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July 31, 2013

SUPREME COURT
Padre Faura Street
Ermita, 1000 Manila

Attention: **HON. MARIA LOURDES SERENO**
Chief Justice

HON. JUSTICE ROBERTO A. ABAD
Chair, Core Committee
National Conference for the Revision of the
Rules of Civil Procedure

Madame and Gentlemen:

The recent efforts of the Honorable Supreme Court to ensure the speedy and equitable administration of justice in this country by addressing issues relative to court delays in litigation deserve no less than the highest commendation from courts and legal practitioners alike. Indeed, the constitution of the National Conference for the Revision of the Rules of Procedure underscores the magnitude of this undertaking, as it requires insights and contributions from all areas of the legal community. We most respectfully take exception, however, to the introduction of drastic amendments to the present Rules of Court which, at their core, amount to a complete overhaul of trial practice in the Philippines as we know it today.

These amendments, while seemingly simplistic in application, will essentially be counter-intuitive and cumbersome for most practitioners since these are not in keeping with how the law is presently taught, studied and, more importantly, practiced. Even worse, some of the amendments completely negate the role of the legal practitioner in ensuring a genuine resolution of issues under litigation in that counsel is relegated to the role of an observer or facilitator rather than an advocate. While the questionable propensity of some lawyers to foster delay cannot be entirely discounted in the process of reviewing the Rules of Court, the nature of the legal profession remains the same for every generation, in that lawyers are

called upon to pursue a learned art with the main purpose of "aid[ing] in the doing of justice according to law between the state and the individual, and between man and man."[1]

It may be true that the current application of the Rules of Court, as usually enforced by the courts, invariably contributed towards the development of an exceedingly and "dominantly adversarial system"[2] of litigation. Rather than a radical departure from the present system, however, it is submitted that the trend towards excessively adversarial litigation may be better addressed by promoting a more meaningful and consequential application by the courts of the present Rules of Court, particularly on the conduct of meaningful discovery and pre-trial proceedings. It is submitted that this method will ensure that trial becomes much simpler and, thus, reduce the opportunity for the more unsavory lawyers to foster delay. It is respectfully submitted, as it is widely recognized, that the present provisions of the Rules of Court, **if properly and consistently enforced**, provide appropriate mandates to litigators and sufficient discretion to the courts to ensure that proceedings will result in a trial of genuine issues and not of personalities. More importantly, the speedy and equitable administration of justice, the very objective the proposed Revised Rules (the "Revised Rules") seeks to realize, will also be realistically achieved.

We respectfully submit our comments on the present draft of the Revised Rules of Civil Procedure (the "Draft Rules") for the consideration of the Honorable Supreme Court.

On the Filing of the Complaint and the Answer

In Title IV, Rule 7, Section 7.4 of the Draft Rules, the plaintiff is required to assert in the complaint not only the ultimate facts that constitute his cause of action but also matters on his compliance with conditions precedent relative to prolonged mediation; admissions; and proposed settlement. The most radical departure from the Rules of Court, however, is that the plaintiff is required to aver "the **ultimate and evidentiary** facts constituting [his] cause of action, duly supported by the documents and/or evidence on which the action is based," and attach "[c]lear and legible copies [of the documents and/or evidence] to the pleading or the judicial affidavits".

The requirements for filing a complaint under Title IV, Rule 7, Section 7.4 not only dispenses with the theorizing and strategizing essential to the practice of a litigator but it is also, for the most part, overly burdensome on lawyers and their clients. The provision, which requires that the complaint set out evidentiary facts, documentary evidence and a table of witnesses, renders an initiatory pleading as a combination of the pre-trial brief, offer of evidence and the memorandum. It is unreasonable and unduly burdensome to require the plaintiff to identify all pieces of evidence to support his case given that the issues have not yet been joined until an answer is filed by the defendant. Inevitably, the proposed amendment would require the plaintiff to state his entire case, anticipate the defenses and evidence of the defendant, and refute these undisclosed and unpleaded defenses and evidence **at the commencement of the proceedings**.

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[1] *See* In re Bergereon, 220 Mass. 47, 107 N.E. 1007.

[2] *See* Primer on the First Draft of the Revised Rules of Civil Procedure, p. 1.

Concomitant thereto is the undue burden placed upon the defendant in requiring, within a very limited period, an exhaustive presentation of his entire case upon filing his answer under Title IV, Rule 7, Section 7.5. This is further compounded by fact that the defendant is only granted a maximum of sixty (60) days (assuming the "one-time extension" to file is even granted by the court) to file an answer under Title IV, Rule 11, Section 11.1.

Thus, it is respectfully submitted that relevant provisions in the Rules of Court as to the requirements for the filing of the complaint and the answer be retained, as these rules allow for the broad and non-adversarial presentation of the controversy at the beginning of the judicial process. Rather than constrain the parties to presenting their positions on various issues through surmises and speculations (with a view to rebutting the opposing party's evidence through a "shotgun approach"), the present Rules of Court allow a judicious and more meaningful presentation of the contested issues.

Indeed, the present rules and trial procedure are meant to simplify and shorten proceedings. Under the present rules, the plaintiff only has to allege ultimate facts in support of his claim, and omit evidentiary matters. Similarly, the defendant is required to only allege ultimate facts in support of his defenses. Upon filing of the answer, the issues are then joined and the parties are properly apprised of their respective claims and defenses and, naturally, the scope of trial and the evidence to be presented are limited to those claims and defenses. In short, parties are not compelled to allege and present evidence on matters which are not disputed and/or are not in issue. Parties are also not compelled to engage in "guesswork" as all issues are made known and refined during the pleading process.

The present rules then compel parties to avail themselves of discovery measures to further limit the scope of trial or dispense with trial altogether. Afterwards, pre-trial ensues which is, among others, meant to specify and limit the remaining issues for trial and require the parties to disclose their evidence and witnesses on the remaining issues. At the pre-trial stage, the parties would have been reasonably apprised of the position of the other party and would have had the full benefit of evaluating the strength of their case. It is with this realization, we respectfully submit, that parties may undergo meaningful settlement negotiations which, we believe, is why the Honorable Supreme Court had required mediation and judicial dispute resolution as integral parts of the pre-trial process. In case settlement negotiations fail, then trial will proceed, albeit only on the remaining contested issues and matters.

Consequently, the solution to the problem of delay, we respectfully submit, is not to do away with the current rules that are meant to define and limit issues for trial and, in the process, simplify proceedings, with a new set of revisions that will prove to be unreasonably superfluous and cumbersome on the part of litigants. **Instead, the Court should compel lower court judges to implement the current rules strictly** (e.g. compel parties to engage in meaningful discovery, apply sanctions for refusal to engage in discovery or refusal to respond to discovery measures, exclude evidence and witnesses not indicated in the pre-trial brief, refuse evidence on matters not put in issue during the pre-trial, etc.)

On further Procedures for Mandatory Alternative Dispute Resolution ("ADR")

Title IV, Rule 1 of the Draft Rules provides for conditions precedent to the commencement of an action in court, which essentially involves, for **all** causes of action, the exchange of letters and undergoing initiatory ADR proceedings before different *fora*. While the objective of "augment[ing] the efforts to decongest our courts" is laudable, it is submitted that the provisions in the Draft Rules requiring further (and mandatory) ADR all but assumes that every controversy, regardless of its nature and complexity, may be subject to such additional rules on conciliation and negotiation. The unrealistic nature of the requirements under this provision is also apparent in that it assumes that the plaintiff can even compel the other party to mediate despite presupposing that there was "no favorable response or no response at all" to the plaintiff's demand.

Further, the additional conditions to filing suit under Title IV, Rule 1, Section 1.1 are unfeasible and unclear, particularly the requirements of a "written proof of a failed effort to meet and negotiate a settlement between the parties" and "a certification that a subsequent submission of the dispute to mediation by a neutral party has also failed". The provision not only fails to state the particular form for the "written proof of a failed effort to meet" and the "certification", but also fails to identify the person/body that will issue the documents. Worse, it is also silent as to whether the submission of the dispute to mediation will interrupt the prescriptive period to file the action, which could lead to abuse by enterprising litigants who intend to defeat the operation of prescriptive periods without the formalities of a court action. The requirement of further ADR may even lead to further unwanted delay and may even be subject to abuse – consider, for instance, Title IV, Rule 1, Section 1.4, which provides for open-ended periods of ADR. On this score, it is suggested that the Draft Rules provide for specific periods within which to commence and complete negotiation and mediation; otherwise, a party, particularly, the defendant, has the ability to delay the plaintiff's prosecution of the case. Moreover, the procedure may be unnecessarily confusing, especially at this stage of the proceedings, if there are several parties (*e.g.*, 3rd and 4th party defendants) involved.

The need for amendments in the portion of the Draft Rules is thus underscored by the fact that the requirements and procedures for further ADR are inconsistent, unrealistic and vague as presently worded. It is suggested that the present system of requiring the parties to undergo Court-Annexed Mediation ("CAM") and Judicial Dispute Resolution ("JDR") after the issues have already been joined (and while having the opportunity to avail of discovery measures) will allow a more expedient and meaningful ADR process, in that the parties have already sifted through the various matters that may remain open to settlement and stipulation, and thus viable for genuine negotiations. Without the element of compulsion, as in the Draft Rules, the present system of mediation is already strategically placed so as to allow the parties to evaluate the strength of their respective positions and thus engage in meaningful settlement. Hence, it is submitted that the present rules on CAM and JDR are already sufficient to attain the objective of Title IV, Rule 1. More importantly, the present rules ensure that the parties will undergo ADR in cases where it is *genuinely* and *realistically* feasible in terms of, but not limited to, commercial considerations and the motivations of the parties.

On Radical Changes in the Conduct of Trial

Title IV, Rule 14 of the Draft Rules provides for a mandatory disclosure of evidence at the preliminary conference stage, where the parties are required to submit to the court and

disclose to each other early in the proceedings all the evidence in the case that are known and available to them. As a matter of policy, the parties are required to make a full disclosure of the known facts of the case early in the proceedings and submit to the court the affidavits and documents that evidence their claims, with the end in view of enabling the court **to accurately identify the issues between the parties and ease the process of settling their disputes amicably or, if this not be possible, to considerably narrow down the scope of trial**.

The suggested amendment is in keeping with the objective of the current rules on pre-trial where the parties are compelled to disclose essential facts, documents and witnesses (indicating their purposes and the scope of their testimonies, respectively) to identify and limit the issues for trial. However, unlike the present rules, the suggested revisions require parties to present their entire case (e.g. by requiring the basic pleadings to allege evidentiary matters, by compelling parties to name, attach and disclose documentary evidence and submit judicial affidavits) prior to the preliminary conference/pre-trial. The preliminary conference then serves as an exercise to exclude irrelevant matters, issues and documents, among others. In other words, the parties are required to make a full-blown disclosure of their claims and positions, including the rebuttal of what could be/what are the other parties' evidence, before the preliminary conference which is, in our assessment, unduly cumbersome on litigants and lawyers, including the judges. **The trial process as we know it is thereby reversed since the entire case, including the evidence, is presented before the preliminary conference and before trial**.

Consequently, we believe that the prevailing procedure commencing with the required contents of the basic pleadings, *i.e.*, ultimate facts, discovery measures and pre-trial, all of which are meant to define and limit issues **before trial proceedings and evidence presentation begin, is the more prudent and least cumbersome approach.** Indeed, parties will just have to state, in an abbreviated manner, their case through ultimate facts, identify and define issues for trial through discovery and pre-trial, and present evidence **only** on those issues during trial.

Title IV, Rule 16 of the Draft Rules provides for the conduct of a "face-to-face trial", which is a radical departure from the present Rules of Court on the conduct of trial, presentation of evidence and examination of witnesses that entails the following procedures: the court shall **first** examine and determine the truthfulness of the judicial affidavits that constitute direct testimonies of the witnesses, *i.e.* conduct direct examination; witnesses from all contending sides shall **appear together** before the court and simultaneously swear to the truth of their respective testimonies; witnesses shall **sit face-to-face around the table** in a non-adversarial environment and answer questions **from the court and the parties' counsel** respecting the factual issue under consideration; **the court shall initiate the inquiry** into each factual issue; witnesses shall not pose questions to the other witnesses relating to their testimonies **but shall be given equal opportunity to respond to the same**; and parties shall have their turns to cross examine, redirect, and re-cross the witnesses.

In seeking to address delays and redundancies caused by an adversarial system, the Draft Rules unwittingly reduces the role of every practitioner from an advocate to that of a mere observer or facilitator while imposing more responsibilities on judges who are, effectively, burdened with eliciting from the witnesses matters that the other party is required to prove. The judge then becomes magistrate and advocate at the same time. In this regard,

we respectfully submit that the present procedure where counsels propound questions and judges ask clarificatory questions after the conclusion of counsel's questioning is the more realistic and practical approach as the parties' respective counsels, and not the judges, are the ones obliged to present their client's case.

Radical changes from the Rules of Court, such as the "face-to-face trial" in Title IV, Rule 16 of the Draft Rules, will alter the foundation of litigation practice and may lead to inconsistency and confusion in the application of the Revised Rules, which would invariably result in further delay. It is submitted that the proposed procedures as presented in the Draft Rules, wherein the role of the advocate is severely undermined for the sake of expediency, offer only a superficial solution to problem of delay. As stated above, the radical proposition of a "face-to-face to trial" under Title IV, Rule 16, Section 16.1 of the Draft Rules, practically eliminates the role of a litigator as an advocate for his client. Unless a complete overhaul of the present trial system is implemented, it cannot be disputed that complete preparation for a case involves the anticipation of the opposing lawyer's theory and evidence. Thus, an advocate's training includes the ability to ask the right questions to elicit responses from the opponent's witness. It is submitted that the curtailment of this skill will not necessarily redound to a simplification of the issues, considering that the provision as worded renders its application unfeasible and unduly burdensome on the court and the witnesses to be presented.

The conduct of a face-to-face trial, where the witnesses from all contending sides shall be examined at the same time and place, will result in a situation where witnesses may listen to the testimonies and responses of other witnesses, as well as observe the manner of cross-examination. Such a scenario lessens the ability of opposing counsel and the judge to test the credibility of witnesses, which is tested or shown by inconsistent answers on the same points or line of questioning. It bears noting that the present system recognizes the rationale for cross-examination, as witnesses who are not being presented are excluded from court proceedings.

Further, experience has shown that the requirement of scheduling hearings for days on which *all* witnesses are available would be extremely difficult, if not impossible, to comply with. Further, to require the presence of a witness during every hearing may be an unreasonable requirement considering the penalty for the absence of a witness during a scheduled hearing, *i.e.* the court shall have his judicial affidavit expunged as direct testimony in support of the party presenting the witness under Title IV, Rule 16, Section 16.11(b).

It is further submitted that the present issues raised by practitioners in the implementation of the 2012 Judicial Affidavit Rule should be duly considered in the finalization of the pertinent portions of the Draft Rules. The mandatory disclosure of evidence through *simultaneous submission* of judicial affidavits under Title IV, Rule 14, Section 14.2 prior to pre-trial may ultimately prove to be counter-productive and unnecessarily burdensome because parties will be tasked to present the entirety of their case by speculating on the evidence needed to overcome their burden of proof and/or rebut the evidence of the opposing party.

Given the foregoing, it is respectfully submitted that the most drastic changes introduced by the Draft Rules will likely translate to a waste of the time and effort of both courts and litigants who will be forced, at the outset, to base their positions on speculation and

assumptions. It is submitted, however, that maintaining a genuinely adversarial system will not necessarily result in unjustifiable delay if the present rules on discovery and pre-trial will be strictly and pro-actively enforced by the courts. Notably, meaningful discovery and pre-trial proceedings under the present Rules of Court will also redound to the result sought by the Draft Rules, *i.e.* **to accurately identify the issues between the parties and ease the process of settling their disputes amicably or, if this not be possible, to considerably narrow down the scope of trial**.

On the Conduct of Motion Hearings

Title VI, Rule 1, Section 1.4 of the Draft Rules renders hearings on written motions as absolutely discretionary, in that no hearing on a written motion shall be permitted unless the court requires it to resolve factual issues.

Although it is recognized that the setting of motion hearings accounts for much of the delay in court processes, it is equally indubitable that there are circumstances when it would be more expedient, or even indispensable, for a motion to be argued orally before the court. This provision on discretionary hearings on motions, while seemingly laudable, discounts the real possibility of urgency and complexity in the issues to be resolved.

Rather than presuming any intent to delay on the part of counsel, the movant should simply be afforded the option of setting his motion for hearing. It is respectfully suggested that the relevant provisions of the Rules of Court be modified so as to allow the parties the prerogative of setting a written motion for hearing. In this scenario, only those motions that genuinely need to be heard will be set for hearing, thus obviating the fear of unnecessarily wasting the court's and litigants' time and resources. Grave sanctions (*e.g. motu proprio* denial of the motion) may further be imposed on litigants who fail to appear during the hearing set for their motion, as the importance (and non-regularity) of such setting will have been underscored by the modification introduced in the Revised Rules.

On the Application for Injunctive Relief

Title VII, Rule 3, Section 3.3 authorizes the executive judge (or the presiding judge in a single *sala* court) to issue, ***ex parte***, a **twenty (20)-day** temporary restraining order ("TRO") "[i]f the matter is of extreme urgency and the applicant will suffer grave injustice and/or irreparable injury".

The proposed revisions to the rules on the grant of injunctive relief are susceptible to abuse. It is submitted, based on experience, that the authority to issue an *ex parte* interim provisional order of twenty (20) days is unjustified and unreasonable, as this may give rise to irreparable damage on the part of the party against whom the order is issued and who was not even able to participate in the hearing on the application. On the other hand, there appears to be no rationale for the grant of such authority in relation to the ultimate objective of preventing delay in the regular course of trial. Indeed, the nature of an application for the issuance of injunctive relief precisely assumes that the court and the parties are mindful of the urgency of the controversy involved in the application. Hence, any further revision to the present Rules of Court on this matter, especially when it involves the possibility of trifling with due process rights, appears to be unnecessarily cumbersome and superfluous.

It is thus suggested that it will be more judicious and realistic to retain the relevant provisions of the Rules of Court and require the conduct of a summary hearing on the application for the issuance of a twenty (20)-day TRO.

On other Proposed Measures for "Efficient Use of Court Time"

It is suggested that certain provisions, which are intended to "promote fairness and efficient use of the court's time",[3] be re-examined to allow for the exigencies of litigation[4] and particularities of different cases. It is submitted that the proposed measures may not directly address the problem of delay and inefficiency if these are largely addressed to the "tendencies" of individual lawyers,[5] while discounting the prejudice that may be suffered by the parties from an overly simplistic view of lawyering.

For instance, the inclusion of outright and express prohibitions on the filing of motions for extension as provided in the Draft Rules[6] is a knee-jerk and artificial solution to the problem of delay and discounts the discretion afforded to courts to deny motions that are patently flimsy and unmeritorious.

Similarly, the blanket prohibition on a motion to dismiss *on any ground* under the Draft Rules[7] may ultimately cause rather than prevent delays in the proceedings given the reality that, under the present Rules of Court, parties may meritoriously raise valid grounds to dismiss that are purely legal, or do not require the reception of evidence or a consideration of factual issues.

Further, requiring the plaintiff to attach an original or a certified true copy of an actionable document will not necessarily allow the court to act efficiently since it will be apprised of the plaintiff's causes of action; on the contrary, it is an impractical requirement for an initiatory submission.[8] Similarly, requiring the preparation of exhaustive terms of reference as provided in the Draft Rules[9] will entail more delay and foster adversarial positions.

On Format and Organization

Lastly, the Draft Rules attempt to collate "in the most logical manner possible" the revised rules by grouping them "under titles that would make the most sense to an average user".[10] As a result of this re-organization, however, the numbering for each title is restarted in the Draft Rules, such that "each title [has] its own Rule 1, 2, 3, *etc.*"[11] Such change appears to be too cumbersome for judges and current practitioners in terms of transitioning from the present Rules of Court. Parenthetically, the sequential numbering of the Rules often proves to

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[3] *Ibid.*, p. 8.

[4] *See* Title IV, Rule 13, Sec. 13.8, which provides for "service of summons" upon "the counsel of record" where there can be no "counsel of record" for the adverse party at this juncture.

[5] *See* Primer on the First Draft of the Revised Rules of Civil Procedure, p. 1.

[6] *See* Title XII, Rule 1, Sec. 1.4; *see also* Title XII, Rule 1, Sec. 1.3.

[7] *See* Title IV, Rule 7, Sec. 7.6.

[8] *See* Title IV, Rule 8, Sec. 8.6.

[9] *See* Title IV, Rule 14, Sec. 14.4.

[10] Editor's Note, First Draft of the Revised Rules of Civil Procedure (May 2013).

[11] *Ibid.*

be valuable to practitioners in terms of recalling and contextualizing the applicability of a particular provision. Given that the objective of organizing a "user-friendly" Revised Rules is not directly addressed by the change in numbering, it is suggested that the present format be retained and that the Revised Rules be numbered sequentially across all Titles. This will enable all interested persons to familiarize themselves with the Revised Rules without having to cite a rule number *and* title number for each provision.

All told, a closer examination of the most drastic changes introduced by the Draft Rules shows that their experimental application might lead to further confusion, more avenues for abuse by unscrupulous parties and, ultimately, prejudicial delay for the entire justice system. Instead of envisioning a complete overhaul of the practice of law in the Philippines in the course of revising the rules of civil procedure, it is respectfully suggested that the present Rules of Court be revisited and strengthened to ensure that any proposed changes, though not inventive or ground-breaking, will nonetheless be practical and meaningful. The adversarial system observed in our courts, while problematic due to limited resources and susceptibility to abuse, has proven time and again to be an effective mode of ferreting judicious means of settling genuine disputes if the rules are strictly and pro-actively enforced by the courts. The long standing pattern of identifying issues, simplifying them and then presenting relevant evidence within the scope of the issues is, by itself, the more logical and expedient means of conducting judicial proceedings rather than forcing the parties, at the outset, to allege and prove their entire case.

On this note, it is hoped that the proposed Revised Rules will eventually harmonize the laudable objective of the Honorable Supreme Court with the present Rules of Court, rather than expand the growing divide between the realities of practice and the oft-invoked "dictates of justice".

Thank you very much.

Very truly yours,

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