

1.09. Court's Power to Call or Examine Witness

(1) Provided the court does not assume the function or appearance of an advocate for a party in the action or proceeding, the court in the sound exercise of its discretion may:

(a) in those unusual circumstances in which the court feels compelled to do so, call and examine a witness on its own. Before doing so, the court must, on the record, explain its reasons for calling the witness and afford the parties an opportunity to be heard outside the presence of the jury. All parties are entitled to cross-examine the witness called by the court.

(b) in limited circumstances, examine witnesses, whether called by the court or by a party, when necessary, for example, to clarify unclear answers from a witness with language difficulty, or to insure that a proper foundation is made for the admission of evidence, or, without assuming the role of an advocate, to elicit significant facts, clarify or enlighten an issue or facilitate the orderly and expeditious progress of the trial. A party may object to questions so asked and to evidence thus adduced.

Note

Subdivision (1). Although the parties have the basic responsibility to present evidence and make objection to offered evidence, the Court of Appeals has stated that “neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-finding process” (*People v Jamison*, 47 NY2d 882, 883 [1979]). Subdivision (1) sets forth two ways, recognized by the Court of Appeals, that a court may take such an active role.

Importantly, however, the Court has cautioned that “[a]lthough the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial” (*People v Arnold*, 98 NY2d 63, 67 [2002]).

Subdivision (1) (a) is derived from *Arnold* (98 NY2d 63) where the court's power to call a witness was directly in issue. In deciding that issue, the Court initially reviewed the general nature of a trial court's discretion in eliciting testimony, finding that

“[t]here is no absolute bar to a trial court asking a particular number of questions of a seated witness; or recalling a witness to the stand; or even allowing the People in narrow circumstances to re-open their case after a defense motion for a trial order of dismissal, when doing so advances the goals of truth and clarity. A court may not, however, assume the advocacy role traditionally reserved for counsel, and in order to avoid this, the court's discretion to intervene must be exercised sparingly” (*id.* at 67-68 [citations omitted]).

From that premise the Court then stated:

“We do not hold that a court may never call its own witness over the objection of a party. In those unusual circumstances in which a court feels compelled to do so, it should explain why, and invite comment from the parties. In that way, the court can consider what it aims to gain against any claims of possible prejudice. Moreover, an appellate court will have a basis on which to review the trial court's exercise of discretion” (*id.* at 68).

Subdivision (1) (b) concerning the court's power to examine witnesses, whether called by itself or by a party, is derived from Court of Appeals precedent that recognizes the court's role is “neither that of automaton nor advocate” (*People v Yut Wai Tom*, 53 NY2d 44, 56 [1981]). Rather, the court must assure the effective presentation of proof for the jury's consideration, “assuming an active role in the resolution of the truth” (*People v De Jesus*, 42 NY2d 519, 523 [1977]). Thus, a court “may, for example, if a witness has a language difficulty, intervene to clarify unclear answers. [It] may also properly question witnesses to insure that a proper foundation is made for the admission of evidence” (*People v Yut Wai Tom*, 53 NY2d 44, 58 [1981]), and a court may examine witnesses when “necessary to elicit significant facts, to clarify or enlighten an issue or merely to facilitate the orderly and expeditious progress of the trial” (*People v Mendes*, 3 NY2d 120, 121 [1957]). Both *Yut Wai Tom* and *Mendes*, however, cautioned that such examination must be conducted sparingly, and that care must be taken in examination lest the court assume the advocate's function. “In last analysis, however, [the court] should be guided by the principle that [the court's] function is to protect the record, not to make it” (*People v Yut Wai Tom*, 53 NY2d 44, 58 [1981] [While “some of the (court's 1300) questions were clearly appropriate by way of clarification or because of language difficulties, there can be no question that in his substantial examination of the witnesses the Trial Judge departed from his appropriate role in a number of respects”]).