Discovering Litigation Practice: A Reintroduction to the Modes of Discovery

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I. INTRODUCTION

In his autobiography, "Courting Justice: From NY Yankees v. Major League Baseball to Bush v. Gore,"[1] renowned litigator David Boies summed up litigation practice in a poignant and most illustrative manner. He said —

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> [I]n virtually every case[,] there are truths that favor each side. The examiner, by controlling the questioning, is able to focus on those that favor his client. Witnesses are then forced to make uncomfortable choices. They can admit fact after fact, knowing they are building the examiner's record, or they can try to deny or evade. The goal of the examiner is to press and cajole witnesses into taking positions as absolute as possible in which they either give up more than they should or stake out a position that is ultimately not sustainable and ends up damaging their credibility.[2]

This statement is a microcosm of litigation practice as many litigators have come to know it. A paradox that some find difficult to reconcile is the constant search for the "truth" most favorable to one's side and the inevitable chasm between two versions of the same set of facts. To be sure, it is a fine line — one that should never be crossed — between advocating and distorting. There is, therefore, a resulting clash among legal gladiators in their pursuit of their clients' ends, which, although necessary, has become cumbersome for some.[3]

Litigation is lawyering in its rawest form, and the Rules of Court are its ultimate handbook. The tools outlined therein are the means by which "causes of action may be effectuated, wrongs redressed[,] and relief obtained."[4] Each of these serves their purpose, and collectively, is "intended to facilitate the ends of justice."[5] Yet, there is still a tendency for some to use the tools improperly "at the expense of substantial justice."[6] This, in turn, has led to protracted trials and the burdening of the country's already

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1. DAVID BOIES, COURTING JUSTICE: FROM NY YANKEES V. MAJOR LEAGUE BASEBALL TO BUSH V. GORE, 1997-2000 (2004).
2. *Id.* at 140-41.
3. *See* George S.D. Aquino, Discovering Litigation Practice, *available at* http://www.accralaw.com/publications/discovering-litigation-practice (last accessed Oct. 31, 2016) & George S.D. Aquino, *Discovering Litigation Practice*, BUSINESSWORLD, July 3, 2013, *available at* http://www.bworldonline.com/content.php?section=Opinion&title=discovering-litigation-practice&id=72733 (last accessed Oct. 31, 2016).
4. BLACK'S LAW DICTIONARY 1162 (5th ed. 1979) (citing Schmitt v. Jenkins Truck Lines, Inc., 260 Iowa 556, 149 (U.S.)).
5. San Luis v. Rojas, 547 SCRA 345 (2008).
6. *Id.*

infamously clogged dockets.[7] A survey by the Supreme Court in 2013 revealed that some trial courts with ideal caseloads of 300 have, instead, dealt with thousands of cases, with some extreme examples having to deal with about 3,500 cases.[8] Judges in these courts hear an average of 30 to 60 cases a day.[9] Research by the Philippine Statistics Authority also reveals that most courts in the Philippines accrue stacks of backlog annually, and have consistently been unable to completely dispose of all their cases.[10] These alarming numbers have triggered the Supreme Court's re-examination of its rules and processes, and have resulted in some commendable innovations, such as the Judicial Affidavit Rule,[11] which, in turn, has revolutionized litigation practice as it was originally understood and envisioned.

This Article seeks to emphasize that the Rules of Court, if fully utilized, already alleviate some of the abovementioned problems besetting the litigation practice today. In particular, it zeroes in on one particular set of tools — the modes of discovery, as currently provided in Rules 23-28 of the 1997 Rules of Civil Procedure[12] (Rules).

In general, a discovery has been described as a "device employed by a party to obtain information about relevant matters on the case from the adverse party in preparation for the trial."[13] If used correctly, the modes of discovery can be, as proven in the English and Canadian experience, "of more value than any other single procedural device [ ] in bringing parties to a settlement who otherwise would have fought their way through to trial."[14]

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7. Artemio V. Panginiban, *'Hustisyeah' to decongest the judiciary*, PHIL. DAILY INQ., July 27, 2013, *available at* http://opinion.inquirer.net/57591/hustisyeah-to-decongest-the-judiciary (last accessed Oct. 31, 2016).

8. *Id.*

9. Ador Vincent Mayol & Patricia Andrea Pateña, *Cebu is pilot area for new court rules*, PHIL. DAILY INQ., Jan. 27, 2012, *available at* http://newsinfo.inquirer.net/135133/cebu-is-pilot-area-for-new-court-rules (last accessed Oct. 31, 2016).

10. Philippine Statistics Authority, Court-Case Disposition Rate by Type of Court 2005-2010, *available at* http://nscb.gov.ph/secstat/d_safety.asp (last accessed Oct. 31, 2016).

11. Supreme Court, Judicial Affidavit Rule, SC Administrative Matter No. 12-8-8-SC [SC A.M. No. 12-8-8-SC] (Sep. 4, 2012).

12. 1997 RULES OF CIVIL PROCEDURE, rules 23-28.

13. I WILLARD B. RIANO, CIVIL PROCEDURE VOLUME I: THE BAR LECTURE SERIES 458 (2011 ed.).

14. Republic v. Sandiganbayan, 204 SCRA 212, 220 (1991) (citing II MANUEL V. MORAN, COMMENTS ON THE RULES OF COURT 5-6 (1979 ed.)).

Unfortunately, it appears that there is an underutilization of the modes of discovery in the Philippines. Out of the 56 branches of the Regional Trial Court of Manila (RTC Manila), there were only nine requests for modes of discovery filed with the courts in the whole of 2015 and until August 2016.[15] Only six of the RTC Manila courts received these requests over that same span of time.[16] This is despite the fact that RTC Manila is already one of the busiest courts in the country. Furthermore, a general survey of Supreme Court decisions from 1901 to 2015 reveals that "discovery" in the context of discovery procedure has only reached the High Court less than 20 times.[17] Depositions have been referred to less than 40 times in the same time period[18] — including those instances where depositions are cited in the

15. Office of the Clerk of Court, Records of Modes of Discovery as used in the Regional Trial Court of Manila (RTC) from 2015-2016 (on file with the Authors). The Authors filed a letter request with the Office of the Clerk of Court of the RTC of Manila, and learned that as of August 2016, in its 56 branches, the modes of discovery were used only nine times in 2015. Three were motions for depositions, two were motions for written interrogatories, two were motions for admissions by adverse parties, one was a motion for production or inspection of documents, and one was a motion for physical or mental examination of persons. *Id.*

16. *Id.*

17. *See* Phil. Computer Solutions v. Hernandez, 527 SCRA 809 (2007); Berdin v. Mascariñas, 526 SCRA 592 (2007); Philippine Health Insurance Corporation v. Our Lady of Lourdes Hospital, 774 SCRA 603 (2015); Hyatt Industrial Manufacturing Co. v. Ley Construction and Development Co., 484 SCRA 286 (2006); Capitol Hills Golf & Country Club v. Sanchez, 717 SCRA 294 (2014); Republic v. Kendrick Development Corporation, 498 SCRA 220 (2006); Lañada v. Court of Appeals, 375 SCRA 543 (2002); Espiritu v. Tankiansee, 651 SCRA 706 (2011); Limos v. Odones, 628 SCRA 288 (2010); Marcelo v. Sandiganbayan, 531 SCRA 385 (2007); Security Bank Corporation v. Court of Appeals, 323 SCRA 330 (2000); Westmont Investment Corporation v. Farmix Fertilizer Corporation, 632 SCRA 50 (2010); Dela Torre v. Pepsi Cola Products Phils., Inc., 298 SCRA 363 (1998); Producers Bank of the Philippines v. Court of Appeals, 285 SCRA 385 (1998); Koh v. Intermediate Appellate Court, 144 SCRA 259 (1986); *Republic*, 204 SCRA; Fortune Corporation v. Court of Appeals, 229 SCRA 212 (1994); & Ong v. Mazo, 431 SCRA 56 (2004).

18. *See* Jonathan Landoil International Co., Inc. v. Spouses Mangadatu, 436 SCRA 599 (2004); Republic v. Sandiganbayan (Fourth Division), 662 SCRA 152 (2011); Yuchengco v. Sandiganbayan, 479 SCRA 1 (2006); Isabela Colleges, Inc. v. Heirs of Nieves Tolentino-Rivera, 344 SCRA 95 (2000); Mactan Cebu International Airport Authority v. Court of Appeals, 346 SCRA 126 (2000); Rosete v. Lim, 490 SCRA 125 (2006); Sales v. Sabino, 477 SCRA 101 (2005);

footnotes in the decisions as evidence,[19] or are quoted directly in the body.[20] The same goes for motions for production of documents, which have been mentioned less than 30 times in Supreme Court decisions.[21] Whether it is

Disini v. Sandiganbayan, 623 SCRA 354 (2010); Dasmariñas Garments, Inc. v. Reyes, 225 SCRA 622 (1993); Marinduque Transp. Co., Inc. v. Public Service Commission, 8 SCRA 625 (1963); Lim Cuan Sy v. Northern Assurance Co., 55 Phil. 248 (1930); Firestone Tire and Rubber v. Delgado, 104 Phil. 920 (1958); Lopez, etc., et al. v. Maceren, et al., 95 Phil. 753 (1954); Autographics, Inc. v. Court of Appeals, 224 SCRA 198 (1993); Caguiat v. Torres, 30 SCRA 106 (1969); Veran v. Court of Appeals, 157 SCRA 438 (1988); People v. Webb, 312 SCRA 573 (1999); Caseñas v. Cabiguen, 14 SCRA 878 (1965); Jacinto v. Amparo, 93 Phil. 633 (1953); Panaguiton v. Watkins, 5 Phil. 539 (1906); Mangio v. Court of Appeals, 371 SCRA 466 (2001); Miranda v. Malate Garage and Taxi Cab Inc., 99 Phil. 670 (1956); Pajarito v. Señeris, 87 SCRA 275 (1978); W.W. Dearing v. Fred Wilson & Co., Inc., 98 SCRA 758 (1980); Northwest Airlines, Inc. v. Cruz, 317 SCRA 761 (1999); Manliclic v. Calaunan, 512 SCRA 642 (2007); Rosete v. Lim, 490 SCRA 125 (2006); Disini v. Sandiganbayan, 623 SCRA 354 (2010); *San Luis*, 547 SCRA; & Dulay v. Dulay, 474 SCRA 674 (2005).

19. *See, e.g.*, Japan Airlines v. Asuncion, 449 SCRA 544 (2005). In this case, the Court cited the deposition involved as a footnote.

20. *See, e.g.*, Lim Cuan Sy v. Northern Assurance Co., 55 Phil. 248 (1930).

21. *See generally* Solidbank Corporation v. Gateway Electronics Coporation, 533 SCRA 256 (2008); Freedom from Debt Coalition v. Energy Regulatory Commission, 432 SCRA 157 (2004); Ty v. Banco Filipino Savings and Mortgage Bank, 422 SCRA 649 (2004); Chan v. Chan, 702 SCRA 76 (2013); Villanueva v. Ople, 475 SCRA 539 (2005); Secretary of National Defense v. Manalo, 568 SCRA 1 (2008); Funa v. Duque III, 742 SCRA 166 (2014); Security Bank and Trust Company v. Court of Appeals, 249 SCRA 206 (1995); *Espiritu*, 651 SCRA at 708-09; Compania General de Tabacos de Filipinas v. Court of Appeals, 426 SCRA 203 (2004); Republic v. Sandiganbayan, 722 SCRA 211 (2014); Estrada v. Office of the Ombudsman, 748 SCRA 1 (2015); Lozada, Jr. v. Macapagal-Arroyo, 670 SCRA 545 (2012); Presidential Anti-Graft Commission (PAGC) v. Pleyto, 646 SCRA 294 (2011); Biraogo v. Philippine Truth Commission of 2010, 637 SCRA 78 (2010); Lee v. Court of Appeals, 375 SCRA 579 (2002); Javellana v. Mirasol and Nuñez, 40 Phil. 761 (1920); United States v. Baluyot, 40 Phil. 385 (1919); Bataan Shipyard & Engineering Co., Inc. v. Presidential Commission on Good Government, 150 SCRA 181 (1987); Kurada v. Jalandoni, 83 Phil. 171 (1949); *Republic*, 204 SCRA at 212; People v. Topacio and Santiago, 59 Phil. 356 (1934); Pangasinan Transportation Co., Inc. v. Legaspi, 12 SCRA 592 (1964); Santiago Land Development Corp. v. Court of Appeals, 267 SCRA 79 (1997); Allado v. Diokno, 232 SCRA 192 (1994); & Beltran v. Samson and Jose, 53 Phil. 570 (1929).

the modes of discovery in general, or the particular discovery tools, the problem is that litigants are often uncooperative and non-compliant with discovery requests.[22] They usually find other ways to evade the use of discovery by opposing parties.[23]

In other jurisdictions, discovery is a standard, almost automatic ingredient of court proceedings, so much so that some foreign lawyers have established their names through discovery. Boies is well known for his legal acumen, and one of his more celebrated cases was the Microsoft antitrust case, *United States v. Microsoft*,[24] where he represented the United States (U.S.) government against corporate giant Microsoft and its leader William H. Gates III (Bill Gates).[25] In *Microsoft*, the U.S. federal government, along with 19 States, filed a suit against Microsoft for purposely monopolizing the software market and violating Sections 1 and 2 of the Sherman Act[26] by

22. *See, e.g.*, *Sales*, 477 SCRA 101 & *W.W. Dearing*, 98 SCRA 758.

23. *Id.*

24. United States v. Microsoft, Civil Action No. 98-1232-33, Nov. 5, 1999, *available at* https://www.justice.gov/sites/default/files/atr/legacy/2006/10/16/218633.pdf (last accessed Oct. 31, 2016).

25. David Margolick, The Man Who Ate Microsoft, Vanity Fair, *available at* http://www.vanityfair.com/news/2000/03/microsoft-200003 (last accessed Oct. 31, 2016).

26. The Sherman Anti-Trust Act is a federal anti-monopoly and anti-trust statute that was passed in the United States in 1890. Sections 1 and 2 of the Sherman Anti-Trust Act provide —

> § 1 — Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.
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> § 2 — Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

engaging in exclusive dealing.[27] Back in the 1990s, when Windows was the only option available to consumers, Microsoft forced the bundling of its browser, Internet Explorer, with its entire operating system, so that if any firm attempted to use the browser system of its competitors, Microsoft could leverage its dominant place in the software market to force the exclusion of the latter.[28] While many debate the validity of the claims and defenses in that case, or even the manner by which the case was handled,[29] the undisputed fact is that this case cemented Boies' place as one of the most accomplished litigators in modern times.[30]

In *Microsoft*, Boies conducted an extensive and even acrimonious examination of then Chief Executive Officer Bill H. Gates — not during trial — but in a videotaped deposition at the Microsoft Headquarters in Redmond, Washington.[31] This deposition is viewed as one of the key factors in ultimately securing a judgment against Microsoft, and Boies accomplished the same without even having to present the witness at the actual hearing.[32] It was in this context that Boies summarized the value of discovery proceedings in his autobiography — "[t]he purpose of discovery is to further the search for truth by giving equal access to facts and evidence by eliminating 'trial by ambush,' where one side hides evidence it wants to spring at trial on an unsuspecting opponent."[33]

For those fond of legal thrillers, it also quite common to see depositions taken by lawyers, often videotaped and with no court personnel present,

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Sherman Anti-Trust Act, 15 U.S.C. §§ 1-2 (2012).

27. *Microsoft*, Civil Action No. 98-1232-33, at 2.

28. *Id.*

29. Ashby Jones, U.S. v. Microsoft 10 Years Later: What Did it Get Us?, *available at* http://blogs.wsj.com/law/2011/05/13/u-s-v-microsoft-10-years-later-what-did-it-get-us (last accessed Oct. 31, 2016).

30. *See* Paul Barrett, *How David Boies Became the Best Friend and Worst Enemy of Big Business*, WALL ST. J., May 13, 2015 *available at* http://www.bloomberg.com/news/articles/2015-05-12/how-david-boies-became-the-best-friend-and-worst-enemy-of-big-business (last accessed Oct. 31, 2016) & Margolick, *supra* note 25.

31. BOIES, *supra* note 1, at 141.

32. The full case files and transcripts, for those interested, are available online. *See* U.S. Department of Justice, U.S. v. Microsoft Corporation [Browser and Middleware], *available at* https://www.justice.gov/atr/case/us-v-microsoft-corporation-browser-and-middleware (last accessed Oct. 31, 2016).

33. BOIES, *supra* note 1, at 134.

known as the mode of discovery of "production of documents."[34] For instance, in the hit U.S. show *Suits*, there was a recurring storyline about how one of the documents required for discovery may have been "buried" by the secretary of the lead lawyer.[35] In the same show, there was a dramatic confrontation between a current and former partner of the law firm in a deposition, and this ultimately led to the settlement of the claims.[36] There was also a depiction of discovery proceedings in Michael Crichton's novel "Disclosure,"[37] where the scandalous revelations of an alleged sexual harassment were made in a deposition.[38] In the movie "The Social Network,"[39] there was a portrayal of the deposition of the Winklevoss twins with respect to their proprietary claims over Facebook.[40]

As mirrored by media, discovery is an integral part of the litigation process in other jurisdictions, and has often been used to great effect elsewhere. Unfortunately, in the Philippines, aside from being gravely underutilized, discovery could perhaps even be considered a misunderstood tool, as acknowledged by no less than the Supreme Court in *Republic v. Sandiganbayan*[41] —

> Now, it appears to the Court that among far too many lawyers (and not a few judges), there is, if not a regrettable unfamiliarity and even outright ignorance about the nature, purposes[,] and operation of the modes of discovery, at least a strong yet unreasoned and unreasonable disinclination to resort to them — which is a great pity[,] for the intelligent and adequate use of the deposition-discovery mechanism, coupled with pre-trial procedure, could, as the experience of other jurisdictions convincingly demonstrates, effectively shorten the period of litigation and speed up adjudication.[42]

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34. *See* RULES OF CIVIL PROCEDURE, rule 27.

35. *Suits*: *Discovery* (USA television broadcast July 12, 2012).

36. *Suits*: *He's Back* (USA television broadcast Feb. 7, 2013).

37. MICHAEL CRICHTON, DISCLOSURE (1994).

38. *Id.*

39. The film follows the deposition of two lawsuits against Facebook founder Mark Zuckerberg filed by Eduardo Saverin, who is another founder of the Facebook, and the Winklevoss twins, who initially hired Zuckerberg to develop a social networking site prior to Facebook. THE SOCIAL NETWORK (Columbia Pictures 2010).

40. *Id.*

41. Republic v. Sandiganbayan, 204 SCRA 212 (1991).

42. *Id.* at 220. The case further posited that —

Republic is considered the landmark case in relation to modes of discovery. Former Chief Justice Andres R. Narvasa, the *ponente* of the decision, felt it necessary to correct many of the misconceptions about discovery procedure, as manifested by the parties in *Republic*.[43] In the case, the Presidential Commission for Good Governance (PCGG) filed a complaint for reconveyance, reversion, accounting, restitution, and damages against Dominador Santiago and Bienvenido Tantoco, Jr., together with Ferdinand Marcos and Imelda Marcos, at the Sandiganbayan.[44] The PCGG alleged in its complaint that the defendants had taken property belonging to the Philippines.[45]

Santiago and Tantoco, however, decided to make use of two modes of discovery to bring some facts to light.[46] They filed a motion to admit written interrogatories as well as another motion for the production of documents, both addressed to the PCGG.[47] In their pleadings, the defendants questioned the PCGG as to what properties it had the right to recover, as well as the specific acts that they were alleged to have done in concert with the Marcoses.[48] The Sandiganbayan admitted the interrogatories and granted the defendants' motion.[49]

> [t]he experience in other jurisdictions has been that ample discovery before trial, under proper regulation, accomplished one of the most necessary of modern procedure [—] it not only eliminates unessential issues from trials thereby shortening them considerably, but also requires parties to play the game with the cards on the table so that the possibility of fair settlement before trial is measurably increased.

Id.

43. Justice Narvasa stated —

> It is the duty of each contending party to lay before the court the facts in issue — fully and fairly; i.e., to present to the court *all* the material and relevant facts known to him, suppressing or concealing nothing, nor preventing another party, by clever and adroit manipulation of the technical rules of pleading and evidence, from also presenting all the facts within his knowledge.

Id. at 222 (emphasis supplied).

44. *Id.* at 214.

45. *Id.*

46. *Republic*, 204 SCRA at 216.

47. *Id.* at 216.

48. *Id.* at 218.

49. *Id.*

On petition for *certiorari* in the Supreme Court, the PCGG protested the Sandiganbayan's grant of the motion for production of documents as well as its admittance of the written interrogatories.[50] The PCGG claimed, among others, that Santiago and Tantoco were dealing with factual matters that were meant to be threshed out at trial, given their evidentiary nature;[51] that the documents requested were already presented at some other stage of the proceedings;[52] and that the interrogatories were "really in the nature of a deposition, which is prematurely filed and irregularly utilized [ ] since the order of trial calls for plaintiff to first present its evidence."[53]

The Supreme Court ruled against the PCGG, and opined that "the liberty of a party to make discovery is well-nigh unrestricted if the matters inquired into are otherwise relevant and not privileged, and the inquiry is made in good faith and within the bounds of the law."[54] Following this statement, the Court held that the discovery mechanisms were precisely there so that evidentiary facts could be threshed out *before* trial.[55] It ratiocinated in this wise —

> That the interrogatories deal with factual matters which will be part of the PCGG's proof upon trial, is not ground for suppressing them. ... [I]t is the precise purpose of discovery to ensure mutual knowledge of all the relevant facts on the part of all parties even before trial, this being deemed essential to proper litigation. This is why either party may compel the other to disgorge whatever facts he has in his possession; and the stage at which disclosure of evidence is made is advanced from the time of trial to the period preceding it.[56]

The Supreme Court also rejected the argument of the PCGG that the defendants were simply fishing for information; thus, their requests to avail of the tools of discovery should be denied[57] —

> The PCGG insinuates that the private respondents are engaged on a 'fishing expedition,' apart from the fact that the information sought is immaterial since they are evidently meant to establish a claim against

50. *Id.*

51. *Id.* at 218.

52. *Republic*, 204 SCRA at 218.

53. *Id.*

54. *Id.* at 228.

55. *Id.*

56. *Id.*

57. *Id.*

> PCGG officers who are not parties to the action. It suffices to point out that 'fishing expeditions' are precisely permitted through the modes of discovery.[58]

Further, the Supreme Court also used the case to address some common misconceptions about the use of the modes of discovery, such as the fact that many people assume that the discovery devices are used only to delay proceedings,[59] in this wise —

> Due no doubt to the deplorable unfamiliarity respecting the nature, purposes[,] and operation of the modes of discovery[,] ... there also appears to be a widely entertained idea that application of said modes is a complicated matter, unduly expensive and dilatory. Nothing could be farther from the truth. For example, ... all that is entailed to activate or put in motion the process of discovery by interrogatories to parties under Rule 25 of the Rules of Court[ ] is simply the delivery directly to a party of a letter setting forth a list of least questions with the request that they be answered individually. That is all. ... So, too, discovery under Rule 26 is begun by nothing more complex than the service on a party of a letter or other written communication containing a request that specific facts therein set forth [or] particular documents copies of which are thereto appended, be admitted in writing. That is all. ... The taking of depositions in accordance with Rule 24 (either on oral examination or by written interrogatories) while somewhat less simple, is nonetheless by no means as complicated as seems to be the lamentably extensive notion.[60]

Republic is just one demonstration of what the modes of discovery can offer to those willing to learn how to use them. They are means by which lawyers can build the best possible case for their client, all while speeding up the trial process considerably. To the mind of the Authors, both students and practitioners may benefit from rediscovering the nuances of each device, for use in practice.

This Article aims to reintroduce the reader to discovery, and how discovery procedure functions as a source of techniques that can promote better litigation practice. It discusses the modes of discovery as embodied in the Rules, that is, how each is used and how each can be practically applied. It blends jurisprudence from the Philippines and abroad, principally from the U.S., where much of the country's remedial law is derived. In order to limit scope, and to highlight the practice area in which the modes may be used

58. *Republic*, 204 SCRA at 228.

59. *Id.*

60. *Id.* at 232-33.

most liberally, the Article focuses on the use of the discovery devices in civil procedure. It is the hope of the Authors that, through this Article, both aspiring and practicing litigators may gain new insights on how the modes of discovery may be creatively applied in dispute resolution, in order to provide for more efficient and expeditious ways to advocate for a client.

II. DISCOVERY: A REINTRODUCTION

The Rules provide for six modes of discovery, which are as follows:

(1) Depositions pending action[61] (Rule 23);

(2) Depositions before action or pending appeal[62] (Rule 24);

(3) Interrogatories to parties[63] (Rule 25);

(4) Admissions by adverse party[64] (Rule 26);

(5) Production or inspection of documents or things[65] (Rule 27); and

(6) Physical and mental examination of persons[66] (Rule 28).

These various modes of discovery serve as devices, along with the pre-trial hearing under Rule 20,[67] to "narrow and clarify the basic issues between the parties."[68] They may be utilized by all parties to a particular case.[69] Furthermore, they are available in both civil and criminal proceedings.[70]

The modes are meant to "permit mutual knowledge before trial of *all* relevant facts gathered by both parties[,] so that either party may compel the other to disgorge [whatever facts] he has in his possession."[71] They provide

61. RULES OF CIVIL PROCEDURE, rule 23.

62. *Id.* rule 24.

63. *Id.* rule 25.

64. *Id.* rule 26.

65. *Id.* rule 27.

66. *Id.* rule 28.

67. RULES OF CIVIL PROCEDURE, rule 20.

68. *Republic*, 204 SCRA at 223.

69. *Id.*

70. *See* Vda. de Manguerra v. Risos, 563 SCRA 499, 510 (2008).

71. I RIANO, *supra* note 13, at 458 (emphasis supplied) (citing 35A C.J.S. § 527 (1960)).

an opportunity for parties to flesh out every detail which may lead to uncovered truths. In a way, it can be said that discovery is a means by which litigants may conduct a fishing expedition which involves "inquiring into the facts underlying [an] opponent's case."[72] As held by the Supreme Court, any attempt on the part of any party to avoid the process of discovery, on the ground of it being a fishing expedition alone, will fall on deaf ears.[73]

All of the modes of discovery serve their own specific purposes, and are governed by different sets of rules.[74] However, it is clear that the Supreme Court fully intends for them to be used liberally by litigants to achieve the most expeditious means of settling disputes.[75] Administrative Matter No. 03-1-09-SC[76] (Circular), for instance, provides guidelines for judges and clerks of court in the conduct of pre-trial and the use of deposition-discovery measures.[77] The Circular states that

> [t]he court shall issue an order requiring the parties to avail of interrogatories to parties under Rule 25 and request[s] for admission by adverse party under Rule 26 or[,] at their discretion[,] [ ] make use of [depositions] under Rule 23 or other measures under Rules 27 and 28 within five days from the filing of the answer. A copy of the order shall be served upon the defendant together with the summons and upon the plaintiff.
>
> Within five [ ] days from date of filing of the reply, the plaintiff must promptly move [*ex parte*] that the case be set for pre-trial conference. If the plaintiff fails to file said motion within the given period, the Branch [clerk of court] shall issue a notice of pre-trial.[78]

It has been noted, however, that despite this Circular, the modes are rarely used in litigation.[79]

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72. *Republic*, 204 SCRA at 224.

73. *Id.*

74. RULES OF CIVIL PROCEDURE, rules 23-28.

75. *Republic*, 204 SCRA at 212.

76. Supreme Court, Re: Proposed Rule on Guidelines to be Observed by Trial Court Judges and Clerks of Court in the Conduct of Pre-Trial and Use of Deposition-Discovery Measures, Administrative Matter No. 03-1-09 [A.M. No. 03-1-09-SC] (July 13, 2004).

77. *Id.*

78. *Id.* para. I (A) (1).

79. Office of the Clerk of Court, *supra* note 15.

The Rules also emphasize the importance of these modes of discovery by imposing sanctions upon parties or witnesses who refuse to comply with the modes of discovery.[80] For instance, in a deposition, when a deponent refuses to answer a question upon oral examination, the proponent may "apply to a proper court of the place where the deposition is being taken, for an order to compel an answer."[81] The court may either choose to grant the application and require the deponent to answer the question, or deny the application.[82] A party "who refuses to be sworn or refuses to answer a question after being directed to do so by the court" may be cited for contempt.[83] Furthermore, pursuant to a party's refusal or failure to appear in relation to discovery proceedings, the court "may strike out all or any part of any pleading of that party,"[84] dismiss the case or any part thereof,[85] enter a judgment by default,[86] arrest the disobeying party,[87] or order the payment of all the requesting party's expenses.[88]

The modes are also versatile in the sense that the availment of one mode will not serve to bar another.[89] The Supreme Court has held that parties may resort to multiple discovery devices to thresh out the facts of a case; one device may even be used as a preliminary to another, so that a litigant may strategize as to which combination, and in what sequence, will produce the best results.[90]

The discovery devices, however, are subject to limitations and must never be the cause of injustice.[91] The enforcement of penalties — when these devices are wrongly invoked — is largely left to the court's sound

80. RULES OF CIVIL PROCEDURE, rule 29.

81. *Id.* rule 29, § 1, para. 1.

82. *Id.* rule 29, § 1, paras. 2-3.

83. *Id.* rule 29, § 2.

84. *Id.* rule 29, § 5.

85. *Id.*

86. RULES OF CIVIL PROCEDURE, rule 29.

87. *Id.* rule 29, § 3.

88. *Id.* rule 29, §§ 1, 3, & 5.

89. MANGONTAWAR M. GUBAT, RULES OF CIVIL PROCEDURE: ANNOTATED 295 (2015 ed.).

90. *See* Fortune Corporation v. Court of Appeals, 229 SCRA 355, 373-75 (1994).

91. Insular Life Assurance Co., Ltd. v. Court of Appeals, 238 SCRA 88, 93 (1994).

discretion,[92] and refusals to comply have been dealt with seriously by trial courts.

For example, in *Arellano v. Court of First Instance of Sorsogon, Br. 1*,[93] the defendant served upon the plaintiff written interrogatories, which the latter failed to answer for two years.[94] As a result, the trial court dismissed the complaint entirely, without even ordering the plaintiff to answer the interrogatories.[95] The Supreme Court affirmed such decision stating that there had been a failure on the part of plaintiff to prosecute, and held that the same constituted *res judicata* as between the parties.[96] The plaintiff was thus effectively barred from seeking relief on his claim.[97]

The modes of discovery can be potent tools to advance a client's cause and to expose the frivolity of the opposing party's claims. To understand how they are best used and practically applied, each of these modes will be discussed individually.

A. Depositions (Rules 23 and 24)

A deposition is "the taking of the testimony of any person, whether he be a party or not, but at the instance of a party to the action."[98] This testimony is taken out of court,[99] and may be taken through two methods — by oral examination or by written interrogatory.[100]

Deposition is conducted under oath and outside of the courtroom, usually in the offices of one of the lawyers.[101] A transcript — a word-for-word account of what happened during the interview — is then made of the deposition, for later use at the trial proper.[102]

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92. *See Insular Life Assurance Co., Ltd.*, 238 SCRA at 93.

93. Arellano v. Court of First Instance of Sorsogon, Br. 1, 65 SCRA 46 (1975).

94. *Id.* at 51.

95. *Id.* at 60-61.

96. *Id.* at 63.

97. *Id.*

98. I RIANO, *supra* note 13, at 460.

99. *Id.*

100. RULES OF CIVIL PROCEDURE, rule 23, §1.

101. Domingo Lucenario, Annotation, *Right to Take Deposition at a Former Proceeding*, 454 SCRA 477, 477 (2005) (citing People v. Webb, 312 SCRA 573 (1999)).

102. *Id.*

As with the other modes of discovery, the courts are very liberal in granting motions for the taking of depositions.[103] This much is clear from jurisprudence, wherein the Supreme Court has opined that —

> Deposition is chiefly a mode of discovery, the primary function of which is to supplement the pleadings for the purpose of disclosing the real points of dispute between the parties and affording an adequate factual basis during the preparation for trial. It should be allowed absent any showing that taking it would prejudice any party. It is accorded a broad and liberal treatment and the liberty of a party to make discovery is well-nigh unrestricted if the matters inquired into are otherwise relevant and not privileged, and the inquiry is made in good faith and within the bounds of law.[104]

Owing to this liberal treatment, among other reasons, deposition is the most commonly used of the various discovery devices.

There are three times when a litigant may seek a deposition — while the action is pending,[105] while an appeal is pending,[106] or before an action is filed.[107] The Rules, therefore, provide for depositions in two Rules — Rules 23 and 24.

1. Depositions Pending Action (Rule 23)

Of all the modes of discovery, perhaps the most popular and arguably the most versatile is the deposition pending action. It grants litigants an opportunity to wade through the murkier facts of the case and observe adverse parties, and often leads to out-of-court settlements.

Under Rule 23, a party may seek the deposition of any person after jurisdiction over the defendant is acquired with leave of court, or, if an answer has already been served, without leave of court.[108] There is no restriction on who may be called, provided that notice is sent to the adverse party.[109] Depositions may also be taken within the country or abroad.[110]

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103. Pajarillaga v. Court of Appeals, 570 SCRA 347, 352-53 (2008).

104. *Id.*

105. RULES OF CIVIL PROCEDURE, rule 23.

106. *Id.* rule 24.

107. *Id.*

108. *Id.* rule 23, § 1.

109. *Id.* When a party requests the deposition of a prisoner, however, it must be made *only* with leave of court and upon such terms as the court may prescribe. *Id.*

Furthermore, attendance of witnesses may even be compelled by subpoena.[111]

This deposition is an examination on *any* relevant matter, so long as it is neither privileged[112] nor restricted by a protective order.[113] The Rules also allow for examinations and cross-examinations, as if the deponent were already on trial.[114] In other words, once a case is filed, one need not wait for trial proper before eliciting testimony from an intended witness. Thus, there will already be an opportunity for a full analysis of the evidence. The courts will also have basis to require that *all* evidence be submitted before it, even before the trial proper begins.[115] This can eliminate many resettings caused by the regular alibis, such as "[w]itness is still being interviewed," or "[t]he documents are still being located," commonly invoked during trial proper.

Depositions pending action are almost standard practice in other jurisdictions, and it is not difficult to see why. They serve as preliminaries to trial proper, allowing the requesting party to observe witnesses before they are prepped to be presented before the court, and to see their reactions in raw and unpolished form.[116]

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110. On one hand, within the Philippines, a deposition may be taken before a judge, before a notary public, or before any person authorized to administer oaths, so long as this is stipulated by the parties in writing. On the other hand, outside the Philippines, a deposition may be taken before a secretary of an embassy or legation, consul general, consul, vice-consul, or consular agent of the Philippines, such person or officer as may be appointed by commission or letters rogatory, or a person authorized to administer oaths, if so stipulated in writing by the parties. I RIANO, *supra* note 13, at 461 (citing RULES OF CIVIL PROCEDURE, rule 23, §§ 10, 11, & 14).

111. RULES OF CIVIL PROCEDURE, rule 23, § 1.

112. *Id.* rule 23, § 2.

113. *Id.* rule 23, §§ 16, 18, & 28.

114. *Id.* rule 23, § 3.

115. *San Luis*, 547 SCRA at 366.

116. *See generally* Christine L. Mast, Use of Depositions (A Paper Presented by a Lawyer at Hawkins Parnell Thackston & Young, an American Law Firm) 9, *available at* http://www.hptylaw.com/media/article/21_Use%20of%20Depositions.pdf (last accessed Oct. 31, 2016). Due to lack of preparedness, there are many times where a famous persona has caught himself or herself in a tight spot during a deposition. For example, there is Robin Thicke and Pharrell Williams, who were sued for copyright infringement over their hit song "Blurred Lines." During his deposition, when asked about the technicalities of

Oftentimes, lawyers have no specific targeted questions in mind when taking depositions,[117] and are fishing around for snippets that can be used later on — a method precisely encouraged by jurisprudence, as well as the Rules of Court, in order to bring ultimate facts to light.[118] As such, given that procedures are followed, opposing counsel can sit the witness down across the room and grill him or her for hours, choosing to test the waters by asking tough questions, or to get a feel of how the deponent thinks and how it will be like to ask him questions during trial.[119]

Litigants often miss out because they do not take the opportunity to depose. In the case of *Air France v. Carrascoso*,[120] Rafael Carrascoso sued Air France for breach of contract of carriage.[121] He bought first class tickets to go from Manila, Philippines to Rome, Italy. During the Bangkok-to-Beirut leg of his trip, the witness Ernesto G. Cuento, a co-passenger of Carrascoso, stated that the manager of Air France told Carrascoso to vacate his seat, as there was a "white man" who had a "better right" to sit there.[122] The lower courts ruled in favor of Carrascoso, and on appeal to the Supreme Court, Air France sought a review of all factual findings of the case.[123] Air France claimed, among others, that Carrascoso "surreptitiously took a first class seat

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engineering a song, Williams countered, "I'm not here to teach you music." He also evaded any question on the technicalities of his song as compared to the one supposedly infringed, stating that the "truth of the matter is silk and rayon are two different things; they just feel the same." Meanwhile, Thicke managed to confess — "[w]ith all due respect, I was high and drunk every time I did an interview last year. ... I didn't do a single interview last year without being high on both." The jury in that case awarded the plaintiff $7.3 million (later reduced by the judge to $5.4 million). *See* Iyana Robertson, Pharrell and Robin Thicke's "Blurred Lines" Depositions Didn't Exactly Go Well..., *available at* http://www.vibe.com/2015/10/pharrell-robin-thicke-blurred-lines-deposition-video (last accessed Oct. 31, 2016) & Eriq Gardner, Robin Thicke's "Blurred Lines" Deposition Unsealed: "I Was High and Drunk" (Exclusive Video), *available at* http://www.hollywoodreporter.com/thr-esq/robin-thickes-blurred-lines-deposition-834403 (last accessed Oct. 31, 2016).

117. Mast, *supra* note 116, at 2.

118. *Id.*

119. BOIES, *supra* note 1, at 134.

120. Air France v. Carrascoso, 18 SCRA 155 (1966).

121. *Id.* at 163-34.

122. *Id.* at 156-57.

123. *Id.* at 157.

to provoke an issue."[124] Furthermore, Carrascoso, serving as witness during the proceedings, narrated that Air France's purser, upon witnessing the incident between Carrascoso and the airline's manager, made an entry in his notebook reading, "[f]irst class passenger was forced to go to the tourist class against his will, and that the captain refused to intervene."[125] Air France also contested the fact that the Court of Appeals considered this piece of evidence, as the same was incompetent.[126]

For both arguments, the Supreme Court sided with the opinions of the lower courts as to the liability of Air France.[127] It further agreed with their observations as to Air France's failure to mount a proper defense — that it could have been solved by them via deposition, had they made any attempt to depose.[128]

Quoting the lower court as to Air France's claim that it was Carrascoso who took the seat to start an argument, the Supreme Court reiterated —

> If there was a justified reason for the action of the defendant's Manager in Bangkok, the defendant could have easily proven it by having taken the testimony of the said Manager by deposition, but defendant did not do so; the presumption is that evidence willfully suppressed would be adverse if produced ... and, under the circumstances, the Court is constrained to find, as it does find, that the Manager of the defendant airline in Bangkok not merely asked but threatened the plaintiff to throw him out of the plane if he did not give up his 'first class' seat because the said Manager wanted to accommodate, using the words of the witness [ ] Cuento, the 'white man.'[129]

Rebutting Air France's claim that Carrascoso's narration as to the purser should not have been admissible as evidence, the Supreme Court again opined —

> At all events, the entry [by the purser of the incident between Carrascoso and the manager] was made outside the Philippines. And, by an employee of [Air France]. It would have been an easy matter for [Air France] to have contradicted Carrascoso's testimony. If it were really true that no such

124. *Id.* at 162.

125. *Id.* at 165.

126. *Air France*, 18 SCRA at 166.

127. *Id.* at 169.

128. *Id.* at 170.

129. *Id.* at 166.

> entry was made, the deposition of the purser could have cleared up the matter.[130]

In this scenario, Air France could have utilized the mechanism provided for in Rule 23[131] given that it could have deposed *anyone* and checked if there were key facts they missed. It could have attempted to depose its employees, including the purser, as to what had actually transpired. It could have even deposed Carrascoso's witness, Cuento, or some other passenger with a different vantage point. It also could have deposed Carrascoso himself, since Air France's main argument was that the contract of carriage between them had never actually been confirmed. Carrascoso did admit in his original complaint with the Court of First Instance that "during the first two legs of the trip from Hong Kong to Saigon and from Saigon to Bangkok, [Air France] furnished to the [Carrascoso] First Class accommodation but only after protestations, arguments[,] and/or insistence were made by [Carrascoso] with [Air France's] employees."[132] Perhaps, the latter facts — that Air France's employees *did* inform Carrascoso beforehand that he had not secured first class seats for one reason or another — would have had an effect on the judgment. While this is clearly an academic discussion not meant to supplant the actual legal strategy employed in the case, it highlights what may be a lack of awareness of discovery procedures that may have been useful for the overall litigation of the case.

Strategy plays an integral part in the deposition process, and like a particularly complex game of poker, one has to decide at each step of the way which card to put down, which move to reveal, and which ones to keep hidden for the decisive win. In the *Microsoft* case, for example, the Bill Gates deposition took a total of 20 hours, spanning over three days.[133] When Boies first sat down to depose Gates, he initially believed that Gates would also be appearing at the trial; as such, Boies did not want to give Gates a "dress rehearsal" to what the cross-examination would be like.[134] Hours into

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130. *Id.* at 170.

131. When *Air France* was decided, deposition was Rule 24 under the old Rules of Court.

132. *Air France*, 18 SCRA at 163.

133. Margolick, *supra* note 25.

134. Ronald H. Clark, Article, *Interplay between Taking a Deposition and Cross-Examination, Cross-Examination Blog*, May 20, 2011: 4:01 p.m., BLOGSPOT, *available at* http://wwwcrossx.blogspot.com/2011/05/interplay-between-taking-deposition-and.html (last accessed Oct. 31, 2016). *See also* BOIES, *supra* note 1, at 141-44.

the deposition, however, Boies concluded that Gates would "never testify at trial,"[135] and decided to turn the deposition into a full-blown cross-examination.[136] Boies engaged in a no-holds-barred confrontation.[137] He presented to Gates numerous copies of e-mails between him (Gates) and other key Microsoft officials, asking plainly whether or not Gates remembered receiving the messages, and if he understood what they meant.[138] Though Gates was often evasive, attempting to dodge any controversial statements on his end, Boies ultimately succeeded in wrangling truths from him about Microsoft's anti-competitive policies.

The Bill Gates deposition is often cited by American litigators as a star deposition, and readings of transcripts shed insight on just how much Gates was compelled to admit. For example, a part of the deposition focused on an e-mail sent by Brad Chase, a Vice-President at Microsoft, to Gates. The transcript states —

> [Boies]: The sentence that says, 'Browser share needs to remain a key priority for our field and marketing efforts,' the sentence right before that says, 'we need to continue our [*jihad*] next year.' That's the way it ends. Do you see that?
>
> [Gates]: Now I see — it doesn't say Microsoft.
>
> [Boies]: Well, when it says 'we' there, do you understand that means something than Microsoft, sir?
>
> [Gates]: It could mean Brad Chase's group.[139]

At this point, Boies asked several more questions in order to discover what "we" from Chase's e-mail meant.[140] Then, he asked about what "jihad" in the e-mails pertained to —

> [Boies]: What do you think he means when he uses the word 'we'?
>
> [Gates]: I'm not sure.
>
> [Boies]: Do you know what he means by [*jihad*]?
>
> [Gates]: I think he is referring to our vigorous efforts to make a superior product and to market that product.[141]

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135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. D. SHANE READ, WINNING AT DEPOSITION 6 (2013).

140. *Id.*

As already discussed, *Microsoft* ultimately ended in a settlement, with the numerous depositions of key Microsoft officers serving as the primary reasons for the corporation's decision to settle.[142] The case demonstrates how it is possible to blend pre-trial and trial techniques to create the best results for a particular advocacy. It showcases how, sometimes, it is not necessary to hold back at the get-go and save one's cards for trial.[143] It also demonstrates the versatility of deposition as a mechanism for discovery.

Depositions taken pursuant to a particular case may also find future use, for the Rules state that the testimony or deposition of a former witness, who is either deceased or unable to testify, when given at a former proceeding involving the same parties and subject matter, may be used as evidence against the adverse party, so long as the latter had the opportunity to conduct a cross-examination.[144]

It is to be noted, however, that the taking of a deposition is not the equivalent of its use during the trial proper. A deposition, by itself, may generally only be used to contradict or impeach the testimony of a deponent serving as a witness in open court.[145] The deponent must, therefore, still be presented before the judge for the latter's scrutiny, and must still be questioned in the typical courtroom cross-examination.[146] As depositions are principally for informing the parties of all relevant facts, and are not meant to replace oral testimony, the Rules of Evidence require that the examination of witnesses be done in open court, under oath of affirmation.[147] Otherwise, they may be excluded on the ground of hearsay.[148]

The general rule may seem to limit what depositions can do to some extent, but actually, they also offer opportunity for the judge to observe and

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141. *Id.* & BOIES, *supra* note 1, at 165.

142. *See* Margolick, *supra* note 25.

143. Kara M. Burgos, et al., Atkinson Barker Court Reporter 101: Deposition Techniques: Get Your Ducks in a Row, *available at* https://www.depo.com/101-deposition-techniques.html (last accessed Oct. 31, 2016).

144. Lucenario, *supra* note 101, at 480 (citing Mangio v. Court of Appeals, 371 SCRA 466, 474-76 (2001) & REVISED RULES ON EVIDENCE, rule 130, § 47).

145. RULES OF CIVIL PROCEDURE, rule 23, § 4 (a).

146. Justice Magdangal M. de Leon, Modes of Discovery: An Outline Discussing the Modes of Discovery, at 3 (2011) (on file with Authors).

147. REVISED RULES ON EVIDENCE, rule 132, § 1.

148. Lucenario, *supra* note 101, at 481 (citing Dasmariñas Garments, Inc. v. Reyes, 225 SCRA 622, 630 (1993)).

look for "the *indicia* of truthfulness or perjury[,] *like the flush of face, or the tone of voice, or the dart of eyes, or the fearful pause*[,]"[149] among other things, which may aid the court in determining the credibility of a particular witness. A witness may say one thing in court, and, in an interrogatory, be caught saying something else entirely.

For example, in the case of *Ong v. Metropolitan Water District*,[150] there was a young boy who drowned in a pool owned by the Metropolitan Water District.[151] His parents instituted a complaint for damages against the company, citing culpable negligence on the part of its staff, lifeguards, and management.[152] Two witnesses stated that they saw the lifeguard on duty reading magazines and talking to the security guard when the drowning incident occurred.[153] The Supreme Court, however, ruled in favor of Metropolitan Water District, and held that there was no negligence on the part of its staff. As to the witnesses' testimonies regarding the lifeguard, the Supreme Court took cognizance of the fact that hours after the boy was discovered unconscious in the pool, the same two witnesses had made written statements that the lifeguard immediately responded when he was alerted that there was a boy who seemed lifeless in the pool.[154] The Supreme Court thus did not find the witnesses' later testimonies in open court to be credible.[155] While the statements given here pertained to ones made at the police report following the incident, it is not difficult to see how the same could be applicable to depositions — witnesses could make minor but key changes to their testimonies, as compared to what they had stated in depositions, that would reveal the truths of the particular case. Hypothetically speaking, if the two witnesses in *Ong*, as they were being questioned by counsel in open court, were reminded of their earlier recorded statements, they would most likely have demonstrated some hesitation, at the very least, about what they were insinuating about the lifeguard's negligence.

149. Lucenario, *supra* note 101, at 479-80 (citing People v. Pascual, 204 SCRA 618, 623 (1991)).

150. Ong v. Metropolitan Water District, 104 Phil. 397 (1958).

151. *Id.* at 399.

152. *Id.* at 398.

153. *Id.* at 403.

154. *Id.*

155. *Id.*

In some instances, however, depositions are also an alternative mode of testimony.[156] They may be used to replace open court examinations if, due to distance,[157] death,[158] or the disability[159] of the deponent, his appearance cannot be compelled.[160] However, in these cases, "the existence of these conditions must be satisfactorily established."[161] Furthermore, the Rules on Evidence must be complied with in order to render them admissible.[162]

This was demonstrated in *San Luis v. Rojas*,[163] when Berdex International (Berdex), a corporation organized under the laws of the U.S., filed a complaint for a sum of money against San Luis.[164] Berdex filed a motion to authorize deposition-taking through interrogatories, stating that all of the deponents involved were residing in the U.S. and were of advanced age, making travel to great distances dangerous.[165] San Luis protested; it opined that allowing written interrogatories would "deprive the court of the opportunity to observe the general bearing and demeanor of witnesses,"[166] as well as prejudice the petitioner's right to cross-examination.[167] Ultimately, the trial court allowed the written interrogatories to replace the deponents' appearances at the trial, and the Supreme Court upheld this decision.[168] This was warranted by the fact that all of the witnesses were residing at a distance of more than 50 kilometers

156. De Leon, *supra* note 146, at 3.

157. Depositions may be used

> [f]or any purpose by any party, where the deponent is a witness, whether or not a party, if the court finds ... that the witness resides more than [100] kilometers from the place of trial or hearing, or is out of the Philippines, unless it appears that his absence was procured by the party offering the deposition

Id. at 6 (citing RULES OF CIVIL PROCEDURE, rule 23, § 4).

158. *Id.*

159. *Id.*

160. De Leon, *supra* note 146, at 3.

161. *Sales*, 477 SCRA at 107.

162. *Sandiganbayan (Fourth Division)*, 662 SCRA at 198.

163. San Luis v. Rojas, 547 SCRA 345 (2008).

164. *Id.* at 350.

165. *Id.* at 351.

166. *Id.* at 354.

167. *Id.*

168. *Id.* at 362.

from the place of trial or hearing.[169] This case is another demonstration of how useful depositions can be. Such is not restricted by distance, as a litigator can secure the deposition of a witness who may even be based abroad. This will eliminate interminable delays and attendant costs in arranging for the witness to be transported to appear before the court.

The difference between taking and actually using depositions can also open up a Pandora's box of possibilities.[170] This is because deposing a person does not mean that said person automatically makes the deponent a party's witness; it is the formal offer of said deposition as evidence to the court that determines whether the deposition will be considered during the proceedings.[171] Thus, although a deposition is taken, the parties still have the opportunity to object to the presentation of the deposition as evidence at the trial or at the hearing where the evidence is supposed to be received, so long as the witness is there and is to testify.[172] Also, while errors and irregularities in depositions in relation to notices — the qualifications of the officer taking the deposition and the manner by which it is being taken — may be waived

169. *San Luis* was decided under the old Rules of Civil Procedure. Under the new Rules, the distance required is now 100 kilometers —

> SEC. 4. *Use of depositions.* — At the trial or upon the hearing of a motion of an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any of the following provisions:
>
> ...
>
> (c) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: ... (2) that the witness resides at a distance more than [ ] [100] kilometers from the place of trial or hearing, or is out of the Philippines, unless it appears that his absence was procured by the party offering the deposition[.]

RULES OF CIVIL PROCEDURE, rule 23, § 4.

170. *Sandiganbayan (Fourth Division)*, 662 SCRA at 199.

171. RULES OF CIVIL PROCEDURE, rule 23, § 7 & Heirs of Pedro Pasag v. Parocha, 522 SCRA 410, 417 (2007).

172. RULES OF CIVIL PROCEDURE, rule 23, § 6.

if not objected to before or during the deposition,[173] the testimony itself may still be objected to for the first time during trial.[174]

For example, in *Faile v. Zarich*,[175] the Connecticut Superior Court was confronted with a deposition wherein the defense attorney was making too many suggestive objections.[176] In the case, the plaintiffs' counsel was deposing Dr. Mitchell Driesman, who was called to be a non-party witness and was represented by his own counsel.[177]

> [Plaintiffs' Counsel]: And how would gaining access cause a branch of the femoral artery to be sheared off? What mechanically would have to happen?
>
> [Defense Counsel]: I am going to object. This is completely hypothetical. Are we talking about in this case, under a particular set of circumstances?
>
> [Plaintiffs' Counsel]: In the process of gaining access to a femoral artery.
>
> [Defense counsel]: I just think that is beyond what — Dr. Driesman didn't perform that part of the procedure. He wasn't there when that part of the procedure was performed.[178]

The trial court sanctioned the defense counsel for attempting to lead the witness, stating, "[b]y her interjection of her statement of evidence, that Dr. Driesman did not perform that part of the procedure and was not present when it was performed, defense counsel was ... suggesting to the witness what she wanted him to say in response to plaintiff's counsel's question."[179] This case highlights that taking a deposition comes with its own limitations, and is subject to sanctions under the Rules of Evidence.

Once the deposition is introduced at the trial, any party may then rebut any relevant evidence contained therein, regardless of who introduced the evidence.[180] If a deponent contradicts his own statements from his deposition, or suddenly sings a different tune, this could once again affect the outcome of the case. This possibility requires a reassessment of when it is

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173. *Sales*, 477 SCRA at 108 (citing RULES OF CIVIL PROCEDURE, rule 23, § 29).

174. RULES OF CIVIL PROCEDURE, rule 23, § 6.

175. Faile v. Zarich, No. HHDX04CV5015994S, 2008 WL 2967405 (Super. Ct. 2008) (Conn.) (U.S.).

176. *Id.* at *1.

177. *Id.* at *3.

178. *Id.*

179. *Id.*

180. RULES OF CIVIL PROCEDURE, rule 23, § 9.

best to use one witness over another, or whether or not to use the deposition at all. For once a part of the deposition is introduced in court, the deponent becomes a witness of that introducing party, if used for a purpose other than contradicting said deponent's statement.[181] The introducing party is thus bound by what the witness says.

Thus, litigants must also take into consideration how much a deponent's statements may be relied upon to support the case, and how much the statements and actuations of a deponent can be defended against what statements the deponent himself may put forward.

2. Depositions Before Action or Pending Appeal (Rule 24)

In case one considers it necessary to already make a record of his own testimony or secure the testimony of a witness even before a case is filed, he can be proactive and preserve testimony by deposition before action, as governed by Rule 24.[182] To do this, he can simply file a petition in a court of the residence of the expected adverse party, and his testimony may be perpetuated.[183] The deposition itself is taken by following the procedure in Rule 23 on depositions pending action.[184] The deposition taken under Rule 24 then becomes admissible, and may be used as evidence in any action subsequently brought involving the same subject matter.[185] Subject to compliance with the requirements of the Rules of Court, in the event the witness becomes unavailable during trial proper, the deposition may be presented in evidence.[186]

Parties whose cases are pending appeal may also file a motion for deposition of witnesses with the trial court in which the case was tried, or even before an appeal is filed, so long as the period provided by the Rules for taking appeals has not yet prescribed.[187] This discovery procedure takes into consideration that, between "the time of the appeal and the subsequent taking of testimony at a new trial, should one be necessary, a considerable

181. *Id.* rule 23, § 8.

182. *Id.* rule 24, § 1.

183. *Id.*

184. *Id.* rule 24, § 4.

185. *Id.* rule 24, § 6.

186. RULES OF CIVIL PROCEDURE, rule 24, § 6.

187. *Id.* rule 24, § 7.

period of time may elapse."[188] Events may occur in the in-between stage which will affect the course of the proceedings and the decision in the case. It is even possible that the appeal itself and the reversal of the trial court's previous decision will drastically change key issues in the case.[189] Owing to these scenarios, the trial court can allow the deposition to be taken if it finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice.[190] Thereafter, the depositions may be taken and used in the same manner and under the same conditions prescribed for depositions taken in pending actions.[191]

This mode of discovery is useful for very practical purposes — it enables litigants to be proactive in their approach when it comes to enforcing future or potential claims. For example, a person interested in preserving his own testimonies about a dispute, because he will later be going abroad for extended periods, or because he is old or is suffering from a terminal sickness, may do so under this Rule even if no case is filed or if the case is pending appeal.[192] Also, a person who is facing an investigation or has reason to believe that a case may soon be filed against him may take steps to defend himself in advance.[193]

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188. Wallace R. Peck, *Depositions, Proceedings to Perpetuate Testimony, Interrogatories to Parties: The Federal Rules and the California Law*, 44 CAL. L. REV. 909, 929 (1956).

189. Justice De Leon provides an illustrative example which may prove enlightening —

> A party may perpetuate the testimony of a witness which was objected by the adverse party and ruled out by the court. If the appellate court should reverse the decision or order of the lower court, it could admit the deposition as [additional evidence] or remand the case to the lower court for such admission in accordance with [Sections] 4 and 5 of Rule 23.

De Leon, *supra* note 146, at 12.

190. RULES OF CIVIL PROCEDURE, rule 24, § 7.

191. *Id.*

192. *Id.*

193. A tax lawyer in the U.S. provides one clear situational example of when this may occur —

> Consider the following situation. It is 1997 and your corporation is under audit by the Franchise Tax Board for income years 1981 to 1983. The primary issue being examined is whether your corporation and its subsidiaries were engaged in a single unitary business during

A person may also be interested in perpetuating the testimony of another, especially where the latter may soon become unavailable. The case of *In re Blow Wind Shipping Ltd., and Lemissoler Ship Management, Ltd.*[194] is a demonstration of this. In that U.S. district court case, the two corporations filed a motion asking the court to issue an order authorizing them to take the deposition of one Vadym Fokin.[195] Fokin was a citizen of Ukraine who was detained in Maine pursuant to material witness warrant issued against him.[196] He filed a motion to discharge the warrant, which was granted by the judge of the district court.[197] Upon the request of the petitioners in the case, the court issued the order authorizing the deposition of Fokin, although no administrative, criminal, or civil complaint was then pending against him; this is precisely to perpetuate his testimony for future use.[198]

Depositions before action or pending appeal are thus precautionary measures taken by those who have an interest in pursuing future suits, or who are otherwise attempting to protect themselves in case suits are filed against them.

> those years. The ex-[Chief Executive Officer] and other former executives of the corporation who have personal and intimate knowledge about the business operations of the corporation during the 1980s are now in their sixties or seventies. Their testimony would support strongly your unitary filing position. What can you do to preserve their testimony and use such testimony as evidence should the matter be litigated in state court?

Kerne Matsubara, Preserving Witness Testimony Under Section 2035 of the California Code of Civil Procedure, *available at* http://www.pmstax.com/state/test9708.shtml (last accessed Oct. 31, 2016). The lawyer goes on to conclude that perpetuating testimony via deposition, as allowed under California's state law, would help to preserve vital information on the matter in the event of the death of the potential witnesses. *Id.*

194. In re Blow Wind Shipping Ltd., and Lemissoler Ship Management, Ltd., Misc. No. 10-114-P-JH, *available at* http://www.med.uscourts.gov/Opinions/Rich/2010/JHR_04212010_2_10mc114_In_re_Blow_Wind.pdf (last accessed Oct. 31, 2016) (Dist. Ct. 2010) (Me.) (U.S.).

195. *Id.* at 1.

196. *Id.*

197. *Id.* at 6.

198. *Id.*

B. Written Interrogatories to Adverse Parties (Rule 25)

Litigants may also choose to serve written interrogatories, "for the purpose of eliciting material and relevant facts from any adverse party."[199]

It is important to distinguish the written interrogatories issued under Rule 23 and those under Rule 25.[200] Under Rule 23, any party may be served;[201] however, Rule 25 pertains only to the adverse party, and is always served on the adverse party himself,[202] rather than to the officer designated in the notice.[203] Furthermore, the failure of a party to avail of Rule 25 may prove especially fatal to him later on, owing to the particular nuances attached to this particular rule.

Under Rule 25, the applicant may send a set of written questions to the adverse party on any material and relevant fact; the adverse party has to respond to these questions within 15 days from receipt.[204] If this device is not availed of, the adverse party, as a general rule, may no longer be called to the witness stand to give testimony during the trial or to give a deposition pending appeal.[205] This is provided for in Section 6 of Rule 25, which states that "[u]nless thereafter allowed by the court for good cause shown and to prevent a failure of justice, a party not served with written interrogatories may not be compelled by the adverse party to give testimony in open court, or to give a deposition pending appeal."[206]

This was demonstrated in *Afulugencia v. Metrobank*,[207] where the plaintiffs-spouses "filed a complaint for nullification of mortgage, foreclosure,

199. I RIANO, *supra* note 13, at 468 (citing RULES OF CIVIL PROCEDURE, rule 25, § 1).

200. I RIANO, *supra* note 13, at 468 (citing A.M. No. 03-1-09-SC, para. I (A) (1)).

201. I RIANO, *supra* note 13, at 468 (citing RULES OF CIVIL PROCEDURE, rule 23, § 1).

202. I RIANO, *supra* note 13, at 468 (citing RULES OF CIVIL PROCEDURE, rule 25, § 1).

203. I RIANO, *supra* note 13, at 468 (citing RULES OF CIVIL PROCEDURE, rule 25, § 26).

204. I RIANO, *supra* note 13, at 469 (citing RULES OF CIVIL PROCEDURE, rule 25, § 1).

205. *See* I RIANO, *supra* note 13, at 469 (citing RULES OF CIVIL PROCEDURE, rule 25, § 6).

206. RULES OF CIVIL PROCEDURE, rule 25, § 6.

207. Afulugencia v. Metrobank, 715 SCRA 399 (2014).

auction sale," and other related transactions against their creditor, Metrobank.[208] After the pre-trial, the plaintiffs-spouses filed a motion for issuance of a subpoena to require Metrobank's officers to testify as their initial witnesses during the hearing for the presentation of their evidence-in-chief.[209] Metrobank opposed the motion, as the plaintiffs-spouses never sent written interrogatories to its officers.[210] The Supreme Court held that the plaintiffs-spouses could no longer compel Metrobank's officers to testify at the witness stand on their behalf.[211] In the decision, the Supreme Court provided the rationale behind this particular rule —

> One of the purposes of [Section 6, Rule 25] is to prevent fishing expeditions and needless delays; it is there to maintain order and facilitate the conduct of trial. It will be presumed that a party who does not serve written interrogatories on the adverse party beforehand will most likely be unable to elicit facts useful to its case if it later opts to call the adverse party to the witness stand as its witness. Instead, the process could be treated as ... an attempt at delaying the proceedings; it produces no significant result that [ ] prior written interrogatories might bring.
>
> Besides, since the calling party is deemed bound by the adverse party's testimony, compelling the adverse party to take the witness stand may result in the calling party damaging its own case. Otherwise stated, if a party cannot elicit facts or information useful to its case through the facility of written interrogatories or other [modes] of discovery, then the calling of the adverse party to the witness stand could only serve to weaken its own case as a result of the calling party's being bound by the adverse party's testimony, which may only be worthless and instead detrimental to the calling party's cause.
>
> Another reason for the rule is that by requiring prior written interrogatories, the court may limit the inquiry to what is relevant, and thus prevent the calling party from straying or harassing the adverse party when it takes the latter to the stand.
>
> Thus, the rule not only protects the adverse party from unwarranted surprises or harassment; it likewise prevents the calling party from ... bungling its own case.[212]

208. *Id.* at 401.

209. *Id.* at 401-02.

210. *Id.* at 402-03.

211. *Id.* at 413.

212. *Id.* at 413.

Litigants who plan to have their adverse party testify on their behalf during trial must, therefore, make sure to comply with provisions of Rule 25; otherwise, the courts have basis to bar motions to call the adverse party to the stand.

This discovery device also has adverse effects on a plaintiff who refuses or fails to answer interrogatories; his case may be dismissed entirely for failure to prosecute, unless he is able to justify the failure or refusal.[213]

C. Request for Admission from Adverse Party (Rule 26)

A request for admission from an adverse party is a similar mechanism as that provided in Rule 25 — both requests for admission and interrogatories cut through only the contested points, so that trial can be confined to those matters.[214] However, the questions posited in a request for admission under Rule 26 are narrower, for it is a written request specifically for an admission of the genuineness of any material or relevant document or fact.[215]

Rule 26 serves as a key means by which facts are established, so that during the trial proper, there will be no endless debate about them which may further prolong proceedings or increase costs for the litigants.[216] This is a potent mode of discovery in that it considers the matter as impliedly *admitted* if the party requested does not file a sworn response thereto — either specifically denying the allegations or explaining why he cannot admit or deny the matters therein stated — within the period given.[217] The admissions may even lead to a summary judgment,[218] with trial for the case dispensed with entirely. Rule 26 thus grants the parties the opportunity to have the adverse party expressly and impliedly admit to key facts that may help them win the case. It is to be noted, however, that the pattern revealed in jurisprudence, relating to this discovery device, is that litigants often use Rule 26 to request for admissions already separately given by the adverse

213. *Marcelo*, 531 SCRA at 411-13 (2007) (citing RULES OF CIVIL PROCEDURE, rule 25).

214. I RIANO, *supra* note 13, at 470.

215. RULES OF CIVIL PROCEDURE, rule 26, § 1.

216. *Limos*, 628 SCRA at 298.

217. RULES OF CIVIL PROCEDURE, rule 26, § 2. This Section provides: "[t]his sworn statement shall be filed and served within the period designated in the request but which shall not be less than [15] days from the service of such request, or within such further time as the court may allow." *Id.*

218. De Leon, *supra* note 146, at 15.

parties in their answers or other pleadings.[219] This Rule, therefore, should be understood to be an additional device for litigants who have yet to elicit a proper response or implied admission from their adverse parties in other pleadings already filed, taking into account the other provisions in the Rules.[220]

Rule 26 introduces another interesting aspect of this Rule — since Section 1 provides that the request for admission may be made *at any time* after issues have been joined[221] (i.e., after the defendant has submitted his answer), it is possible to file and serve the request for admission after having already submitted the Pre-Trial Brief, thus allowing an opportunity for strategy on the part of the parties. One of them may, for example, make some statements in his brief during the early stage of the proceedings, which he will be forced to admit as false or inaccurate later on, leaving the latter with no choice but to retract his own statements. It grants another interesting opportunity for litigators to choose what to reveal early on and what to keep as cards to be used later on in the trial.

On the other hand, a party who fails to file a request for admission is not allowed to present independent evidence on the facts that could have been admitted by the opposing party.[222]

It is to be noted that the request for admission must be served directly upon the party, and not his counsel or representative.[223] In *Duque v. Court of Appeals*,[224] it was the counsel who was furnished a copy of the request for

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219. *See Limos*, 628 SCRA at 298 & *Lañada*, 375 SCRA at 552-55.

220. One example of a relevant provision with respect to implied admissions is the provision on Section 8 of Rule 8, which states that the failure of a party to specifically denial under oath of the genuineness and due execution of a written instrument attached to or contained in a pleading submitted by either plaintiff or defendant constitutes an implied admission of such facts. RULES OF CIVIL PROCEDURE, rule 8, § 8.

Interestingly, though, this same provision may be used in this mode of discovery. A plaintiff, for example, may file a Request for Admission against the defendant, requesting that he admit that he forged the plaintiff's signature in a document, which in turn is attached to the Request. If the defendant fails to specifically deny under oath plaintiff's allegations, it also becomes an implied admission on his part, pursuant to Rule 8 of the Rules of Court. *Id.*

221. *Id.* rule 26, § 1.

222. *Id.* rule 26, § 5.

223. *Id.* rule 26, § 1.

224. Duque v. Court of Appeals, 383 SCRA 520 (2002).

admission, not the party himself from whom the admission was sought; thus, there could be no implied admission of truth.[225] The answer to the request, however, may be prepared by the counsel of the party requested, without it becoming an implied admission on the part of the latter.[226] As can be gleaned from this case, Rule 26 is so powerful a device that there is a tendency for courts to construe more strictly against the requesting party in procedural matters.[227]

D. Request for Production and Inspection of Things (Rule 27)

A request for production and inspection of things is used in a pending action, and allows a party to seek an order from the court to compel any party to produce any designated papers or tangible objects, *not privileged*,[228] which may constitute "evidence material to any matter involved in the action and which are in his possession, custody[,] or control," so that the

225. *Id.* at 526-31.

226. *Lañada*, 375 SCRA at 554.

227. *Id.*

228. Section 130 of the Revised Rules on Evidence provides the types of disqualification by reason of privileged communication:

(a) communication between husband and wife;

(b) communication between attorney and client;

(c) communication between physician and patient;

(d) communication between priest and penitent; and

(e) public officers and public interest.

Aside from these, there are also privileged communications which are not mentioned in Rule 130. These include:

(a) editors may not be compelled to disclose the source of published news;

(b) voters may not be compelled to disclose for whom they voted;

(c) trade secrets;

(d) information contained in tax census returns; and

(e) bank deposits.

I RIANO, *supra* note 13, at 473 (citing Air Philippines Corporation v. Pennswell, Inc., 540 SCRA 215, 233-34 (2007) (citing REVISED RULES ON EVIDENCE, rule 130, § 24 & RICARDO J. FRANCISCO, EVIDENCE 171-73 (3d ed. 1996))).

requesting party may inspect, copy, or photocopy the papers or objects for use in the proceedings.[229]

Rule 27 may also be used to request the court to issue an order to any party to allow the movant's entry upon a designated land in his possession or control for inspection or surveying.[230] Although a movant may file a motion for this request before or during trial, he is limited only to the parties to the action.[231]

With the production of documents, parties can be fully apprised of potentially voluminous pieces of evidence that will tax the Supreme Court's time if examined in open court. The Supreme Court has also referred to this discovery device as a way to make the parties play the game "with cards on the table,"[232] so that the proceedings may be expedited or a fair settlement may be made even before trial begins.[233] This device is thus another opportunity for litigators to ensure that all parties are fully informed of all the key facts.

However, Rule 27 must be used with caution, for, as has been emphasized, privileged matters cannot be inquired into using this discovery device. This was attempted in the case of *Chan v. Chan*.[234] The facts state that Josielene Chan (Josielene) filed a petition for the declaration of the nullity of her marriage to Johnny Chan (Johnny).[235] During the pre-trial conference, Josielene pre-marked Johnny's PhilHealth Claim Form, which was attached to his answer, "as proof that he was forcibly confined at the rehabilitation unit of a hospital."[236] The form stated that Johnny actually suffered from "methamphetamine and alcohol abuse."[237] Later, Josielene filed "a request for the issuance of a subpoena *duces tecum* addressed to Medical City, a private, tertiary-level hospital in the Philippines, covering Johnny's medical records from when he was confined."[238] Josielene also filed

229. RULES OF CIVIL PROCEDURE, rule 27, § 1.

230. *Id.*

231. *Id.*

232. Security Bank Corporation v. Court of Appeals, 323 SCRA 330, 344 (2000).

233. *Id.*

234. Chan v. Chan, 702 SCRA 76 (2013).

235. *Id.* at 79-80.

236. *Id.*

237. *Id.*

238. *Id.*

a motion to allow the submission in evidence of the records sought via subpoena *duces tecum*.[239] The Court, however, did not allow Josielene to use Rule 27 to compel the disclosure of Johnny's medical records.[240] The Court opined —

> To allow [ ] the disclosure during discovery procedure of the hospital records — the results of tests that the physician ordered, the diagnosis of the patient's illness, and the advice or treatment he gave him — would be to allow access to evidence that is inadmissible without the patient's consent. [A] [p]hysician memorializes all these information in the patient's records. Disclosing them would be the equivalent of compelling the physician to testify on privileged matters he gained while dealing with the patient, without the latter's prior consent.[241]

Aside from a patient's hospital records, Rule 27 cannot also be used to compel the disclosure of lists of ingredients which constitute a company's trade secrets.[242]

E. Physical and Mental Examination of Persons (Rule 28)

Finally, Rule 28 provides for the last discovery device currently available in the Rules.[243] In a case where the mental or physical condition of a party is in controversy, the court may order him to submit to a physical or mental examination.[244]

Furthermore, when the party examined makes a request to see the results of the examination, he thereby "waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical examination."[245]

This mode of discovery gives way to several practical applications. Dean Willard B. Riano gives at least three scenarios in which Rule 28 could come into play: (1) an action for annulment of a contract, where the ground that

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239. *Id.*

240. *Chan*, 702 SCRA at 84.

241. *Id.*

242. I RIANO, *supra* note 13, at 473 (citing *Air Philippines Corporation*, 540 SCRA at 233-34 (citing FRANCISCO, *supra* note 228, at 171-73)).

243. RULES OF CIVIL PROCEDURE, rule 28.

244. *Id.* rule 28, § 1.

245. *Id.* rule 28, § 4.

the plaintiff is relying upon is insanity;[246] (2) a petition for guardianship of a person alleged to be insane;[247] or (3) an action to recover damages for personal injury where the issue is the extent of the injuries of the plaintiff.[248] The law is littered with many more situations in which Rule 28 could be used. It is a tool that succeeds in informing parties better, so that one or the other proceeds to trial with more prudence and insight.

III. CONCLUSION

The various discovery devices are powerful tools often underutilized in the Philippines. An examination of each — in terms of scope, capability, and possible effects — demonstrates how much of a game changer they can be in a dispute. If properly used, these devices can also accelerate the resolution between parties, all while arriving at the best possible settlement for one's client.

In trying to reinvent the litigation processes, lawyers can start by reinventing themselves and their strategies first before resorting to radical change. Utilization of modes of discovery is a good start for lawyers who seek to re-*discover* litigation practice. The only amendment necessary, in this regard, is in the way litigants think of and approach cases. Courts can also play an important role by reminding, or even compelling, resort to discovery, depending on the peculiarities of a case. After all, litigation, while considered a "war of attrition," should actually be an effort to determine the true nature and weight of one's claims and defenses, with speedy and fair judgment, and possibly even settlement, as the end in view. Cutting through the usual sources of delay is a great step towards that direction.

246. I RIANO, *supra* note 13, at 473.

247. *Id.* at 474.

248. *Id.*