

## **1.07 Court Control Over Presentation of Evidence<sup>1</sup>**

**(1) In the exercise of the court’s responsibility to supervise and oversee the conduct of a hearing or trial, the mode and order of presenting evidence and examining witnesses is committed to the sound discretion of the court.**

**(2) The court in the exercise of its discretion may permit a party to:**

**(a) introduce rebuttal and surrebuttal evidence that normally addresses new matters raised by the opposing party on that party’s case, albeit a court may, in its discretion, in the interests of justice, permit evidence that is not technically of a rebuttal or surrebuttal nature.**

**(b) recall a witness; and**

**(c) in an exceptional circumstance, reopen a party’s case, provided, however, the court may not permit the People to reopen their case at a suppression hearing if they have been given a full and fair opportunity to be heard and the court has rendered its decision.**

**(3) 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 on its own, rule that a question, in form or substance, is not proper, or that a response to a question is not proper and is struck, or that proffered evidence is inadmissible.**

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<sup>1</sup> In August 2020, subdivisions (3) (a) and (b) were removed from this rule and set forth separately as rule 1.09 (Court Power to Call and Examine Witnesses).

In December 2020, subdivision (2) (a) and (c) were amended to include the reasons for allowing rebuttal and surrebuttal evidence and the reopening of a party’s case.

**(4) The court shall enforce a stipulation between opposing parties concerning an item of evidence, relevant fact, or claim unless the court rules in the sound exercise of its discretion in the furtherance of the interests of justice to relieve a party or parties, in whole or in part, from the stipulation, particularly where doing so would not significantly prejudice a party.**

### **Note**

**Subdivision (1)** is derived from a long line of Court of Appeals cases that follow the common law in defining a trial judge's traditional power (*e.g. People v Schwartzman*, 24 NY2d 241, 244 [1969] ["The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge"]; *Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980] ["(T)he order of introducing evidence and the time when it may be introduced are matters generally resting in the sound discretion of the trial court"]; *Bernstein v Bodean*, 53 NY2d 520, 529 [1981] ["(W)ith respect to the examination of all witnesses, the scope and manner of interrogation are committed to the Trial Judge in the exercise of his responsibility to supervise and to oversee the conduct of the trial"]).

The common law is embedded in or supplemented by statutory law. For example, CPLR 4011 empowers the court to "determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum." And CPL 260.30 and 320.20 (3) specify the order of criminal jury and non-jury trials, respectively.

Court of Appeals decisions have recognized that those statutes do not circumscribe the broad common-law power accorded trial judges in conducting civil trials (*Feldsberg*, 49 NY2d at 643) and criminal trials (*People v Washington*, 71 NY2d 916, 918 [1988] ["CPL 260.30 sets forth the order in which a jury trial is to proceed, but the common-law power of the trial court to alter the order of proof in its discretion and in furtherance of justice remains at least up to the time the case is submitted to the jury" (internal quotation marks omitted)]; *People v Smith*, 166 AD2d 385, 385-386 [1st Dept 1990], *aff'd for reasons stated in Appellate Division mem op* 79 NY2d 779 [1991] [where the People's expert witness was unavailable and the People had thus not rested, the court did not err in requiring the defendant, over his objection, to proceed with his case and, specifically, his testimony]; *People v Olsen*, 34 NY2d 349, 353 [1974]; *People v Benham*, 160 NY 402, 437 [1899]).

**Subdivision (2)** restates New York law allowing judicial discretion in conducting specific aspects of a trial.

**Subdivision (2) (a)** is derived both from CPL 260.30 (7), which gives the court discretion to allow the People to offer rebuttal evidence to the defendant's evidence and the defendant then to rebut the People's rebuttal evidence, and from Court of Appeals precedent reaching the same conclusion in civil cases (e.g. *Ankersmit v Tuch*, 114 NY 51, 55-56 [1889]; *Marshall v Davies*, 78 NY 414, 420 [1879]).

To be admissible, rebuttal and surrebuttal evidence must address new matters raised by the opposing party on that party's case (*People v Harris*, 98 NY2d 452, 489 [2002] ["The opportunity to present rebuttal, however, does not permit a party to hold back evidence properly part of the case-in-chief and then submit that evidence to bolster the direct case after the opponent has rested"]). A trial court may in its discretion, in the interest of justice, however, permit evidence on rebuttal that is not technically of a rebuttal nature (see *Marshall v Davies*, 78 NY at 420 ["These (rebuttal) rules may in special cases be departed from in the discretion of the trial judge, but a refusal to depart from them is no ground of exception"]; *People v Harris*, 98 NY2d at 489 ["Even where evidence is not technically of a rebuttal nature and more properly a part of the party's direct case, however, a court has discretion, in the interest of justice, to allow its admission on rebuttal pursuant to CPL 260.30 (7)"]).

**Subdivision (2) (b)**, which concerns the power of a court to permit a witness to be recalled, is derived from *Feldsberg*. There, the Court stated:

"Nor can it be doubted that recall of a witness for redirect examination is subject to the discretion of the court. Generally, sound trial practice demands that every witness be questioned in the first instance on all relevant matters of which he has knowledge and be excused at the completion of this testimony. In this manner, the litigation is contained within reasonable limits, the adversary is aware of the evidence he will have to meet, and the jury is not unnecessarily confused. Recall at a later point in the trial not only may inject untoward administrative burdens into the litigation by reopening the whole range of prior testimony, but may also unfairly disadvantage the adversary in his ability to meet the proof or unnecessarily divert the jury's attention away from the material issues of the case. In certain situations, however, the trial court may find it necessary to depart from this general rule and may do so in its discretion" (49 NY2d at 643-644 [citations omitted]).

Consistent with *Feldsberg*, a court also has the discretion to allow a witness to be recalled for further cross-examination (cf. *People v Gibson*, 106 AD3d 834, 835 [2d Dept 2013] ["Supreme Court providently exercised its discretion, and did not deprive (the defendant) of the right to confront adverse witnesses against him, when it denied his request to recall a prosecution witness for further cross-examination"]; *People v Yu Weng*, 47 Misc 3d 138[A], 2015 NY Slip Op 50584[U],

\*2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015] [“We further find no error with respect to the court’s refusal to allow the defense to re-call the undercover officer the day after his cross-examination had concluded. The cross-examination had been completed without improper restriction and, other than stating that he had ‘additional questions,’ defense counsel articulated no basis for further questioning” (citations omitted)]; *see People v Montes*, 16 NY3d 250, 253 [2011] [“the inability to recall (an unavailable witness) did not violate defendant’s rights under the Confrontation Clause”]).

**Subdivision (2) (c)** states the general rule that a court has the “power to permit the introduction of evidence after the close of the [officer’s] case or prohibit the same” (*Feldsberg*, 49 NY2d at 643 [citations omitted]; *People v Ventura*, 35 NY2d 654, 655 [1974] [“The determinations as to whether to reopen the case for further testimony . . . rested in the reasonable discretion of the Trial Judge”]; *cf. People v Hecker*, 15 NY3d 625, 659-660 [2010] [the record on whether defense counsel gave a pretextual reason for excusing a juror “would have been more complete if Supreme Court agreed to defense counsel’s proposal” to further question the juror]).

A court’s sound exercise of discretion to permit a party to reopen its case may, however, be circumscribed by the nature or timing of the application. In *Olsen* (34 NY2d at 353), for example, the Court advised that a trial court should use “utmost caution” in determining whether to permit a party to reopen its case after the jury has retired to deliberate:

“There are obvious reasons why at this stage the power to reopen a case for additional proof must be exercised with utmost caution. One reason of course is that at some point the trial must come to an end. If requests to reopen were casually granted and became routine, the orderly trial process, fundamental to our jurisprudence, would soon erode away. Another consideration, apart from the merits of a predictable trial pattern, is that new evidence introduced during the jury’s deliberations is likely to be given ‘undue emphasis . . . with consequent distortion of the evidence as a whole’ giving rise to the real possibility of prejudice to the party against whom the evidence is offered” (*id.*).

On its facts, *Olsen* held that the trial court abused its discretion in permitting the prosecution to reopen its case after the jury started deliberations to address an alleged credibility issue involving a prosecution witness that had been prompted by a jury note. The “evidence submitted to the jury under these circumstances,” the Court held, “is bound to be given great weight even though it bears only indirectly on the main issue” (*id.* at 355). A similar rationale led the Court in *People v Escobar* (36 NY2d 883, 884 [1975]) to find no abuse of discretion in a trial court’s denial of a defendant’s request to permit its case to be reopened after the completion of

summations to permit the defense to introduce recantation testimony from a prosecution witness.

The Court of Appeals has also cautioned that there are “narrow circumstances” in which a trial court may reasonably exercise its discretion to permit a party to reopen its case to prove a missing element (*People v Whipple*, 97 NY2d 1, 8 [2001]). In *Whipple*, the trial court properly exercised its discretion to permit the People to reopen their case to prove a missing element, given that “the missing element is simple to prove and not seriously contested, and reopening the case does not unduly prejudice the defense” (*id.* at 3).

In the context of a suppression hearing, after the People have rested but before the court has rendered a decision, the Court of Appeals in *People v Cook* (34 NY3d 412, 422 [2019]) held that the trial court has discretion to reopen the suppression hearing and permit additional evidence. *Whipple* did not “so tightly cabin the hearing court’s discretion prior to rendering a decision” to only those circumstances where the issue to be presented after reopening is simple to prove and not seriously contested (*id.*). Once the decision has been rendered, however, absent a showing that the People were “deprived of a full and fair opportunity to be heard,” it would be an abuse of discretion to permit the hearing to be reopened (34 NY3d at 419; *People v Kevin W.*, 22 NY3d 287, 289 [2013]; *People v Havelka*, 45 NY2d 636 [1978]; *see People v Grant*, 159 AD3d 640, 640 [1st Dept 2018] [“The hearing court properly reopened the suppression hearing to permit the People to present evidence on the theory of inevitable discovery, because the People were not afforded a full and fair opportunity to litigate that issue during the initial hearing”]).

By statute, a trial court may permit the defense to reopen a pretrial determination and denial of a suppression motion if the “court is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion” (CPL 710.40 [4]; *see People v Clark*, 88 NY2d 552, 555 [1996] [“additional pertinent facts” requires “at least that the facts asserted be ‘pertinent’ to the issue of official suggestiveness such that they would materially affect or have affected” the earlier determination]; *see also People v Banach*, 80 NY2d 610, 618-619 [1992] [trial court erred in not reopening a suppression hearing when it was discovered at trial that the defense had not received the correct memo book of the officer who testified at the hearing]).

**Subdivision (3).** 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]).

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]).

The rule set forth in subdivision (3) relates to a trial court’s ruling to preclude the admission of evidence notwithstanding the failure of a party to object.

It is the attorney’s obligation to object to evidence offered against the attorney’s client (*People v Robinson*, 36 NY2d 224, 228 [1975] [“counsel for both sides are not without responsibility in protecting the substantial rights of the parties and that that responsibility extends to calling the attention of the court to errors of law which adversely affect a client *at a time when such errors are correctible*”]).

The trial court, however, retains the discretion to exclude offered evidence on its own when the evidence is irrelevant, or it is in the interests of a fair trial to exclude the evidence (*see People v De Jesus*, 42 NY2d 519, 524 [1977]; *Farmers’ & Manufacturers’ Bank v Whinfield*, 24 Wend 419, 425-426 [Sup Ct of Judicature of NY 1840]; *see* CJI2d[NY] Model Instructions, Preliminary Instructions [“(T)he court has an obligation under the laws of New York to make sure that certain fundamental rules of law are followed even if one of the lawyers does not voice an objection. So, on occasion, you may hear me say sustained or words to that effect, even though one of the lawyers has not objected”]).

**Subdivision (4)** is derived from *People v Gary* (26 NY3d 1017, 1019 [2015]) and *Matter of New York, Lackawanna & W. R.R. Co.* (98 NY 447, 453 [1885]). The Court of Appeals has cautioned that while “courts are ordinarily bound to enforce party stipulations,” a court may exercise its discretion to relieve a party from a stipulation, “particularly where doing so would not significantly prejudice the other side” (*Gary*, 26 NY3d at 1019).