 Akzo Chemie B.V. v Commission, Case C-62/86, ECR I-3359 [1991].

152 Jones & Townley, *supra* note 33, 540.

4.4 AEC Commitments

As seen from Chapter 3 of this thesis, the AEC was a factor for the development of Competition Law in the Philippines as part of its ASEAN commitments. While it is true that ASEAN is an ambitious project that is transnational and transboundary in nature, the separation of national and regional goals are nonetheless interlinked due to globalization. As a point of conjecture, to achieve the AEC's goal of having three freedoms necessitates competition law and policy. This objective although less ambitious than that of the EU, can gain insight from the best practices of the EU model while harmonization, let alone an ASEAN Competition Regime, is still a legal fiction and a goal that can be aspired for in the future. In retrospect, the EU could be what the AEC is aspiring towards, and a reason why one MS of ASEAN, the Philippines, decided to pattern elements of the PCA after the EU. Although, as stated in the section on M&As, examining the EUMR could be more appropriate for ASEAN, particularly in future developments of the AEC.

4.5 Compatibility of Choice

The Philippines scoured competition laws of different jurisdictions to create its national competition policy and statute. However, was this a good model? One has to take into account that the Philippines is still a developing country. Could taking inspiration from established jurisdictions such as the EU yield significant and successful enforcement results? This could be another starting point for further research.

Nevertheless, it is evinced that elements such as collective dominance was taken from the EU. The concept of collective dominance evolved from a divergent branch of Article 101 TFEU on anti-competitive agreements. Eventually, the economic links tied to undertakings involved provided the understanding that multiple entities could exercise collective market control. This is

particularly relevant for the case of oligopolistic markets. Due to constitutional competitive, and regulatory constraints, the business landscape in the Philippines has oligopolistic tendencies – and is a perfect reason why collective dominance would apply in the Philippines.[153]

## 5. Conclusion

Competition Law is a necessary tool to promote free and fair competition. Some jurisdictions were the pioneers to the whole concept, while others have only just begun with this law and economics project. It would appear logical for developing jurisdictions to base their competition laws on renowned and well-established antitrust regimes. It seems this was the route the Philippines decided to take. What this juxtaposition has aimed to showcase was the overarching influence of established jurisdictions' Competition Laws, particularly the EU, on a developing country and the emergence of the Philippine Competition Act.

The PCA contains three pillars for competition law enforcement. The first two pillars on anti-competitive agreements and the abuse of dominance seem to have the most documented EU influence, while the latter pillar on M&A regulation has the least. This is because the EUMR is a transnational check and "one-stop-shop" for the EU and would be more beneficial for a regional organization such as ASEAN compared to one specific MS. Nonetheless, the EU was chosen by the legislators as one of the model competition laws for the Philippines. More concretely, landmark EU cases were made into the statutory definitions in the PCA. Additionally, the "third line of defense" or assessment of efficiencies used for all three pillars stems from the EU.

The amalgamation of concepts and law from the EU seems to be have been sparked by different reasons. First, the inefficiency of previous sectoral and national legislation based on obsolete colonial antitrust statutes. Second, the availability of expert

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[153] *See* Marquis, *supra* note 18, at 79-122.

personnel and liaison with other jurisdictions. Third, the hierarchy of Philippine legal sources and possibility to reference other jurisdictions in times of doubt. Finally, the Philippines's AEC commitments that could possibly be modelled after the EU.

For the sake of brevity, some elements were excluded or merely discussed in passing. While salient, these points are best used as a starting point for new avenues for future research. Substantive elements which were only slightly touched upon were for example: the determination of control, the nature of agreements, and the other exemptions to prohibited M&As. Further, other elements of Competition Law were excluded from this thesis. These pertain to matters of procedure such as the Leniency Program, Private Enforcement, Economic methods or tools utilized in assessing each case, fines and penalties, and the PCC's powers of initiating an investigation. In fact, according to sources, the Leniency Program bears similarities with the EU Leniency Program.[154] Nevertheless, questions still linger regarding other aspects of the PCA *inter alia* procedural aspects and private enforcement. Could there be some semblance of EU influence manifested in these as well i.e., PCC powers during investigation (RFI) or the concept of *parens patriae* for private enforcement? Additionally, questions pertaining to the degree to which EU jurisprudence will be followed in new cases made by the PCC will need monitoring and subsequently, room for future research.

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[154] *See* PCA, § 35; *See also* TY, *supra* note 7, at 100-102. Upon closer inspection, the parameters for an immunity of suit seem to mimic the requirements in EC Commission Notice 2006/C 298/11 on Immunity from fines and reduction of fines in cartel cases. For example, it requires that when an entity comes forward, PCC, has not received information about the alleged anti-competitive conduct from another source, is not the ringleader to the agreement, did not coerce another party to participate in the anti-competitive agreement, etc. This would be another avenue for future research.