THE METROPOLITAN TRIBUNAL & OFFICE OF CANONICAL AFFAIRS

ADVOCATE TRAINING PROGRAM

2014-2015

LESSON 5

Proofs • Publication of the Acts • Advocate's Brief • Defender of the Bond

I. Proofs

- The burden of proof (*onus probandi*) rests on the one who makes an assertion or the allegation (*DC*, art. 156, 1 and c. 1526, §1)

- If proof is not brought forward, then the judge must find in favor of the defendant (cf. c. 1608, §4; *DC*, art. 247, 5).

- The party names or proposes witnesses and leaves the collection of the proof to the court. It's the party's responsibility to present the necessary information about the witnesses to the court. These include, very importantly, the names and addresses of the potential witnesses.

I.1. No Proof Needed

- Canon 1526 §2 (*DC*, art. 156, 2): The following do not need proof:
  - 1º matters presumed by the law itself;
    - the presumption in favor of marriage itself (c. 1060);
    - the presumption of conformity of the will to the words expressed (c. 1101, §1);
    - the presumption of sufficient knowledge (c. 1096, §2);
    - the presumption of consummation (c. 1061, §2);
    - the presumption of validity of baptism (c. 1086, §3);
    - the presumption of the duration of consent (c. 1107);
    - the presumption of condonation (c. 1152).
  - 2º facts alleged by one of the contending parties and admitted by the other unless the law or the judge nevertheless requires proof.

I.2. Who Instructs the Cause

- The *praeses* of the collegial court if he has assumed the duties of the *ponens* and to the extent that he has not taken on the duties of the auditor in accord with *DC*, art. 50, 3;

- The *ponens* if this function is exercised by a judge other than the *praeses*; *DC*, art. 47, 2; determines the duties of the *ponens*;

- The judge of another tribunal who has been asked to assist the sitting tribunal according to *DC*, art. 29 (the rogatory commission);

- The auditor who is appointed by virtue of *DC*, art. 50, and who acts in accord with his/her mandate; the reference to *DC*, art. 158, 2 emphasizes again that the auditor may make only provisional decisions regarding the collection of proofs;

- The person who is delegated to collect proof for only a particular occasion, in accord with the provisions of *DC*, art. 51;

I.3. Different Types of Proofs

- ❑ Declarations of the parties (*DC*, artt. 177-182);
- ❑ Documents (*DC*, artt. 183-192);
- ❑ Witnesses (*DC*, artt. 193-202);
- ❑ Experts (*DC*, artt. 203-213);
- ❑ Presumptions (*DC*, artt. 214-216).

I.4. Types of Proofs to be Admitted

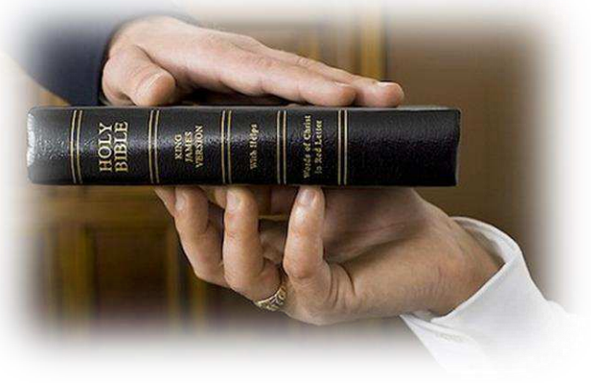
- Can. 1527, §1: Proofs of any kind which seem useful for adjudicating the case and are licit can be brought forward. §2: If a party insists that a proof rejected by a judge be accepted, the judge is to decide the matter as promptly as possib le “expeditissime” (DC, artt. 157, §1 and 158, §1).

- The judge is to determine whether a given element is to be considered as proo f, or whether it is to be rejected. Note that the Judge’s decision here cannot be appealed by any party,

I.4. Types of Proofs to be Admitted (cont.)

Examination of the Parties

- Obligation to Testify
- Obligation to the truth and oath
- Judicial Confessions
- Probative Weight of Judicial Confessions
- Probative Weight of Extrajudicial Confessions
- Error, Force, or Fear



I.5. PROOF THROUGH DOCUMENTS

(c. 1539-1546)

- Can. 1539 (*DC*, art. 183): In any kind of trial, proof by means of both public and private documents is allowed.
- Documentary proof is the most probative means of proof in the trial (cf. cc. 1686-1688; *DC*, art. 295-299) for the principles that govern the documentary process – the process where the invalidity of a marriage is established only by means of documentary proof.

The Nature and Trustworthiness of Documents

- The Code of Canon Law identifies two broad types of documents: two types of Public documents and Private.

- Can. 1540 – §1: **Public ecclesiastical documents** are those which a public person has drawn up in the exercise of that person's function in the Church, after the solemnities prescribed by law have been observed. §2: **Public civil documents** are those which the laws of each place consider to be such. §3: Other documents are private (*DC*, art. 184).

- **Public documents** are to be trusted (*fidem faciunt*). They are fully probative of what they directly and principally affirm. In so far as the authenticity of the document is verified, no further corroboration is required (*DC*, p. 320).

- Examples of **Public Ecclesiastical Documents**:

- judicial sentences,
- letter of appointment of a judicial vicar, vicar general, pastor of a parish, rector of a church,
- baptismal certificates,
- letters from the Holy See, et cetera.

- Examples of **Public Civil** Documents include:

- birth certificates,
- driver's license,
- marriage certificates,
- separation agreements,
- divorce decrees,
- court convictions,
- police records, et cetera.

- **Private documents**: c. 1540, §3 (*DC*, art. 184, §3) defines all the other documents which are neither public ecclesiastical or public civil as private. For example: diaries, letters, financial records, tape recordings, emails, text messages, *et cetera*.

- medical reports;
- psychological evaluations;
- letters written by one of the parties;
- letters of recommendation;
- photographs.

- Can. 1686 speaks of the most evident type of trial where documents are used (otherwise called the Documentary Process):

The following impediments can be subject to the documentary process:

- lack of sufficient age (c. 1083);
- prior bond (c. 1085);
- disparity of cult (c. 1086);
- sacred orders (c. 1087);
- public perpetual vows of chastity (c. 1088);
- consanguinity (c. 1091);
- affinity (c. 1092);
- adoption (c. 1094).

It is the responsibility of the judge to evaluate the probative weight of the documents in question.

I.5. PROOF THROUGH WITNESS TESTIMONY

- Can. 1547 (*DC*, art. 193) – Proof by means of witnesses is allowed under the direction of the judge in cases of any kind.

- As we have already seen, the judge (*iudex*) in this case includes the *praeses* and *ponens*, the judge of another tribunal whose assistance has been requested in accord with c. 1418; a person delegated by a judge to question a witness, and an auditor (*DC*, p. 327).

- Can. 1548 – §1: When the judge questions witnesses legitimately, they **must tell the truth**. §2: Without prejudice to the prescript of c. 1550, §2, n.

- Because of the secrecy involved, it is <u>not advisable for parties to present as witnesses persons who might not be able or even feel free to tell the whole truth in a case even when they are released by a party</u>. Sometimes, once released, the person has no difficulty or problem testifying. Note that once a person has been released by a party, the obligation of professional secrecy no longer binds. Therefore, once the person has been authorized to disclose the matter, the person must tell the judge what he/she knows which was covered by the professional secrecy (in accord with c. 1548, §1: (*When the judge questions witnesses legitimately, they must tell the truth*) since he/she has now been released to uncover them.

In addition to mentioning those who are bound by some form of professional secrecy, the Code also provides in c. 1548, §2, n.2 (*DC*, art. 194, §2, n.3), a more subjective group of persons who are exempt from giving testimony, those who fear that from their own testimony the following will befall them, or their spouses, or persons related to them by consanguinity or affinity:

- ill repute;
- dangerous hardships;
- other grave evils,

“Proofs are not to be admitted under secrecy, unless for a grave reason and as long as their communication with the advocates of the parties has been guaranteed, without prejudice to artt. 230 and 234” (*DC*, art. 157, §2).

Those Who Can be Witnesses

- Can. 1549 (*DC*, art. 195): All persons can be witnesses unless the law expressly excludes them in whole or in part.

- Can. 1550 – §1: Minors below the fourteenth year of age and those of limited mental capacity are not allowed to give testimony; they can, however, be heard by a decree of the judge which declares such a hearing expedient.

The Introduction and Exclusion of Witnesses

- Can. 1551 (*DC*, art. 197): The party who has introduced a witness can renounce the examination of that witness; the opposing party, however, can request that the witness be examined nevertheless.

- Can. 1552 – §1: When proof through witnesses is requested, their names and domicile are to be communicated to the tribunal. §2: The items of discussion about which questioning of the witnesses is sought are to be presented within the time period set by the judge; otherwise, the request is to be considered as abandoned (*DC*, artt. 198 and 164).

- Can. 1553 (*DC*, art. 157, §3): It is for the judge to curb an excessive number of witnesses.

Citation of Witnesses

Can. 1556 (*DC*, art 163, §1): The citation of a witness occurs through a decree of the judge legitimately communicated to the witness.

Can. 1557 (*DC*, art. 163, §2): A witness who has been cited properly is to appear or to inform the judge of the reason for the absence.

The proper citation of witnesses requires the observance of c. 1509: *The notification of citations, decrees, sentences, and other judicial acts must be made through the public postal services or by some other very secure method according to the norms established in particular law* (c. 1509, §1). *The fact of notification and its method must be evident in the acts* (c. 1509, §2).

A properly cited witness has an obligation to appear or to notify the judge of the reason for his/her absence.

Examination of Witnesses

- Canons 1558-1571 provide several principles to be observed in examining witnesses.

- Can. 1558 – §1: Witnesses must be examined at the tribunal unless the judge deems otherwise.

- Can. 1559 (*DC*, art. 159): The parties cannot be present at the examination of the witnesses unless the judge has decided to admit them, especially when the matter concerns a private good. Their advocates or procurators, however, can be present.

- Can. 1560 – §1: Each witness must be examined separately

- Can. 1561 (*DC*, art. 166): The judge, the judge's delegate or an auditor examines the witness; the examiner must have the assistance of a notary.

- Can. 1562 – §1: The judge is to call to the attention of the witness the grave obligation to speak the whole truth and only the truth.

- Can. 1563 (*DC*, art. 168): The judge is first of all to establish the identity of the witness, then ask what relationship the witness has with the parties, and, when addressing specific questions to the witness concerning the case, also inquire about the sources of his or her knowledge and the precise time when the witness learned what he or she asserts.

Note that a number of these norms also apply to the examination of parties (in accord with c. 1534: *The provisions of cc. 1548, §2, n. 1; 1552; and 1558-1565 concerning witnesses are to be observed to the extent possible when questioning the parties*).

Examination of Witnesses

Foundational Questions

- Can. 1563 (*DC*, art. 168): The judge is first of all to establish the identity of the witness, then ask what relationship the witness has with the parties, and, when addressing specific questions to the witness concerning the case, also inquire about the sources of his or her knowledge and the precise time when the witness learned what he or she asserts.

Nature of the Questions

- Can. 1564 (*DC*, art. 169): The questions are to be brief, accommodated to the mental capacity of the person being questioned, not comprised of several points at the same time, not deceitful or deceptive or suggestive of a response, free from any kind of offense, and pertinent to the case being tried.

"Objection! The Prosecution is attempting to lead the witness!"

Examination of Witnesses

No Advance Communication of Questions

Can. 1565 – §1: Questions must not be communicated to the witnesses beforehand.

Oral Responses

Can. 1566 (*DC*, art. 171) – Witnesses are to give testimony orally and are not to read written materials unless they are computations and accounts; in this case, they can consult the notes which they brought with them.

Transcription and Recording of Proof

Can. 1567 – §1: The notary is to write down the response immediately and must report the exact words of the testimony given, at least in what pertains to those points which touch directly upon the material of the trial.

Duties of the Notary

Can. 1568 (*DC*, art. 174): The notary is to make mention in the acts of whether the oath was taken, excused, or refused, of the presence of the parties and other persons, of the questions added *ex officio*, and in general of everything worth remembering which may have occurred while the witnesses were being examined.

Transcript

Can. 1569 – §1: At the end of the examination, what the notary has written down from the deposition must be read to the witness, or what has been recorded with a tape-recorder during the deposition

Further Examinations

Can. 1570 (*DC*, art. 176): Although already examined, witnesses can be recalled for examination before the acts or testimonies are published

The Trustworthiness or Credibility of Testimonies (fundamental)

Canons 1572 and 1573 (*DC*, art. 201-202) outline principles for establishing the credibility or trustworthiness of the testimonies of the parties and witnesses.

Evaluation of Testimony

Can. 1572 (*DC*, art. 201): In evaluating testimony, the judge, after having requested testimonial letters if necessary, is to consider the following:

1º what the condition or reputation of the person is;

2º whether the testimony derives from personal knowledge, especially from what has been seen or heard personally, or whether from opinion, rumor, or hearsay;

3º whether the witness is reliable and firmly consistent or inconsistent, uncertain, or vacillating;

4º whether the witness has co-witnesses to the testimony or is supported or not by other elements of proof.

Ex officio Witnesses

- Can. 1573 *(DC*, art. 202): The testimony of one witness cannot produce full proof unless it concerns a qualified witness making a deposition concerning matters done *ex officio*, or unless the circumstances of things and persons suggest otherwise.

Credibility Witnesses

- Can. 1679 (*DC*, art. 180, §2): Unless there are full proofs from elsewhere, in order to evaluate the depositions of the parties according to the norm of c. 1536, the judge, if possible, is to use witnesses to the credibility of those parties in addition to other indications and supporting factors.

II. Parties Who do not Appear

❑ When the Respondent is Absent

❑ The Rights of an Absent Respondent

- Can. 1593 – §1: If the respondent appears at the trial later or responds before a decision in the case, the respondent can offer conclusions and proofs, without prejudice to the prescript of c. 1600; the judge, however, is to take care that the trial is not prolonged intentionally through longer and unnecessary delays. §2: Even if the respondent did not appear or respond before a decision in the case, the respondent can use challenges against the sentence; if the respondent proves that there was a legitimate impediment for being detained and there was no personal fault in its not being made known beforehand, the respondent can use a complaint of nullity (*DC*, art. 139).

- This canon must be given great attention. The law favors greatly the right of defense of the respondent. To overlook or take for granted the provisions of this canon can jeopardize the outcome of the case. Even though the respondent has been legitimately declared absent, his/her rights in the case do not come to an end. The respondent may change his/her attitude at any time before the conclusion of the case and even afterwards, provided the proper procedures are followed.

❑ Notification process with regard to respondent as concretized by *Dignitas connubii*, art. 134:

When the Petitioner is Absent

- Can. 1594 (*DC*, art. 140): If the petitioner has not appeared on the day and at the hour prescribed for the joinder of the issue and has not offered a suitable excuse:

- 1º the judge is to cite the petitioner again;

- 2º if the petitioner does not comply with the new citation, the petitioner is presumed to have renounced the trial according to the norm of cc. 1524-1525;

- 3º if the petitioner later wishes to intervene in the process, c. 1593 is to be observed.

- *Dignitas connubii*, art. 140 provides that, even in the absence of the petitioner, the respondent or the promoter of justice could ask the court to proceed with the case.

II. PUBLICATION OF THE ACTS

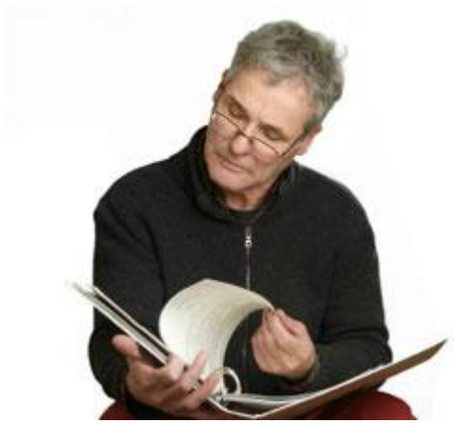
(cc. 1598; 1600)

Publication of the Acts (1983 *Code of Canon Law*, canons 1598; 1600 and *Dignitas Connubii*, arts. 229 – 339) The Publication of the acts (*Publicatio actorum*) is referred to in the 1917 Code as the Publication of the process (*Publicatio processus*) is the last step before the Conclusion of the Instruction phase of the Trial.

- **Reasons for the publication:** The publication serves to allow the parties knowledge of the state of the instruction so that they not only have the opportunity to complete the proofs (*DC*, art. 236) but also, that they might become familiar with the proofs against which they will have to defend themselves.

- **Publication of the acts (art. 229):** The judge must with a decree invite the parties and their advocates to inspect the acts not yet seen or known.

- **Exceptions to the publication (art. 230):** In cases concerning public good such as marriage, to avoid very serious dangers (*gravissima pericula*), such as civil trials, and so forth, the judge (not the advocate, the parties, or the defender of the bond) can by a duly notarized decree decide that a particular part or parts of the acts are not to be shown to anyone;



Sanction of nullity (art. 231):

The violation of the right to examine the acts to the parties and their advocates in accordance with the provisions of art. 229, §3 results in sanctions - violation of the obligation to publish the acts in accord with art. 229, §3 is sanctioned by art. 231 in two ways:

1. the sentence suffers from *remediable nullity* (art. 272, 5º). If it is not challenged within three months, it is sanated.
2. if the right of defense was denied one or both parties, the sentence suffers from *irremediable nullity* (cf. art. 270, 7º; c. 1620, 7º).

Obligation to confidentiality (art. 232): Because of the sensitive nature of the acts or some of the materials therein, *Dignitas connubii* makes an additional provision whereby the judge can require the parties to take an oath that they will use the knowledge gained through the inspection of the acts only for their legitimate defense in the canonical forum (*DC*, art. 232, §1).

Place of *publicatio actorum* (art. 233): Normally, the examination of the acts is to take place at the tribunal chancery.

Advocate's right to publication of the acts (art. 234): "If the judge thinks that in order to avoid very serious dangers some act is not to be shown to the parties, the advocates of the parties, having first taken an oath or made a promise to observe secrecy, may study the same act" (*DC*, art. 234).

Pope John Paul II and the Right of Defense regarding Publication:
Regarding the right of defense of the parties in relation to the publication of the acts, Pope John Paul II affirms: "The right of defense demands of its very nature the concrete possibility of knowing the proofs adduced both by the opposing party and *ex officio*."

Second publication of the acts (art. 236 and canon 1598, §2):

In line with the purpose of the publication of the acts, if the parties feel that the proofs are not complete after the first publication, they can propose additional proofs. The Defender of the Bond can also propose additional proofs. If these proofs are accepted, then the judge is required to decree a second publication of the new acts.

Admission of New Proofs:

Can. 1600 – §1: After the conclusion of the case, the judge can still summon the same or other witnesses or arrange for other proofs which were not requested earlier, only:

1º in cases which concern the private good of the parties alone, if all the parties consent;
2º in other cases, after the parties have been heard and provided that there is a grave reason and any danger of fraud or subordination is eliminated;
3º in all cases whenever it is likely that the sentence will be unjust

§2: The judge, moreover, can order or allow a document to be shown, which may have been unable to be shown earlier through no negligence of the interested person.

§3: New proofs are to be published according to c. 1598, §1 (*DC*, art. 239).

Third publication of the acts (c. 1600, §3 and *DC*, art. 239, §3): Canon 1600, §3 (*DC*, art. 239, §3) provides that if new proofs are admitted after the conclusion of the case, then a further publication is required. Thus, there could be three acts of publication: the first one (required in all cases), the second one (when additional proofs are gathered), and the third one (if further proofs are added after the conclusion of the case).

Note that the publication of the acts is different from the publication of the sentence (c. 1614), which is also required by the law. The publication of the sentence will be examined by another Canonist in due course.

III. PETITIONER'S ADVOCATE'S BRIEF - COMPONENTS

DENVERIENSIS
NULLITATIS MATRIMONII
PETITIONER- RESPONDENT

PETITIONER'S ADVOCATE'S BRIEF
Prot. no.: 0000-0000

- **I. The Facts (*facti species*)**
  - Behaviors of parties
  - Was the courtship/engagement broken?
  - Sexual intercourse before marriage?
  - Motive(s) for the marriage (why did they decide to marry?)

<u>General facts/History of conjugal life – from the celebration of marriage to divorce</u>

  - Behaviors of parties
  - Assess links/discrepancies between courtship/engagement and conjugal life (why the separation - reasons for their separation?)

- **II. In law *(in iure*)**
  - Canons 1055, 1056 and 1057 + the specific ground (s) – *contestatio litis* (joinder of issue). For example, if the Judge decided that it is canon 1095, 2 and 3, the Advocate would write what juridical principles are available

III. Argumentation (*in facto*)

- The Advocate would write the facts and circumstances concerning each ground established by the Judge in the joinder of the issue (about party)
- About the conclusions of Expert about the psychic health of the party at the time of consent
  - Judicial Declaration of the Petitioner
  - Judicial Declaration of the Respondent
  - Testimony of Witnesses

PETITIONER'S ADVOCATE'S BRIEF - COMPONENTS

Conclusion

- What is the real consensus that the couple have expressed?
- What is the level achieved by the couple in the realization of marriage as a project of mutual self-giving?
- What efforts did the couple make in the face of difficulties/problems?

If for example the ground established by the Judge is **a grave lack of due discretion** (canon 1095, 2), a grave lack of d ue discretion must be present at the time of courtship.

Respectfully submitted this 24th day of November, 2014
Francis James
Advocate for the Petitioner

IV. THE DEFENDER OF THE BOND

(*Defensor vinculi*)

Institution of the Office

The office of defender of the bond was instituted on November 3, 1741 by Pope Benedict XIV in his Apostolic Constitution *Dei miseratione* (Lawrence Wrenn, *The Code of Canon Law*: *A Text and Commentary*, p. 957; *ExComm*. vol. IV/1, p. 773).

Appointment and Function

Can. 1432 - the defender of the bond is bound by office to propose and explain everything which reasonably can be brought forth against nullity or dissolution.

When a Defender of the bond is not cited

If the defender of the bond was not cited in cases which require his/her presence, the acts are invalid unless he/she actually took part even if not cited or, after he/she has inspected the acts, at least was able to fulfill his/her function before the sentence (c. 1433).

Other rights of the Defender of the Bond:

- to be present at the examination of the parties, witnesses, and experts (c. 1678 §1 n.1; c. 1559; DC, p. 274);
- to inspect the judicial acts, even those not yet published, and to review the documents presented by the parties (c. 1678 §1 n.2; DC, p. 275);
- to verify all documents submitted as proofs. This right results from the particularly significant probative weight the documents carry (DC, p. 275);

THE DEFENDER OF THE BOND
(*Defensor vinculi*)

The Defender in Relation to Expert Witnesses

The defender:

- is to ensure that any experts the tribunal is using are qualified;
- must diligently evaluate questions proposed to experts, especially in cases involving c. 1095;
- is to see that experts address the specific person or persons and not generic descriptions of diseases and that experts properly evaluated the person or persons;