

questioned (cf. can. 1556).

§ 2. The one who has been duly summoned is to appear or inform the judge without delay of the reason for his absence (cf. can. 1557).

§ 2. *Rite citatus pareat aut causam suae absentiae iudici sine mora notam faciat (cf. can. 1557).*

1. The summons or citation of a party, witness or expert has a two-fold character. It is first a judicial decision that directs the course of the trial, here the instruction of the cause. Because of this the decision to summon is to be notified to the interested persons. Since the decree is merely procedural, it need not contain reasons for its provisions (Art. 261). With this decision the judge determines which persons are to be heard and possibly by whom they will be questioned. The judge indicates this now unless he already did so when issuing the decree opening the instruction of the cause (Art. 137).
2. The summons also constitutes the order for the persons to be questioned to appear before the judge, or a person designated by him, in accord with Art. 51. The appearance is mandated so that the person will answer questions concerning the matter before the court. In order for this goal to be fulfilled, the summons must be notified to the party, witness or expert. The Instruction thus uses the expression *legitime notificato*, which refers to Art. 130. Accordingly, the notification should take place in a secure, verifiable way. As a matter of record, an indication that the summons was sent should be included in the acts.
3. The Instruction does not stipulate that the summons must take place in written form. The provisions contained in the decree of the judge can be notified to the person orally, either in person or even by use of the telephone. Inasmuch as a person actually appears for an examination, it does not matter whether or not he was formally summoned for the hearing. Of course, an oral notification of a summons is not recommended since it is more difficult to establish that the notification occurred. If uncertainty prevails, a party who proposed a witness might be able to raise the challenge that the summons issued by the judge was not presented to the witness.
4. The summons should inform the person why he is to be examined by the judge. However, the person is not to be informed of the actual questions that will be posed (see Art. 170 §1). All the same, the judge can give indications of the topics to be addressed if the person to be questioned needs to prepare for the examination. This might be necessary, for instance, if the judge will pose questions regarding technical matters or issues from the distant past that a person might have to consider prior to the hearing so better to recall relevant facts.

5. §2 comprises a parallel to the provisions of Art. 133, which expresses the obligation of the parties to accept the citation. The obligation that witnesses and experts bear is of another character. It does not constitute a strict, procedural obligation since the witnesses and experts are not parties to the process. Moreover, procedurally speaking the obligation poses no burden to them inasmuch as they are not threatened by any disadvantage should they fail to answer the summons.

The obligation arising from the summons belongs to the general duties of the Christian faithful to obey a judicial summons. The basis for this is c. 209 §2, which obliges the Christian faithful to fulfill the duties they owe to the universal Church and particular church. By means of their cooperation in the ecclesiastical trial, witnesses and experts serve the Church's endeavor to realize justice in the Church and to promote the rights of the parties.

6. The Church enjoys no actual means by which to compel a reluctant witness or expert to appear. Rightly, the law has foregone use of the threat of penalties since material or temporal penalties are unenforceable and spiritual ones are not appropriate as a response. Accordingly, the Church approaches witnesses in a way that will invite their participation in the process, even if this means that the witness may have to offer a statement to non-ecclesiastical authorities designated by the Church (see Art. 161).

#### Article 164

**Art. 164** – The parties, either personally or through their advocates, and the defender of the bond are to exhibit, within a time limit set by the judge, the specific points of the matters about which the interrogation of the parties, witnesses or experts is being sought, without prejudice to art. 71 (cf. can. 1552, § 2).

#### Indication of the Matter of Proof

*Art. 164 – Partes, per se vel per advocatos, et defensor vinculi, exhibeant, intra terminum a iudice praestitutum, articulos argumentorum, super quibus petitur partium, testium vel periti interrogatio, salvo art. 71 (cf. can. 1552, § 2).*

1. In marriage nullity trials, the indication of what matters persons to be questioned will speak to is required if it has not already been indicated in the introductory petition itself. It can be useful to, but it is not essential for a meaningful examination to give persons prior notice of what particular areas they will be questioned about, such as the circumstances surrounding the spouses before the marriage.
2. In order to avoid delays in the trial, the judge can set a deadline for the parties

to indicate the matter concerning which proposed witnesses will speak. The deadline serves only to keep the trial on course. Passage of the deadline without the required indication being given does not deprive the parties of their right to propose witnesses to the court.

3. The current article refers expressly to Art. 71, which indicates that the judge is to proceed *ex officio* when necessary with regard to collecting proofs. This means that the judge is to question parties and witnesses on the basis of the petition itself if the parties or defender of the bond do not further specify what information the particular person is meant to offer.
4. Based on Art. 56 §3, the defender of the bond can adduce all manner of proofs. Similarly, he can also suggest what matters parties, witnesses and experts should be questioned on when he proposes the hearing of them to the judge. Since in marriage nullity trials the defender of the bond always enjoys the right to inspect the acts (see Art. 159 §1, 2<sup>o</sup>), he or she can propose questions to the judge even before the hearing of the parties and witnesses takes place. At the examination itself, at which the defender may be present, he or she is permitted to suggest to the judge further questions to be answered by the person being questioned (see Art. 166).

According to Art. 58, the promoter of justice enjoys the same rights as the petitioning party.

#### Article 165

#### Individual Examination

**Art. 165 – § 1.** The parties, witnesses and experts are each to be questioned individually and apart from one another (cf. can. 1560, § 1).

*Art. 165 – § 1. Partes, testes, et periti seorsim singuli examinandi sunt (cf. can. 1560, § 1).*

§ 2. If however they disagree with one another in a grave matter, the judge can have the disagreeing parties discuss or confer between themselves, while avoiding disagreements and scandal as much as possible (cf. can. 1560, § 2).

*§ 2. Si autem iidem in re gravi dissentiant, iudex discrepantes inter se conferre seu comparare potest, remotis, quantum fieri poterit, dissidiis et scandalo (cf. can. 1560, § 2).*

1. As is the case with the parties themselves, the witnesses and experts are to be heard individually. To do otherwise would also create difficulties for follow up examination of witnesses. If witnesses are able to hear the statements of others, clear distinctions between the sources of the information becomes difficult to maintain. The statements of one person might also affect the subsequent answers given by another.

2. If the judge finds himself faced with the dilemma that two witnesses (such as spouses) insist that they be heard together or they will refuse to be questioned, the judge may make an exception to the general norm that they be heard individually. He should note in the acts the circumstances that led to the exception to §1. He should also be attentive during the questioning of the witnesses as to what testimony is given individually or in common. The appraisal of the statements should also take account of the circumstances under which the statements were made.

3. The possibility for parties or witnesses to confer among themselves was permitted for prudent reasons under the 1917 code, but only as a last resort, or *ultima ratio* (see c. 1772 CIC/1917). It can never be ruled out that disputes between them might arise that elude the influence of the court. However, the conferral among parties and witnesses can have only one purpose, the discovery of the truth, which is the highest goal of the ecclesiastical trial. Conditions for allowing parties and witnesses to confer among themselves are:

- that two statements are so contradictory that both cannot be true at the same time; of course, a certain degree of difference between statements will always exist, especially in marriage nullity trials; this requires the judge to make a careful interpretation of those statements prior to allowing the conferral to occur;

- that clarification of the contradictions is necessary for the final judgment of the court. It is not legitimate simply to allow the contradictions to remain unresolved and so to speak against the plea of the petitioner in the sense of Art. 247 §5. On the other hand, it is not necessary to allow for the conferral if the judge is able to reach moral certitude regarding the plea without the clarification of the contradictions in testimony.

#### Article 166

#### Examination by the Judge

**Art. 166 –** The examination is to be carried out by the judge who must be assisted by a notary; therefore, without prejudice to art. 159, the defender of the bond or the advocates who are present for the examination, if they have further questions to be asked, are to propose them to the judge or the one taking the judge's place, so that he may put the questions, unless particular law provides otherwise (cf. can. 1561).

*Art. 166 – Examen fit a iudice cui assistat oportet notarius; quapropter, firmiter art. 159, defensor vinculi vel advocati qui examini intersint, si alias interrogationes faciendas habeant, has iudici vel eius locum tenenti proponant, ut eas ipse deferat, nisi aliter lex particularis caveat (cf. can. 1561).*

1. The *moderatio* of the proofs through the examination of the parties and witnesses is concretized in Art. 166. The judge or the one designated by him is to question them. Article 155 §2 specifies what is meant here by the term *judge*.
2. It rests with the judge to carry out the examination. This means that he is authorized to the fullest extent to question the parties and witnesses. As opposed to the provisions of the 1917 code and *Provida mater*, the judge not only asks the questions of them, but does so without being restricted to a text prepared by the defender of the bond (cf., c. 1968, 1° *CIC/1917*). The judge himself now determines what will be asked of them.

Even as the law does not expressly forbid the judge from using questions prepared by others, neither does it bind him to use such questions. If he does use questionnaires prepared by others, he must take care that the questions are not crafted in such a way that they take away from the objectivity of the examination and so bring the truth itself into question.

What counts for the *praeses*, the collegial judge, sole judge, *ponens* and auditor – that they themselves compose the questions for the examination – does not apply in the same way to the person who is designated according to Art. 51 as a delegate (*delegatus*) of the judge or auditor. This person has no direct knowledge of the matter of the trial itself other than the immediate task for which he or she is designated. Moreover, the person will most often have little experience with ecclesiastical trials or the hearing of witnesses. Nor is the delegated person responsible, as is the judge, for the entire course of the trial. The delegate receives from the judge directing the instruction of the cause a list of questions that he or she is to pose to the party or witness. At the same time, the delegate has the duty to pose the questions so they will be understood by the one questioned (see Art. 169), to ask additional questions that might arise in light of the answers given, and to omit questions concerning which the person questioned would clearly have no knowledge. The judge is also obliged to see that the answers are recorded in a transcript prepared by the notary (see Art. 173 §1).

Finally, it belongs to the judge to administer the oath mandated by Art. 167 §2, and to assure that all required signatures are obtained in accord with Art. 175 §2. Although the current law (like the former) does not require that the judge obtain testimonial letters concerning the person examined by the court, the inclusion of such letters is highly recommended (see Art. 201).

3. The judge himself poses to the party or witness additional questions that other authorized persons might desire to have answered. Such persons include the defender of the bond and the advocates of the parties when they are present at the examination. These persons must indicate to the judge what questions they

wish to be asked. The judge then decides whether and how he will put the suggested questions to the person. In any event, the judge should not permit the advocate himself to ask questions of parties or witnesses.

4. The presence of the notary at the examination is, as a rule, obligatory. Use of the phrase *assistat oportet* makes this clear. It is not, however, absolutely necessary for the notary to transcribe the proceedings at that time. For instance, it is possible to tape record the examination (Art. 173 §2). This would make the need for the presence of a transcriber (but not a notary) superfluous.

## Article 167

**Art. 167 – § 1.** The judge is to remind the parties and the witnesses about their duty to speak the whole truth and only the truth, without prejudice to art. 194, § 2 (cf. can. 1562, § 1).<sup>9</sup>

§ 2. The judge is also to have them take an oath to tell the truth, or at least an oath about the truth of the things they have already said, unless a grave cause would suggest otherwise; if someone should refuse to take an oath he is to make a promise to tell the truth (cf. can. 1532; 1562, § 2).

§ 3. The judge can also administer to them an oath, or if need be, a promise to keep secrecy.

1. Whoever offers a statement or testifies in an ecclesiastical trial is bound by the strictest obligation to answer truthfully and completely. This obligation to speak the truth applies without exception so long as no right of exemption from testifying exists as provided for in Art. 194 §2. A party or witness may limit his or her testimony only insofar as failure to do so might lead to a conflict of rights or harm interests protected by the law. Under such circumstances, the person need not offer a statement. However, if the person chooses to do so despite the feared or unwelcome consequences, his testimony must be truthful and complete.

If a person during the course of the examination feels bound by an obligation to remain silent on a specific matter, he or she must indicate this to the judge. The person should not simply refrain from revealing the full truth regarding the

## Obligation to the Truth and Oath

*Art. 167 – § 1. Iudex partibus et testibus in mentem revocet gravem obligationem dicendi totam et solam veritatem, salvo art. 194, § 2 (cf. can. 1562, § 1).*<sup>9</sup>

§ 2. *Iudex iisdem quoque deferat iusiurandum de veritate dicenda aut saltem de veritate dictorum, nisi gravis causa aliud suadeat; quod si quis eorum renuat illud emittere, promissionem de veritate dicenda praestet (cf. cann. 1532; 1562, § 2).*

§ 3. *Iudex iisdem quoque iusiurandum vel, si casus ferat, promissionem deferre potest de secreto servando.*

matter. It is then up to the judge to determine whether the person knew nothing regarding the issue or whether the witness simply refused to answer the questions.

When applicable, a sanction may be imposed for the conscious offering of a false statement while under oath (see c. 1368).

2. The judge must inform the parties or the witnesses before the examination of the obligation to tell the truth. The allocution of Pope Pius XII, which the footnote of the Instruction refers to, addresses the sole purpose of the marriage nullity trial; namely, the discovery of the truth. The parties, witnesses and experts are all bound to advance the same goal. They are not permitted, consequently, to invent stories and present them as facts, to interpret circumstances falsely, to lie, to deceive or otherwise to obfuscate the truth.
3. The judge would do well to inform persons of their right to refuse to testify so that conflicts of interest do not arise that might remain undiscovered and yet affect the outcome of the examination. It might also be advisable to inform the person of the requirement to take an oath if that oath will be asked of him following his examination.
4. As a rule, in marriage nullity trials, in which the judge is bound to seek the objective truth, the parties and witnesses are to take an oath to tell the truth. However, the wording of the text uses the subjunctive mood, indicating that it is not proposing a strict legal requirement, but allows for exceptions in situations where a serious cause so demands.
5. For grave cause the judge can forego the swearing of parties or witnesses in marriage nullity trials. A reason for doing so can be that parties exhibit a legitimate reason for refusing the oath, such as opposition based on religious motives. A further, serious reason for the judge not to administer an oath to a person arises if the party or witness is scrupulous concerning or not fully responsible for his or her statement before the court. There is no requirement that a person take an oath after it becomes apparent that the person did not tell the truth.
6. While the 1917 code did not conceive of the possibility of the refusal to take an oath, Art. 96 §1 of *Provida mater* did so. There the judge could take the unsworn testimony of a witness if he considered it useful. Article 167 §2 abrogates that clause inasmuch as the judgment as to whether or not the statement would be useful for the definitive judgment can be made later. The judge is to weigh the motives for the refusal of a person to take an oath. In any event, the probative weight of unsworn testimony is less than that of sworn statements, unless particular circumstances suggest otherwise.

7. If a judge allows a party to be examined without taking an oath, he is still to have the person promise to tell the truth. The judge may also have the person make such a promise at the end of his examination; that is, the party would attest to the fact that he did tell the truth throughout the examination.

8. In §2 the Instruction requires that an oath be taken regarding the truth of the things to be said (*de veritate dicenda*), or at least regarding those things that have already been said (*de veritate dictorum*). The relationship between the two phrases is not quite clear. According to the 1917 code (c. 1744 *CIC/1917* and Art. 36 §1 *PM*) it was a question only of a retrospective oath, or *iusiurandum de veritate dicenda*. Canon 1768 *CIC/1917* recognized the oath of a witness regarding those matters to which he had already testified.

9. From the wording of c. 1532, the following can be drawn:

- only one oath is required. The tradition also speaks in favor of requiring only one oath; it did not recognize requiring two oaths from the same person. The oath as a means of proof according to cc. 1829-1836 *CIC/1917* should not be considered. The use of the particle *aut* as a disjunctive refers to the distinction between the oath prior to and after the examination of the person;

- as a rule the oath should be administered prior to the examination, and offered to the court as an indication of the truth of the statement;

- the oath should at least be administered as a means of establishing the truth of testimony already presented before the court. The use of the term *saltem* indicates that the law clearly prefers the administration of the oath prior to the examination. Doing so after the statement is offered should be by way of exception.

The preference that §2 gives to the prior administration of the oath might not be entirely consistent with the value that the oath can play in supporting the probative weight of witness testimony. The judge does not ultimately want to know whether the party is *prepared* to tell the truth, something the taking of a prior oath affirms. Rather, the judge seeks assurance that the statement actually offered by the witness is true. The particular preparedness of a witness is not an element of proof; only the testimony of the witness will comprise that. Thus, the most practical approach might be for the court to inform the parties and witnesses from the start of the requirement to take an oath so that they will keep that fact in mind even if the oath is administered after the examination has been completed. In this way, the taking of the oath following the examination might actually strengthen the testimony given and so add to the probative value of the statements offered.

10. For commentary concerning the obligation to secrecy binding those involved in the trial, see Art. 73.

#### Article 168

**Art. 168** – The judge is first to establish the identity of the person to be questioned; he is to inquire what is his relationship with the parties and, when he is asking specific questions about the object of the cause, he is also to ask for the sources of this knowledge and in what specific moment of time the person came to know of what he is now asserting (cf. can. 1563).

1. It is necessary to establish the identity of parties, witnesses and experts prior to their examination. This assures the true and proper identity of the person appearing before the judge. Persons should themselves state their identity. In marriage nullity processes, the parties and witnesses must always disclose their own, personal information.
2. A person's identity may be established by means of an official identity card, such as a driver's license, presuming it contains the information necessary to identify the person (name, date of birth, etc.). The identity card should also include a photograph of the person. No identity card is necessary if the person is already known to the judge.
3. In order to classify and evaluate the statements of those being questioned (including how credible they are), the judge must ask them what relationship they have to the parties to the cause. The judge can gain from such questions a better knowledge of the viewpoint the persons have towards the matter before the court, what matters they will have personal knowledge of, and whether or not they have an interest in a particular outcome to the trial.
4. The judge should also ask those being questioned where their knowledge comes from and when they came by it. These questions attempt to discover whether the persons are speaking from personal knowledge or knowledge gained from another person. In order to realize the proper evaluation of evidence mentioned in Art. 201, 2<sup>o</sup>, the judge must question the source of knowledge; that is, the means by which and the time when the persons gained the knowledge.

#### Foundational Questions

*Art. 168 – Iudex imprimis interrogandi identitatem comprobet; exquirat quaenam sit ipsi cum partibus necessitudo et, cum ipsi interrogationes specificas circa obiectum causae defert, sciscitetur quoque fontes eius scientiae et quo definito tempore ea, quae asserit, cognoverit (cf. can. 1563).*

#### Article 169

**Art. 169** – The questions are to be brief, adapted to the capacity of the person being questioned, not involving several matters at the same time, not confusing, not tricky, not suggesting a response, avoiding any offensiveness, and pertinent to the cause in question (can. 1564).

1. The value of the statement of a party or witness for the discovery of the truth, and so for a just judgment, depends on the nature of the communication that takes place between the judge and the person examined. The answer given will be heavily influenced in several ways by the manner in which the question is posed. Article 169 mentions two positive and some negative requirements with regard to the appropriate manner of questioning.
2. From a positive perspective, the questions should be phrased in such a way that they correspond to the ability of the person to grasp the meaning of them. The restoration of the prerogative of the judge to formulate the questions rather than have them presented to him by others (see Art. 166; comm., par. 2) makes it far more possible for the judge to realize this fundamental requirement.

The judge who is to question a party or a witness should see his task as a unique moment determined largely by the circumstances of the person and cause at hand. The goal always remains the same: uncovering the knowledge the person has regarding the facts related to the cause and the transcription of those statements for inclusion in the acts. However, the specific conditions of each examination will vary. The judge must take account of the various levels of education that distinguish witnesses from one another. He should also note particular characteristics that one witness might exhibit. These might include whether the witness is inhibited or rash, taciturn or loquacious, scrupulous or flippant, indifferent or possessing clear self-interest, and whether the person expresses reservations regarding the ecclesiastical process or religious fervor towards it. Further issues might arise related to advanced age, illness, and partiality. Finally, with regard to marriage nullity trials in particular, attention should be paid to the fact that many parties and witnesses who appear before ecclesiastical courts will have been influenced from childhood by a false understanding of the indissolubility of marriage.

In light of the above, it becomes clear that achieving a successful examination depends on the personal maturity of the one who conducts the examination. Without this, there is less assurance that the examination will be useful to the

#### Manner of Examination

*Art. 169 – Interrogationes breves sunt, interrogandi captui accommodatae, non plura simul complectentes, non captiosae, non subdolae, non suggerentes responsionem, remotae a cuiusvis offensione et pertinentes ad causam quae agitur (can. 1564).*

