respecting the artistic element of the profession. Ultimately, it offers success in what Karl Llewellyn might term "the job of law school."

JUDICIAL INTERVENTION IN WITNESS EXAMINATION

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Chief Justice Marcelo B. Fernan, in the opening article published in the manual of "Reading Materials" used during the First Judicial Career Development Program held recently[1] at Puerto Azul, Cavite, wrote thus:

> The goal of an efficient court system is, indeed, half-won by having morally upright and competent judges and court personnel. The other half, however, is equally important and it includes the streamlining of procedural rules together with the provision of improved facilities and adequate resources for our courts.

It is streamlining one aspect of the procedural rules that this short work will focus on, because a reform in this area, unlike in the other areas, will not require improved facilities nor financial resources to attain. Thus, whatever savings that may be realized by deferring reforms in the other areas may be expanded for other projects of the judiciary.

The procedural aspect to be treated in this piece, which is proposed to be reformed, pertains to judge's intervention in the examination of witnesses during trial.

The present Clerk of Court of the Supreme Court, Atty. Daniel T. Martinez -- a fellow of the Institute for Court Management at Denver, Colorado -- in defining delay, has identified inexperience and inefficiency of the lawyer in procedural matters as among the major causes of a lawyer-caused delay. One instance of incompetence on the part of a lawyer, Atty. Martinez wrote, refers to the failure to allege the essential elements of the cause of action in his pleading, which, in effect, means incompetence in proving his case; for a party cannot prove what he has not asserted.

Now, if the lawyer is incompetent or ill-prepared to prove his case during trial, should the judge simply watch the proceeding as a passive and impartial umpire; or should he intervene at the trial to bring out from the

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[1] Held September 10-16, 1989.

parties or their witnesses the needed proof so as to ascertain the truth, expedite the proceeding, and render substantial justice? Unfortunately, the present procedural rules do not authorize such an intervention from the judge. None of the inherent powers of the courts, under Sec. 5, Rule 135 of the Rules of Court, include such authority. Should not then the Rules of Court include a provision *expressly* allowing such intervention, if only to remove from the judge all kinds of apprehension that if he does so his action might be taken as an overt act of prejudgment, prejudice or bias? It can be presumed that, while adjudicating a case, a judge truly believes that he is observing what Edmund Burke called "the cold neutrality of an impartial judge." This fact has been conceded by Bernard L. Shientag in his article *The Virtue of Impartiality*. He qualified this concession, though, by saying that;

> [I]t is precisely through this blind faith in his impartiality that a judge lulls himself into a false sense of security. x x x. He has overlooked the difficulty of bringing to consciousness hidden motives, ideas and prepossessions. The partiality, the prejudice, with which we are concerned is not an overt act, something tangible on which you can put your finger, x x x."[2]

Notwithstanding this qualifying statement of Shientag, the judge's intervention during trial does not mean that by that mere act he "unfrocks" himself of the presumptive mantle of impartiality. The premise posited by Shientag is that partiality or impartiality belongs to the realm of hidden motives, ideas and prepossessions which, unlike overt acts, cannot be perceived. This is, of course, not true when a judge intervenes in the examination of witnesses. Such kind of intervention is definitely an overt act done in open court and made part of the record. It is not in the nature of what Shientag called "hidden motives, ideas an prepossessions."

The European courts even go beyond simply intervening in the examination of witnesses during trial.[3] While courts in other jurisdictions endeavor to guarantee justice with procedures, European courts equate justice with particular substantive outcomes. This European approach, known

[2] Reading Materials, *First Judicial Career Development Program*, 68-69 [Published by the Supreme Court].

[3] Dubois, Philip L., **The Analysis of Judicial Reform**, [D.C. Health and Company, Lexington, Massachusetts, Toronto, Canada, 1982], 20.

as the "inquisitorial"[4] system, has some of these major features, namely:

> The third party plays an active role and is seen not as a referee but as a key player in the determination of truth.
>
> The process is directed by the adjudicator -- that is, it does not rely on aggressive action on the part of the claimant.
>
> The court uses its subpoena power to compel the production of evidence and to conduct its own independent investigation -- that is, it calls its own witnesses and conducts its own questioning.
>
> The judge actively engages in suggesting to the parties possible settlements.
>
> The role of lawyers is restricted and their loyalty is to truth and justice rather than to their client's interests.
>
> Legal fees are set by law, and the loser must pay the fees and costs incurred by the winner. (see Kaplan, von Mehren and Schaefer 1958).[5]

From those features, one may conclude that the key element of the inquisitional system is judicial, as opposed to litigant, control of the proceedings. Studies made by one group of court management experts have shown that the inquisitorial system can produce such benefits as accuracy in the discovery of truth, speed, and inexpensiveness in the adjudication of cases.

In the U.S., however, more lawyers prefer negotiation and settlement of their dispute to trying cases in court. This development came about due to the broad pre-trial and discovery rules being followed in the federal courts.

Our Rules of Court, like the Federal Rules of Court, also provides for pre-trial and discovery procedures. In fact, pre-trial is made mandatory in our rules. Yet nowhere in the guidelines on pre-trial prescribed by the Supreme Court for compliance by the designated branches of courts in the conduct of so-called mandatory continuous trial can there be found any indication that the judge has enough latitude in compelling observance of those procedures in a manner that he may deem proper to expedite the proceeding and bring about an early termination of the case.

In civil cases, for instance, judges are urged at the pre-trial

[4] The word "inquisitorial" is used as an adjective of "inquest" and is not supposed to convey the connotation that the word "inquisition" of the infamous Spanish ecclesiastical trials carried.

[5] Dubois, *Ibid., at 20.*

conference, among other things, to persuade the parties to arrive at a settlement of the dispute with all tact and patience. In criminal cases, pre-trial can be conducted only if the accused and his counsel agree; so that absent such agreement, all the court can do is to fix the trial dates for presentation of evidence by the parties.

As regards discovery procedure, which is provided for in Rule 24 to Rule 29 of the Rules of Court, the Supreme Court instructs judges to merely "encourage" lawyers and parties to avail themselves of this evidently aid as its use would greatly expedite the trial of cases. (Circular No. 13 dated July 1, 1987). In criminal cases, no procedure for discovery exists in the rules that may be resorted to before trial; what the rules have is perpetuation of testimony of the prosecution and defense witnesses, and not discovery of evidence before trial to expedite the adjudication process.

Now, if Shientag entertains apprehensions that, although a judge sincerely believes that he is deciding a case with utmost impartiality, he may overlook the partiality or prejudice which is not an overt act, something tangible on which you can put your finger. Such apprehensions -- while applicable to the other aspects of the proceeding, such as pre-trial, discovery procedure, and decision-making --- do not apply to reception of evidence or examination of witnesses, because these latter transactions are done in open court and are, therefore, clearly overt acts exposed to public view.

Why does the Rules of Court not expressly authorize trial judges to assume a more active role by intervening in the proceeding to ferret out evidence during the examination of witnesses for purposes of ascertaining the truth and expediting adjudication of the case?

In 1906, Dean Roscoe Pound, in an indicting speech he delivered before the American Bar Association in St. Paul, Minnesota, attacked the adversary system as promoting a "sporting of justice, thus resulting in our taking it as a matter of course "that a judge be a mere umpire, to pass upon objection and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference."[6]

But Pound was not alone in advocating that a judge should interfere in the trial to help ascertain the truth and dispense substantial justice. One other authority, Kaufman, has also stated that, "Contrary to what most of us have accepted as gospel, a purely adversarial system, uncontrolled by the

[6] Pound, Roscoe, *The Causes of Popular Dissatisfaction With the Administration of Justice*, American Law Review, 440, 729-749.

judiciary, is not an automatic guarantee that justice will be done."[7]

In West Germany, for instance,

> [T]he order of evidence and witness examination is determined solely by the judge, and not by a traditional procedure. He or she can call for the production of documents by the parties or his or her own motion. He or she decides whether expert testimony is needed and which expert to call. Expert witnesses are chosen by the judge from an official list and are completely identified with the court, as opposed to the 'bought and paid for' aura of such testimony in American courts where the parties produce competing experts. The West German judge evaluates all offered evidence, giving it the weight he or she thinks it reasonably deserves. The German judge's control even extends to the record. In contrast to the verbatim accounts made at most American trials, the West German judge dictates summaries of oral testimony and arguments. These become the record of the proceedings used by the full three-judge court as the basis for its ultimate decision.[8]

This pattern of judicial control in civil procedure is prevalent as a central feature of the courts in the other western European countries. In France, although disputants are allowed a greater degree of participation, the decision-making process is subject to active judicial control.

> Testimony is presented at special proof takings, where all questioning is conducted by a delegated judge (*juge commissaire*, usually the *juge charge de suivre la procedure*). When the parties request a proof taking, the court or reporting judge decides whether particular evidence should be taken and can call witnesses on his or her own motion. The delegated judge controls the record by summarizing all testimony. Expert witnesses are identified with the court and are appointed by the full court or in the usual case by the reporting judge. The weight given evidence and the

[7] Kaufman, I.R., *The Philosophy of Effective Judicial Supervision over Litigation. In Seminar on Procedures for Effective Judicial Administration*, 29 Federal Rules Decisions, [St. Paul, Minn. West Publishing Co., 1962].

[8] Kaplan, B., von Mehren, A.. & Schaefer, R. *Phases of German Civil Procedure*, 71 Harvard Law Review 1193-1268, 1443-1472, (1958); Cohn, E. J., **Manual of German Law**, Vol. II. [Dobbs Ferry, N.Y.: Ocean Publication, 2nd ed., 1971].

inferences allowable are left to the discretion of the court.[9]

Thibaut and Walker, in their book, *Procedural Justice: A Psychological Analysis,* reported that the result of their research shows that in Western Europe the inquisitorial method is also applied in criminal procedure. Thus, they wrote:

> The substantial control exercised by the West German civil judge is also exercised by West German judges in criminal cases. Indeed, the judge in a criminal case possesses even more control because of the demand on him or her to do material justice. Section 244 of the German Code of Criminal Procedure requires the court to investigate *all* aspects of a case with the purpose of ascertaining objective truth. In other words, the court is not limited to the evidence offered by the prosecution or the accused but must satisfy itself with any investigation necessary to insure that material justice has been served. The presiding judge selects expert witnesses. He or she conducts the proceedings, interrogating the accused and all witnesses. According to Section 261, the court is to evaluate evidence freely, unconstrained by formalistic rules.
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> This pattern of strong judge control in criminal cases is also found in France, according to Pugh (1962). When a criminal complaint is lodged, an impartial judicial official, the *juge d'instruction*, is interjected into the criminal process after the police investigation but before the actual trial. Under Article 81 of the French Code of Criminal Procedure, he or she is empowered to undertake all acts of investigation that he or she deems useful to determining the truth. His or her control is practically total. He or she directly interrogates the accused and all witnesses and can order expert testimony. His or her role is to develop all the facts -- those favoring the accused as well as those favoring the prosecution. From his or her investigation the *juge d'instruction* decides whether the accused should be brought to trial or the charge dismissed.
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> The socialist countries of eastern Europe are no exception to the pattern of active participation by the decision maker. For example, although Soviet civil procedure claims, according to Gsovski (1948), an objective of protecting the socialist system of

[9] Herzog, P., **Civil Procedure in France**, [The Hague, Netherlands: Martinus Nijhoff, 1967].

> economy and order of social relations as well as adjusting private conflict, the decision-making framework is essentially identical to that of the Western Europe countries. The judge is the 'master' of the legal process. Presentation order of evidence and argument is controlled by him. He conducts all questioning of witnesses and has unrestricted power to bring out all essential facts including the power to order production of any evidence or testimony. Evaluation of evidence is completely free. According to Berman and Spindler (1972), the assertive role of the court also carries over into the criminal process. The *sledovatel* is the Soviet counterpart of the *juge d'instruction*. He is charged with making an intervening impartial investigation to determine whether a criminal trial is warranted. Both the *sledovatel* and the trial judge exercise broad powers to investigate facts and examine evidence.[10]

Some Asean countries are not averse to the inquisitorial system. During the First International Seminar-Workshop on "Managing Delay in the Courts," held September 6-8, 1983 in Manila, attended by 52 participants, seminar speakers form several Asean countries proposed the adoption of some features of the inquisitorial model in their judicial systems.

The Hon. Yong Ho Oh, District Court Judge of Seoul, Korea, for instance, proposed the following as one of the remedies to the delay in civil procedure: "The court should take the responsibility to make clear the cause of action and not just remain as an umpire under the adversary system. Neglecting the duty to proceed with the case on the part of the court can be a ground for appeal by a party."[11]

The Hon Prof. Z. Asikin Kusumah Atmadja, Deputy Chief Justice on Civil Law, Supreme Court of the Republic of Indonesia, on his part, proposed that:

> To prevent or avoid delay, the judge should know the litigation process. x x x It is also his duty to control the trial. The judge should be at all times the leader of the trial by actively and firmly requiring, when necessary, that the proceedings be conducted with dignity and avoiding waste of time.

[10] Thibaut and Walker, **Procedural Justice: A Psychological Analysis**, 25, [Lawrence Erlbaum Associates].

[11] Quisumbing, P.V., Soliman, J.N.R., Pangalangan, E.A., *Civil Procedure of Korea: Causes of Delay and Proposed Remedies*, Managing Delay in the Courts, 69 [The Academy of Asean Law and Jurisprudence, UP Law Complex and The Asia Foundation].

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THE GATHERING OF EVIDENCE

After the formal allegations have been finished and the court has not discovered all the facts of the case, the court may order one of the parties or both parties to affirmatively prove some facts in dispute.

The court then will dispose a summary (declaratory) judgment on issues of law where the evidence is clearly insufficient to support a claim of defense.

In this stage of the civil process, it is necessary that the court directs the parties to determine the scope and nature of evidence needed in this case.

One of the principles of Indonesia's civil procedure is the active role of the judges during the proceedings, with power to give directives to parties regarding evidence, legal resources and legal rights of parties during trial.

In order to avoid unnecessary proof according to trial practice during the formal allegations, the judge simplifies the issues. On the motion of the party or *ex officio* he make an amendment to the pleadings, limiting the number of witnesses (experts or non-experts).

The main aim of the gathering of evidence during the discovery proceedings is to search for the cause of the case (claim) and the material truth. Therefore, the taking and use of depositions before and during trial, the use of written interrogations, the productions of documents for inspection and copying, requests for admission and requests for the physical and mental examination of parties are allowed.

Evidence requested ex officio by the court is also allowed, but the court may not exercise pressure on the parties to submit or produce evidence. If the party fails to produce or submit the evidence required, the court simply states that the failing party could not prove his claim or his defense.

The definition of the issues of law in the summary judgment (preparatory judgment) will also speed up the trial because it narrows the scope of the controversy between parties by obtaining exact definition of the relevant issues and eliminating the irrelevant issues. The wasting of time by examining irrelevant documents or unnecessary witnesses are avoided. Therefore irrelevant issues of law, legal claims and defenses which are apparently not supported or which cannot be supported by evidence must be already cleared out during the formal allegations proceedings.

The evidence is always taken by the judges who will adjudicate the controversy. Evidence taken by specialized personnel be it non-judges or instructing judges is regulated in Indonesia's civil procedure.[12]

The workshop report on the nature and causes of delay from the courts' perspectives, submitted to the conference, included these statements:

> It was felt that protracted presentation of evidence contributes to delay but Judge Maceren shared with the group the procedure he adopted in his sala for regulating presentation of evidence. He fixes the amount of time available to each of the parties in the presentation. On the scheduled date of trial, the lawyer is required to present all the evidence he wishes to produce during the period allotted to him. He said that (on) the date of the trial, the judge should make the lawyer do what should be done. However, it was agreed that efforts to limit the time for the presentation of evidence should not prejudice the right to due process.[13]

Finally, from the practicing lawyer's perspectives, in relation to the judge or court-caused delay, the pertinent workshop report identified the following causes:

> 1. Leniency and laxity in the handling of cases
>
> X X X X
>
> 4. Allowing several adjournments and postponements of cases.[14]

Indeed, what appears to be indicated from all the foregoing is that a closer judicial control and a more active intervention in the trial of cases, particularly during the presentation of evidence, may be a major solution to the problem of court delay.

Thus, except for the third of those features of an inquisitorial system enumerated above -- which may be modified by regulating the authority of the court "to conduct its own independent investigation" -- the rest of the activities as thus characterized under the inquisitorial system may well be adopted as parts of the policy of our courts and included in the present Rules of Court. The inclusion of those inquisitorial features by express provisions in the Rules will reassure judges of the propriety of intervening, without apprehension or hesitancy, in the trial of cases, if need be to

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[12] *Responsibility for Preventing Delay, Ibid.*, at 93-95.

[13] *Report of Workshop on the Nature of Causes of Delay from the Courts' Perspective, Ibid.*, at 324.

[14] *Ibid.*, at 329.

ascertain the truth and render speedy justice.

In fact, the Code of Judicial Conduct, effective from October 20, 1989, already contains a provision that accords judges some kind of reassurance in this regard. Thus, Canon 3,[15] Rule 3.06 of the Code, provides as follows:

> While a judge may, to promote justice, prevent waste of time or clear up some obscurity, properly intervene in the presentation of evidence during the trial, it should always be borne in mind that undue interference may prevent the proper presentation of the cause or the ascertainment of truth.

In the final analysis, what is proper intervention or what is undue interference in the presentation of evidence during trial will largely depend on how the judge asks his questions of the witnesses. Since intervention is deemed proper only if the purpose is to prevent waste of time or to clear up some obscurity, then the intervening questions of the judge should not assume the form nor the tone of cross-examining questions.

Needless to state, the specific aims of cross-examination are, among

[15] Amending Canon 14 of the Canons of Judicial Ethics (Administrative Order No. 162) which provided the following:

> While a judge may properly intervene in a trial of a case to promote expedition and prevent unnecessary waste of time, or to clear up some obscurity, nevertheless, he should bear in mind that this undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his party toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.
>
> Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial tone.
>
> He should avoid interruption of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to an unnecessary display of learning or a premature judgment.

other things, to destroy the material parts of the evidence-in-chief; to weaken the evidence, where it cannot be destroyed; to elicit new evidence, helpful to the party cross- examining; and to undermine the witness (or shake his credit, as it is commonly expressed) by showing that he cannot be trusted to speak the truth, or that he is deposing (however honestly) to matters of which he has no real knowledge.[16] Therefore, the questions asked by the judge in cross-examining form or tone -- such as to impeach, argue, disprove, et. -- are hardly those that can expedite the proceeding to prevent waste of time or ascertain the truth by clearing up obscurity.

Indeed, if the judge, in trying to prevent waste of time or to clear up obscurity, intervenes in the presentation of evidence by the parties during trial by asking questions that tend simply to elicit fats -- such as those preceded by "who", "what", "when", "where", "why", or "how" --, there should be no reason for him to entertain any apprehension or hesitancy in intervening in the trial of cases or, for that matter, in adopting the other features of an inquisitorial model where proper, provided only that due process is observed and justice is promoted.

Thus, by amending the Rules of Court in accordance with the above exposition, an aspect of judicial reform to prevent delay in the disposition of cases may be effected without having to require improved facilities or financial resources for its attainment.

[16] Munkman, John H., **The Technique of Advocacy**, 52 [Stevens & Sons Limited, London, 1951].